

FILED
Court of Appeals
Division II
State of Washington
1/24/2020 4:29 PM
No. 53367-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH KEITH McCOURT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it failed to give the requested lesser included jury instruction for Assault in the Fourth Degree?
- B. Did the trial court err when it failed to give the requested Lawful Force - No Duty to Retreat jury instruction?
- C. The State concedes the trial court erroneously imposed interest on non-restitution interest. Is the trial court's imposition of community custody fees ripe?

II. STATEMENT OF THE CASE

Charles Devous¹ ordered Joseph McCourt to get out of his house after a dispute over the wages Charles allegedly owed McCourt. RP 90, 111-12, 124, 194, 201, 258-62. McCourt and Charles had known each other for approximately four years, about the same amount of time McCourt had been dating Aimee, Charles's sister. RP 248-49. Charles had his own contracting business and McCourt was doing some work for Charles. RP 192. Around the time of the confrontation at the Devous residence, McCourt had been working for Charles for approximately a week and a half. RP 192

On November 29, 2019, Aimee and McCourt moved into Charles's and his wife, Leslie's, home. RP 104-05. Staying with

¹ There are three members of the Devous family mentioned in the three volume verbatim report of proceedings for the trial, Charles (Scooter) Devous, Leslie (Danny) Devous, and Aimee Devous. The State will refer to each member of the Devous family by their first name to avoid confusion, no disrespect intended.

Charles and Leslie was a temporary situation. RP 106. Aimee hoped they would be out before the holidays, as she was attempting to deal with a housing situation in Olympia, where she worked. RP 104-06. Charles allowed Aimee and McCourt to move in, but place some rules, specifically that McCourt could not consume alcohol. RP 192-93, 271.

On December 7th, after receiving a check from a homeowner for a remodel job, McCourt and Charles had a disagreement about how Charles was compensating McCourt for his work. RP 194-96, 252-54, 260. Charles told McCourt that he had accidentally miscalculated McCourt's hours, therefore the original amount Charles told McCourt he was going to be paid was incorrect. RP 194. McCourt was not happy about the situation. *Id.* Charles offered to pay McCourt more money per hour, \$18 an hour versus \$15 per hour, to try to balance out the situation. RP 194-95.

Charles and McCourt stopped by a gas station and McCourt purchased a beer. RP 197. Charles also had a beer when he returned home. RP 198. Charles settled down in his living room on the couch and McCourt went upstairs and appeared to have some type of discussion with Aimee. RP 198-99. McCourt came back downstairs, and began the discussion again with Charles about his

hours, which then evolved into a heated, yelling match between the two men. RP 90-91, 111, 122-23, 200-01. It was at his point when Charles told McCourt to get the fuck out of my house. RP 124, 201.

McCourt followed Charles's directive. RP 262. McCourt asked Charles if he could retrieve his belongings. RP 263. Charles told McCourt to hurry the fuck up. *Id.* McCourt and his son went upstairs, packed their stuff, and went outside. RP 112-13 263. Leslie and Aimee went outside because they had heard from McCourt's son's mother. RP 113. The women were trying to get the boy out of the situation. RP 113. The mother wanted Leslie and Aimee to take the boy and drive in to meet her. RP 113.

Charles walked out of the house, cell phone in hand, and told McCourt, here are your hours. RP 93, 118. Charles was on the front porch, at the bottom of the steps, approximately 10 to 15 feet away from McCourt with a truck between them. RP 94. McCourt charged Charles. RP 94, 119. McCourt wrapped himself around Charles and threw him onto the gravel ground, landing on top of Charles. RP 94, 119.

As a result of the incident, Charles went to Centralia Providence emergency room for treatment. RP 171-73. Charles explained to the emergency room doctor he had been tackled,

landed on the ground on his right side, and was now in severe pain with a deformity around his collarbone. RP 173-74. Charles also sustained a scrape to the back of his head. RP 175. Charles's clavicle was broken down the middle. RP 176. It was obvious to the emergency room doctor that Charles was in constant pain. RP 176-77. Charles remained in intense pain for approximately two weeks and still did not have range of motion nearly three months later. RP 238-39.

McCourt was charged by information with Assault in the Second Degree. CP 1-2. McCourt elected to exercise his right to a jury trial. See RP. The State's witnesses testified fairly consistent with the statement of facts above. McCourt testified on his own behalf. RP 248-93. McCourt explained how he believed he was being slighted in pay, especially given his experience, he was running the crew for Charles, he believed they had an agreement, and family takes care of each other. RP 520-53, 260. McCourt stated when he and Charles got in to a heated discussion regarding the pay situation inside the residence, Charles pushed McCourt twice in the middle of McCourt's chest. RP 260-61. McCourt told Charles not to touch him. RP 261. Charles was yelling. RP 261. Then, Charles told McCourt to get out of the house, and McCourt thought, gladly, he wanted to

leave right away. RP 262. McCourt looked at his son, told him, let's go, and they both went outside. RP 262. McCourt then called his ex-wife to come and get them, to get his son. RP 262.

McCourt's explanation of the physical confrontation outside was that Charles came outside, yelling demanding to know why McCourt has not left yet. RP 264-65. McCourt did not remember what he said, but he walked up to about two feet from Charles. RP 265. McCourt thought Charles was going to strike him again, so McCourt grabbed Charles arm and tipped him over. *Id.* "I didn't get on top of him. I didn't charge him. You know, I just tipped him over." *Id.* It must have been when Charles's clavicle was broken. *Id.* McCourt then walked away, grabbed his son, and walked down the driveway. *Id.*

The jury was instructed on self-defense and given a lesser included instruction of Assault in the Third Degree. CP 6-30. The jury acquitted McCourt of Assault in the Second Degree, but convicted him of Assault in the Third Degree. CP 32-33. McCourt was sentenced to 10 months in custody. RP 43-48. McCourt timely appeals his conviction and sentence. CP 49.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. McCOURT WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

McCourt asserts the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Assault in the Fourth Degree. Brief of Appellant 8-17. McCourt argues the trial court erred when it refused to give the lesser Assault instruction when the evidence presented showed he lacked the requisite mens rea, which the jury could rationally find did not support he recklessly inflicted substantial bodily harm. *Id.* at 9-16. The State respectfully disagrees with McCourt's interpretation of the evidence. The trial court did not err because the evidence does not support the inference that, as alleged, McCourt only committed Assault in the Fourth Degree, to the exclusion of the charged crime of Assault in the Second Degree.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable

reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion “only when no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. McCourt Was Not Entitled To Have The Trial Court Instruct On His Proposed Lesser Included Jury Instruction For Assault in the Fourth Degree.

McCourt requested the trial court give a lesser included instruction of Assault in the Fourth Degree. Supp. CP Def JI², citing WPIC 35.25 and WPIC 35.26; RP 294-95, 297, 305. McCourt’s trial counsel argued merely because Assault in the Fourth Degree is a lesser included offense of Assault in the Second Degree he should get the jury instruction for the inferior offense. RP 294-95. McCourt’s trial counsel never gave a reasoned argument why McCourt was entitled to the proposed lesser included instruction beyond stating it was a lesser included offense. RP 294-95, 305. The trial court concurred with the State’s analysis, provided both in the form of

² This Court granted McCourt leave to supplement the record with the missing jury instructions submitted by McCourt’s trial counsel but inexplicitly missing from the court file. These instructions have been designated but not yet sent up to the Court, therefore the State will cite the instructions as Supp. CP Def JI, with some identifier or explanation as to which instruction that State is discussing.

cases submitted to the court and argument to the trial court. RP 304-09, 311-12. The trial court denied the requested instruction for Assault in the Fourth Degree. RP 312.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case law but it is not absolute. *Gamble*, 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The analysis whether an offense is an inferior charged offense as applied to the law is:

- (1) The statutes for both the charged offense and 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...

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). When dealing with a crime such as Assault in the Second Degree, it is clear Assault in the Fourth Degree meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 9A.36.021; RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, "there is evidence that the defendant committed **only** the inferior offense." *Id.* at 454 (emphasis added). This necessitates the inference must be that the inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lesser included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State's evidence that points towards guilty. *Id.* at 456.

“The evidence must firmly establish the defendant’s theory of the case.” *Id.* A defendant may present inconsistent defenses, and doing such is not a bar to requesting a lesser included or inferior included offense instruction. *Id.* at 459-460. If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State alleged McCourt committed Assault in the Second Degree under the substantial bodily harm prong of the statute. RCW 9A.36.021(1)(a); CP 1. The trial court instructed the jury on Assault in the Second Degree, substantial bodily harm. CP 15-21. The State was required to prove, that McCourt assaulted Charles Devous, thereby recklessly inflicting substantial bodily harm. CP 17, *citing* WPIC 35.13. To prove substantial bodily harm, the State had to show McCourt fractured a bodily part or inflicted temporary but substantial disfigurement upon Charles. CP 21, *citing* WPIC 2.03.01. The jury was also instructed that “[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a substantial bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” CP 19, *citing* WPIC 10.03.

McCourt's argument centers on that there was sufficient evidence presented that he lacked the requisite mens rea to commit Assault in the Second Degree. Brief of Appellant 11-16. McCourt asserts the trial court read out the requirement of recklessness and disregarded the evidence supported a conclusion that McCourt did not know and disregarded a substantial risk of fracturing Charles's clavicle from the assault. *Id.* McCourt argues it was dark out, he did not intend to harm Charles, both men had been drinking, all which support McCourt's assertion he did not appreciate a substantial risk of fracturing Charles's clavicle, and therefore the lesser included Assault in the Fourth Degree instruction was improperly denied. Brief of Appellant 15-16. The evidence produced at trial in support of Assault in the Second Degree, in particular "recklessly inflicting substantial bodily harm," and the lack of evidence supporting that only the inferior offense of Assault in the Fourth Degree occurred, support the trial court's decision to deny the lesser included instruction.

Following an argument inside the residence regarding hours and pay, McCourt went outside after being told to leave by Charles. The incident resulting in Charles's injury occurred in one of two ways, depending on which version of the events the finder of fact chooses

to believe. One version, supported by Charles, Aimee, and Leslie, is Charles exited the residence with his phone in his hand to show McCourt the hours McCourt worked. RP 93-94, 118, 203-06. Upon exiting the house, phone in hand, calling out to McCourt to see his hours, Charles is charged by McCourt and tackled to the ground. RP 96, 118-19, 206, 208. The alternative version is that Charles came outside, yelling and demanding to know why McCourt had not left the property yet. RP 264-65. Charles had a piece of paper in his hand that he was attempting to show McCourt, as Charles kept yelling about the hours. RP 272. When Charles exited the residence and began yelling, McCourt was two car lengths away from Charles, but decided to walk up to Charles. RP 273-74. Then, according to McCourt, he tipped Charles over when Charles stuck his arm out towards McCourt. RP 274. McCourt explained he turned and pivoted Charles over and then let Charles go. *Id.* This, according to McCourt, is how Charles ended up on the ground. *Id.*

In this matter, for McCourt to be entitled to the lesser included instruction of Assault in the Fourth Degree there must be an inference that only the Assault in the Fourth Degree occurred at the exclusion of the Assault in the Second Degree. *Fernandez-Medina*, 141 Wn.2d at 445. The Courts apply an analysis of the offense as

charged and prosecuted, rather than how the charged offense broadly appears in statute. *State v. Keend*, 140 Wn. App. 858, 869, 166 P.3d 1268 (2007), *review denied* 163 Wn.2d 1041 (2008). This approach is necessary because a defendant requesting a lesser-included instruction is not entitled to the instruction merely because a jury might disbelieve the State's evidence. *Id.*

There is an objective and subjective component to reckless conduct. *Id.* "Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." *Id.* (internal quotations and citations omitted). The jury is also "permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists." *Id.*

In *Keend*, the defendant broke the victim's jaw with a single punch to jaw. *Id.* at 863. Keend argued a reasonable jury could conclude a single punch does not create a substantial risk that the other party would sustain a broken jaw. *Id.* at 869-70. This Court rejected Keend's argument. *Id.* "Without question, any reasonable person knows punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm." *Id.* at 870, *citing State v. R.H.S.*, 94 Wn. App. 844, 847, 974

P.2d 1253 (1999). This Court held there was insufficient evidence to support Kneed's assertion he unlawfully touched the victim, "yet did not *recklessly* inflict substantial bodily harm[,]" and therefore was not entitled to a lesser included instruction for Assault in the Fourth Degree. *Id.*

The testimony, taken in the light most favorable to McCourt, was McCourt grabbed Charles, pivoted Charles over, and simply let go. RP 265, 274. McCourt, after grabbing Charles's arm, turned him, and then dropped Charles on the hard gravel ground. RP 95, 119, 207, 274.

While the trial court did discuss the unpublished case *State v. Toston*, at length in regards to the nature of the injury and the reasoning why a lesser included instruction for Assault in the Fourth Degree would not be appropriate, it was not the only law the trial court relied upon. RP 304, 308-09, 311-13; *Fernandez-Medina*, 141 Wn.2d 448; *State v. Toston*, 2018 Wash. App. LEXIS 1772; 2018 WL 3641739.³ This Court determined, where the only evidence presented was that the defendant broke the victim's tooth after striking the victim, there was no evidence presented in the case that

³ *State v. Toston*, in an unpublished decision, cited as non-binding authority pursuant to GR 14.1.

an assault that did not result in substantial bodily harm occurred. *Toston*, at 8-9.

McCourt's trial counsel never articulated a reason why he was requesting the lesser included instruction, other than Assault in the Fourth Degree is a lesser included offense of Assault in the Second Degree. RP 294-95, 297, 305, 312-13. The State argued that under the facts presented an Assault in the Fourth Degree could not have been committed at the exclusion of Assault in the Second Degree. RP 295-96. Now, McCourt is asserting the trial court erred because it made an incorrect determination regarding the factual analysis because the trial court disregarded the recklessly element of the infliction of substantial bodily harm. An argument McCourt never asserted to the trial court.

There is no evidence to support McCourt's assertion he did not recklessly inflict substantial bodily harm. McCourt cites to *State v. Norby*, 20 Wn. App. 378, 579 P.2d 1358 (1978), for the proposition that the consumption of alcohol made him less aware, less culpable, and therefore unable to appreciate the risk of injury that could occur when he dropped Charles into the gravel. Brief of Appellant at 15. McCourt's argument is not supported by the evidence. McCourt consumed between a half of a beer to a beer, and while Deputy

Kasinger smelled alcohol on McCourt, he stated McCourt was not intoxicated. RP 84, 197, 271. When viewing the facts McCourt, at a minimum, knew at the time of the assault: McCourt was about to drop a man on a hard, gravel surface, who McCourt had least one of the man's arms in a hold. Applying how a reasonable person would have acted knowing these facts, McCourt could only have recklessly inflicted substantial bodily harm. Any reasonable person would know that simply letting go of a person and letting them fall onto a hard, gravel surface, without the ability (or at least limited ability) to brace themselves, could result in a broken bone, lacerations, or even head trauma, such as a concussion. See, *State v. McKague*, 172 Wn.2d 802, 805-07, 262 P.3d 1225 (2011) (a concussion can meet the definition of substantial bodily harm); *Kneed*, 140 Wn. App. at 870.

For McCourt to be entitled to a lesser included instruction for Assault in the Fourth Degree there must be an inference from the evidence that only the Assault in the Fourth Degree was committed. *Fernandez-Medina*, 141 Wn.2d at 454. McCourt must be able to show the evidence inferred, in the light most favorable to him, that McCourt, while assaulting Charles, did not recklessly inflict substantial bodily harm. In other words, McCourt only intentionally touched Charles in a harmful or offensive way, to the exclusion of the

reckless infliction of substantial bodily harm as alleged by the State. See RCW 9A.36.021(1)(a); RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55. The trial court did not abuse its discretion when it denied McCourt's request for the lesser included instruction of Assault in the Fourth Degree. This Court should affirm the trial court and McCourt's conviction.

B. McCOURT WAS NOT ENTITLED TO HAVE THE JURY INSTRUCTED THAT HE DID NOT HAVE A DUTY TO RETREAT AS PART OF McCOURT'S SELF-DEFENSE CLAIM.

McCourt argues the trial court improperly instructed the jury on self-defense by refusing to give his proposed No Duty to Retreat instruction. Brief of Appellant 17-22. The trial court gave the appropriate self-defense instruction, as McCourt was not entitled to a No Duty to Retreat instruction due to his theory of the case pursuant to the facts presented to support McCourt's self-defense argument. There was no error and this Court should affirm.

1. Standard Of Review

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Bennett*, 161 Wn.2d at 307. Juries are presumed to follow the jury instructions

provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

2. The Trial Court Gave The Proper Self Defense Instructions.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). “When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” *Webb*, 162 Wn. App. at 208, *citing State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

A defendant is entitled to a jury instruction on self-defense if the defendant produces some evidence that demonstrates self-

defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citation omitted). Once the defendant is entitled to the self-defense instruction, it then becomes the State's burden to prove beyond a reasonable doubt the absence of self-defense. *Id.*

Evidence of self-defense is evaluated from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. This standard incorporates objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id. at 474. A person is only entitled to use the degree of force necessary that a reasonable prudent person would find necessary under similar conditions as they appeared to the defendant. *Id.* "The refusal to give instruction on a party's theory of the case when there is supporting evidence is reversible error when it prejudices the party." *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citation omitted).

McCourt's theory of the case was he acted in self-defense. McCourt requested and was granted, uncontested by the State, WPIC 17.02 – Lawful Force – Defense of Self, Others, Property and WPIC 17.04 – Lawful Force – Actual Danger not Necessary. RP 297, 313, CP 27-28; Supp. CP JI. McCourt argues it was error for the trial

court to fail to give his proposed, and contested, Lawful Force – No Duty to Retreat instruction. Brief of Appellant 17-22; RP 305-07, 311; Supp. CP JI, *citing* WPIC 17.05. McCourt did not propose giving the entirety of WPIC 17.05. McCourt’s proposed instruction stated,

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.

Supp. CP JI, *citing* WPIC 17.05.

A person does not have a duty to retreat in Washington when they are assaulted in a place they have the right to be. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). If there is sufficient evidence produced at trial to support that the defendant does not have a duty to retreat then the defendant is entitled to the jury instruction. *Studd*, 137 Wn.2d at 549. However, in cases where duty to retreat is not an issue, the instruction is not warranted. *Id.*

In *Studd*, an opinion that consolidated several cases, a defendant named Cook was properly denied a No Duty to Retreat instruction. *Id.* at 549-50. The Court explained under the State’s theory, the defendant shot the victim “after any imminent danger had passed.” *Id.* at 549. While Cook’s self-defense theory was predicated on the victim holding the defendant at gunpoint at the time the Cook

shot the victim. *Id.* Therefore, “[n]either scenario raises an inference that Cook could have avoided the use of force through a timely retreat.” *Id.*

Similar to *Studd*, neither scenario presented in McCourt’s case support giving a No Duty to Retreat instruction. The State’s theory of the case was simple, Charles walked outside, phone in hand, asking/yelling at McCourt if he wanted to see his hours, and before Charles could even turn towards McCourt he was charged by McCourt and tackled to the ground. RP 93-94, 118-19, 203, 206-07. There is no imminent danger when McCourt charges Charles from 15 feet away under the State’s theory of the case. RP 94. Even including the physical contact alleged by McCourt that occurred inside the residence, the push from Charles occurred approximately 10 minutes before the incident outside the residence, therefore negating any claim of imminent danger. RP 260, 272-73.

McCourt’s theory of the case, as presented through the evidence in support of self-defense, was that Charles came outside with a piece of paper in his hand, yelling at McCourt who was two car lengths away about McCourt’s hours. RP 272-74. McCourt walked up to Charles, because Charles called McCourt towards him to show McCourt his hours. RP 265, 272-74. Once the two men were face to

face, Charles swings at McCourt and McCourt grabs Charles arm to prevent from being struck. RP 265-66, 274. This close quarters, instantaneous attack by Charles does not raise an inference that McCourt could have avoided the use of force by retreating.

McCourt, similar to the defendant in *Studd*, notes the deputy prosecutor argued during his closing argument that “Mr. McCourt had no reason to approach Mr. Devious [sic] and could have left.” Brief of Appellant at 22; *Studd*, 137 Wn.2d at 549-50. Similar to Cook, McCourt takes the deputy prosecutor’s comments out of context. RP 337-38; *Studd*, 137 Wn.2d at 550. The deputy prosecutor argued:

And I make a big deal about how the defendant was the one who approached the victim, because the defendant's outside. He was actually told to leave and was in the process of leaving. He had no reason whatsoever to approach Charles. He could have left but he didn't. He chose to do what he did, and that was charge at Charles, take him to the ground.

He knew he wasn't in danger, because he saw what was in Charles's hands. He didn't have any weapons. Nobody testified that any weapons were ever used in this case, so there was no threat of harm.

RP 337-38. The deputy prosecutor’s argument is in regards to McCourt charging at Charles for no reason, that there was no reason to approach Charles, there was no imminent risk to McCourt. Any incident that allegedly occurred in the house had happened 10 to 15 minutes earlier. RP 272-73, 336-37. McCourt argued Charles went

to hit him in the chest and he threw Charles to the ground. RP 358. The deputy prosecutor did not argue that McCourt should have run away, retreat, after Charles swung at McCourt. See RP 329-44, 362-66.

The trial court's instructions to the jury allowed McCourt to argue his theory of the case, including his self-defense claim. CP 6-30. The trial court gave McCourt's requested self-defense instruction. CP 27-28; Supp. CP JI WPIC 17.02, 17.04. McCourt was not entitled to a Lawful Force – No Duty to Retreat jury instruction, as retreat was simply not an issue given the competing theories of the case. The trial court did not err in failing to give WPIC 17.05, as proposed by McCourt, and this Court should affirm McCourt's conviction.

C. THE STATE CONCEDES THE TRIAL COURT ERRONEOUSLY IMPOSED INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS, BUT THE COURT DID HAVE THE DISCRETION TO IMPOSE COMMUNITY CUSTODY FEES AND THOSE POSSIBLE FUTURE FEES SHOULD NOT BE STRICKEN FROM McCOURT'S JUDGMENT AND SENTENCE.

McCourt asserts the trial court erroneously imposed interest on his legal financial obligations. The State concedes that pursuant to the 2018 legislative amendments to the legal financial obligation statutes enacted under Engrossed Second Substitute House Bill

1783, nonrestitution legal financial obligations no longer bear interest for any defendants, indigent or otherwise. RCW 10.82.090(1). Therefore, the order for payment of interest in McCourt's judgment and sentence was in error.

McCourt's judgment and sentence was entered on March 28, 2019. CP 43-48. McCourt was ordered to pay \$500 victim assessment. CP 45. The imposition of restitution was reserved. *Id.*

The judgment and sentence included the following language:

The 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. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

CP 46.

On June 7, 2018, the amendment to RCW 10.82.090 was effective. Laws of 2018, ch. 269, § 1. The amended statute reads:

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 June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations...

RCW 10.82.090(1).

Therefore, the trial court erred by including the language in the judgment and sentence ordering interest to bear on the imposed legal financial obligations. This Court should remand this matter back to the trial court to strike the interest bearing provision and any interest that has accrued.

McCourt's judgment and sentence also included "While on community custody, the defendant shall:...(7) pay supervision fees as determined by DOC." CP 45. The trial court during sentencing did state it would only impose the mandatory fines, fees, and assessments, based on McCourt's lack of income, lack of employment, and that he was in school. RP 396. Yet, the issue regarding the future possible payment of a Department Of Corrections supervision fee is not ripe. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). McCourt is not on DOC supervision, he has not had any fees imposed, it is unknown at this time if those fees, if they are even imposed, would cause McCourt a hardship once he is released from prison and on community custody. Therefore, the issue raised is not merely legal, but factual in nature and McCourt currently suffers no hardship from the imposed obligation. *Cates*, 183 Wn.2d at 534-35. This Court should deny

McCourt's request to strike DOC's ability to impose supervision fees once McCourt is on community custody.

IV. CONCLUSION

The trial court did not abuse its discretion when it denied McCourt's request for a lesser included jury instruction for Assault in the Fourth Degree. The trial court similarly did not abuse its discretion when it denied McCourt's request for a jury instruction informing the jury McCourt had no duty to retreat. The State concedes the trial court erroneously imposed interest on non-restitution legal financial obligations and this Court should remand the matter to for the trial court to strike the provision from the judgment and sentence. The trial court had the discretion to impose the ability of DOC to collect community custody fees from McCourt. The issue regarding community custody fees is not ripe, as McCourt is not currently on community custody and no fees are being assessed.

This Court should affirm McCourt's conviction and sentence with the exception of remanding the matter back to the trial court to strike the erroneous interest provision.

RESPECTFULLY submitted this 24th day of January, 2020.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

January 24, 2020 - 4:29 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Joseph Keith McCourt, Appellant
Superior Court Case Number: 18-1-00986-8

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