



No. 293645

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CEDRIC ERIC BURTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE SALVATORE COZZA

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	Assignments of Error	1
II.	Statement of Facts.....	2
III.	Argument	
	A. The Trial Court Erred When It Refused To Instruct The Jury On A Lesser Degree Offense That Was Supported By Evidence In The Record.....	5
	B. The Trial Court Exceed Its Authority When It Imposed A Non-Crime Related Prohibition On Mr. Burton.....	10
IV.	Conclusion.....	12

TABLE OF AUTHORITIES

Washington State Cases

<i>State v. Clausing</i> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	6
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	5,8,9
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979).....	6
<i>State v. Hayes</i> , 55 Wn.App. 13, 776 P.2d 718 (1989).	11
<i>State v. Llama-Villa</i> , 67 Wn.App. 448, 836 P.2d 239 (1992).....	11
<i>State v. McClam</i> , 69 Wn.App. 885, 850 P.2d 1377 (1993).	8,9
<i>State v. Moen</i> , 129 Wn.2d 535, 918 P.2d 69 (1966).....	11
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	6,7
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	11
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	9
<i>State v. Williams</i> , 157 Wn.App. 689, 239 P.3d 600 (2010).	10
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	6

Statutes

RCW 9.94A.030(10) 10
RCW 9.94A.505(8)..... 10
RCW 9A.36.021(1)(c) 6
RCW 9A.36.041(1)..... 7
RCW 10.61.003 6

Other

WPIC 35.50..... 7

SUMMARY OF ARGUMENT

Originally charged with attempted murder in the first degree, Mr. Burton's second-degree assault conviction arises out of what began as a misunderstanding in the parking lot of a bar, and escalated to a verbal exchange of insults and threats. The trial court erred when, in contradiction to case law it did not consider all the trial testimony and refused Mr. Burton's request to give jury instructions for assault in the fourth degree. The court further erred when it exceeded its authority and imposed a non-crime related prohibition on Mr. Burton.

I. ASSIGNMENTS OF ERROR

- A. The trial court erred by refusing to give the defendant's proposed jury instruction related to fourth-degree assault:
- B. The court erred by ordering Mr. Burton "not to wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle."

Issues Pertaining to Assignments of Error

1. Did the trial court err when it refused to instruct the jury on the lesser degree offense of fourth degree assault that was supported by evidence in the record?

2. Did the trial court exceed its authority when it imposed a non-crime related prohibition on Mr. Burton?

II. STATEMENT OF FACTS

On November 22, 2009, Cedric Burton and his cousin, Charles Jackson, left a club in downtown Spokane around 2 a.m and walked through the parking lot to their car. (RP 137). The lot, a main parking lot for nearby clubs, was crowded with people and cars. (RP 138, 140). Mr. Burton let his car warm up, but the windows were still fogged. (RP 142). As he backed out of his parking space, he heard something smack the back of his car and someone yell, "Watch the f- where you are going." He hit his brakes. (RP 142). Mr. Burton and Mr. Jackson got out of the car. (RP 143).

Standing next to the car were Jacob Schreiber and Michael Ryan. Both had also just left a club and were intoxicated. (RP 65, 73). Within seconds, a member of the Ryan/Schreiber party, Bradley Hollibaugh, came up to the car. (RP 46, 69, 143). Mr. Hollibaugh, a professional body builder and trainer, had been drinking that night. (RP 79-80). He testified he yelled, "What the f- is your problem?" at Mr. Burton, and "told him to watch what he was

doing.” (RP 112,143). Mr. Burton testified Mr. Hollibaugh said, “Get the fuck back in your car before I beat your ass.” (RP 143).

Mr. Burton immediately got back in his car, rolled down the window, and exchanged verbal insults with Mr. Hollibaugh. (RP 143). Mr. Schreiber and Mr. Ryan joined in the “trash talk” and yelled at Mr. Burton to get out of the car and fight Mr. Hollibaugh. (RP 70, 144). All the parties were yelling profanities. (RP 86,144). Mr. Hollibaugh continued to approach the car and as Mr. Burton slowly drove, Mr. Hollibaugh hit the side window with his hand and kicked the car. (RP 56, 60,70, 76, 85,148).

All witnesses agreed the parking lot was very crowded, Mr. Burton was driving slowly, the tires of the car never ‘squealed’, and Mr. Hollibaugh continued going toward the car even though Mr. Burton was already back in the vehicle. (RP 60, 83,123, 147). Witness testimony differed on whether Mr. Burton was attempting to navigate his car through the parking lot to an exit, or whether he was trying to follow Mr. Hollibaugh through the lot with the intent to injure him. (RP 51, 94, 124, 146).

Mr. Burton testified he was afraid of Mr. Hollibaugh and tried to weave through the crowded parking lot to get away. (RP 145-156). Mr. Hollibaugh continued to come close to Mr. Burton’s

vehicle, as he yelled at him to get out and fight. (RP 147). Mr. Burton said he “hit the gas” two different times in order to get away from Mr. Hollibaugh and get out of the parking lot. (RP 148).

Mr. Hollibaugh testified he saw Mr. Burton’s car “weave in and out of spaces.” (RP 84). He said Mr. Burton had gunned the car engine as he “tried to line up on me.” (RP 85). Mr. Hollibaugh testified he had to “jump out of the way” to avoid being hit two or three times. (RP 84-85). He admitted that when the car was close to him he hit and kicked it. (RP 86).

Mr. Burton was subsequently arrested for assault in the second degree. (CP 1). He was later charged by information with two counts of attempted murder in the first degree, or in the alternative first-degree assault, for the initial incident of backing out of his parking space and almost injuring Mr. Schreiber, and the events involving Mr. Hollibaugh. CP 5).

At trial, the court allowed an instruction on second-degree assault, but denied an instruction on assault in the fourth degree saying,

“It is not as if the defense took the position, Yeah, I committed an assault but I wasn’t trying to do so with a deadly weapon or in a manner to injure anybody. That is not the way the evidence came in.” (RP 175).

Mr. Burton was acquitted of the charges of the attempted murders of Mr. Hollibaugh and Mr. Schreiber. He was also acquitted of first-degree assault charges for both men. He was convicted of second-degree assault of Mr. Hollibaugh and sentenced to 63 months and an additional 18 months on community custody. (CP 128). As part of community custody, the court ordered:

The defendant shall not wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle. (CP 129).

This timely appeal follows.

III. ARGUMENT

A. The Trial Court Erred When It Refused To Instruct The Jury On A Lesser Degree Offense That Was Supported By Evidence In The Record.

Mr. Burton was entitled, under the facts, to an instruction on fourth-degree assault, as an inferior degree of first-degree assault. The appellate court, in determining whether there is sufficient evidence to support an instruction, is to view the supporting evidence in a light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141Wn.2d 448, 455-456, 6 P.3d 1150 (2000). The adequacy of jury instructions is a question

of law, which is reviewed *de novo*. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

Under Washington law, a defendant may be found not guilty of the charged offense and guilty of any degree inferior thereto. RCW 10.61.003. The Washington Supreme Court has held that an instruction on an inferior degree of offense is proper when (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997).¹

Here, the first two *Peterson* factors have been met because every degree of assault is a lesser degree of all higher degrees of assault. *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

Assault in the second degree requires, in pertinent part, *intent* to assault another with a deadly weapon. RCW 9A.36.021(1)(c). (emphasis added). A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second

¹ The trial court here incorrectly cited the *Workman* factors as the test for a lesser-degree offense instruction. However, it is of little consequence as all parties agreed the "legal prong" was met. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

or third degree, he assaults another. RCW 9A.36.041(1). The definitional instruction of assault includes “an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” WPIC 35.50.

Here, evidence was presented at trial that Mr. Hollibaugh was fearful he would be injured during his encounter with Mr. Burton. Several witnesses testified Mr. Hollibaugh continued to approach Mr. Burton’s car even as he attempted to drive out of the parking lot. Mr. Burton testified he “hit the gas” to get through the parking lot past other cars, and away from Mr. Hollibaugh. Although angry and frightened himself, he had no intention to inflict bodily harm or scare Mr. Hollibaugh.

It was quite possible that Mr. Hollibaugh was frightened *and* that Mr. Burton had no intention to either injure or frighten him. Under the facts of the case, a jury could still find fourth-degree assault had been committed because there was no intent. The testimony raised the inference that *only* the inferior degree offense was committed, thus satisfying the third *Peterson* factor. *Peterson*, 133 Wn.2d at 891.

Over defense objection, the trial court here denied Mr. Burton's requested fourth degree assault instruction on the basis that it did not fit with the defendant's presentation of evidence, that is, that he did not commit assault. (RP 175). This was wrong. A trial court must consider all of the evidence presented at trial when deciding whether or not to give an instruction. *Fernandez-Medina*, 141 Wn.2d at 456. Indeed, although there must be affirmative evidence from which a jury could find the facts of the lesser offense, there is no requirement in case law that the evidence must come from the defendant or even that the defendant's testimony cannot contradict this evidence. *State v. McClam*, 69 Wn.App. 885, 889, 850 P.2d 1377 (1993).

In *McClam*, the defendant was charged with a violation of the Uniform Controlled Substances Act, possession with intent to deliver. McClam testified he gave a cigarette to his friend and the friend paid him a dollar he had owed to him. He denied he had possession of any narcotics. *McClam*, 60 Wn.App. at 887. The court denied the defense request that a lesser-included offense instruction for possession of a controlled substance be given to the jury. Despite the defendant's denial of possession, affirmative evidence supporting the lesser-included charge was presented at

trial. The court held it was error to refuse the instruction. *McClam*, 69 Wn.App. at 885.

Similarly, the defendant in *Fernandez-Medina* requested a lesser degree instruction of assault. The trial court denied the instruction because the alibi defense that *Fernandez-Medina* presented negated an inference that only the lesser-included offense had been committed. *Fernandez-Medina*, 141 Wn.2d at 452. The Washington Supreme Court held a defendant who denies committing any crime might still be entitled to an instruction on a lesser offense, if there is other evidence indicating that only the lesser crime was committed. *Fernandez-Medina*, 141 Wn.2d at 45-460.

Here, the evidence presented would permit a jury to rationally find Mr. Burton guilty only of fourth-degree assault. The trial court should have given the lesser degree offense instruction. *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). It is reversible error to refuse a lesser degree offense instruction when evidence exists that the lower degree could have been the only offense committed. *Fernandez-Medina*, 141 Wn.2d at 461. The court's failure to give the requested instructions on fourth-degree assault requires a new trial.

B. The Trial Court Exceed Its Authority When It Imposed A Non-Crime Related Prohibition On Mr. Burton.

Mr. Burton challenges a condition imposed by the court that he not wear “[c]lothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle.” (CP 144).

Under RCW 9.94A.505, the general sentencing statute of the Sentencing Reform Act, “[A]s a part of any sentence, the Court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8). A “crime-related prohibition” is an order of a court prohibiting conduct that *directly relates to the circumstances of the crime* for which the offender has been convicted. RCW 9.94A.030 (10). (emphasis added). A “circumstance” is defined as “[a]n accompanying or accessory fact.” *State v. Williams*, 157 Wn.App. 689, 692, 239 P.3d 600 (2010).

Here, there is nothing in the record to indicate there was anything gang-related about the circumstances of the assault. Although no causal link needs to be established between the condition imposed and the crime committed, the condition must

relate to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). Mr. Burton asserts that the restriction is invalid because it is not related to the circumstances of the crime. The type of clothing, insignia, jewelry, or tattoos he wears was and is not related to the underlying conviction.

The sentencing authority of the court is limited to that provided by statute. When the court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 545, 919 P.2d 69 (1996). Further, sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Abuse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Hayes*, 55 Wn.App. 13, 16, 776 P.2d 718 (1989).

Here, the court's imposition of the restriction was exercised on untenable grounds. The record was devoid of any facts suggesting gang-involvement or lifestyle being directly related to the circumstances of the offense. The order was an abuse of discretion and should be vacated.

IV. CONCLUSION

The trial court erred by refusing to give instructions relating to fourth-degree assault because it is an inferior degree of first degree assault, and the evidence presented supported an inference that Mr. Burton committed only fourth-degree assault. The court also erred in imposing a non-crime related prohibition on Mr. Burton, exceeding its authority.

Based on the foregoing facts and authorities, Mr. Burton respectfully requests this court to reverse the second-degree assault conviction and vacate the non-crime related prohibition.

Dated this 6th day of January, 2011.

Respectfully submitted,


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Attorney for Appellant Burton

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Cedric Burton, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on January 6, 2010, to Cedric E. Burton, DOC # 882703, Airway Heights Correction Center, PO Box 2049, Airway Heights, WA, 99001; and personally delivered to Mark Erik Lindsey, Spokane County Prosecuting Attorney, 1100 W. Mallon, Spokane, WA.



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