IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARIA SHAUNA ROGERS, Appellant.	)	DIVISION ONE No. 77225-2-I UNPUBLISHED OPINION FILED: January 22, 2019

DWYER, J. – During her trial for third degree theft and two counts of third degree assault, Maria Rogers admitted shoplifting merchandise and spraying a plain clothes loss prevention officer with pepper spray when he confronted her outside the store. She testified, however, that she sprayed the officer in self-defense. She denied intentionally spraying a second store employee who ran up to her moments after she sprayed the loss prevention officer.

Rogers' counsel requested, but the trial court refused to give, an inferior degree instruction on fourth degree assault for the third degree assault counts. A jury acquitted Rogers of assaulting the loss prevention officer but convicted her of assaulting the other store employee. She now appeals, arguing that the court erred in refusing to give a fourth degree assault instruction. The State contends that she waived this claim of error. We rule that Rogers did not waive the error. But because there is no evidence establishing that fourth degree assault occurred *to the exclusion of third degree assault*, we affirm.

I

Based on police reports outlining the facts recited above, the State charged Rogers with two counts of third degree assault and one count of third degree theft. The amended information stated that Rogers committed the assaults with intent to resist lawful apprehension "**and** with criminal negligence." (Emphasis added.)

At trial, Edgardo Malabuen testified that he was working at a Super Saver Food Store when he saw Rogers leave the store without paying for merchandise. He stopped her in the parking lot and identified himself as store security. He told her she had unpaid items in her possession and asked her to come inside to answer questions. Rogers reached into her shoulder bag. Fearing she might have a weapon, Malabuen ordered her not to reach into the bag. As the two struggled over the bag, Rogers sprayed Malabuen in the face with pepper spray. Malabuen fell to the ground, temporarily blinded.

Store employee Alan Chirino-Alamo witnessed Rogers' attack and corroborated Malabuen's account of the assault. Chirino-Alamo testified that he ran to help Malabuen, but when he got within three or four feet of him, Rogers turned toward Chirino-Alamo, extended her arm, and sprayed him directly in the face. Rogers then fled.

Chirino-Alamo and two other employees—all wearing red store employee bibs—chased Rogers and eventually caught up to her. She initially refused to

return to the store but relented when Chirino-Alamo called police. Chirino-Alamo testified that during the walk back, Rogers apologized for pepper spraying him.

Rogers testified and admitted taking merchandise without paying for it. As she left the store, she heard somebody running and turned to see Malabuen running toward her. According to Rogers, Malabuen did not identify himself and was not wearing a badge or uniform. She immediately dropped a gift bag containing the stolen merchandise. Malabuen then grabbed her backpack and reached for the gift bag. When asked what "was going on internally" for her at that moment, Rogers testified that she "didn't know who he was" or "what he was really doing," and she "was pregnant . . . and . . . just in defense mode." She recalled thinking that Malabuen could be store security or could be a civilian. She also recalled thinking that if Malabuen was store security, he would just pick up the bag of merchandise she dropped and leave her alone. When Malabuen continued to struggle with her, she "felt like maybe he's trying to hurt me, or rob me." She then pepper-sprayed him in "self-defense."

When asked about Chirino-Alamo, Rogers expressly denied spraying him with pepper spray:

> Q: Okay. Let's speak about Alan [Chirino-Alamo] for a little bit. Why did you spray him? I've been confused about that.
>
> A: I didn't know he got sprayed. I didn't spray him intentionally or on purpose. I had no idea he got sprayed.
>
> Q: So, you had no idea that you stood up, turned around, extended your arm, and sprayed him directly in the face.
>
> A: I did not do that.

Rogers claimed that she "took off running" and was "in defense mode" after she sprayed Malabuen. When asked if she was worried about being caught shoplifting, Rogers said, "I was just running. I was just in a defense mode."

As she ran, Rogers saw three store employees, including Chirino-Alamo, wearing red store aprons. Defense counsel asked Rogers why she ran from these employees:

> Q. . . . [W]hen you say that you were afraid, . . . were you afraid that you would be caught? Were you afraid you were going to get hurt? What was going on in your mind?
>
> A. Only when they first ran at me. I was afraid.
>
> Q. Okay. And why was that?
>
> A. I was afraid of being rushed, because . . . they were workers, and I thought they were running at me because they thought maybe I still had the items or something.
>
> Q. So, you were worried that they might, like, physically harass you?
>
> A. Um-huh.

At the close of the evidence, the trial court asked counsel whether they had any objections to its proposed instructions. The proposed "to convict" instructions on the assaults stated the jury could convict if Rogers committed the assaults "with the intent to prevent or resist lawful apprehension or detention of herself; **OR** . . . with criminal negligence [that] the defendant caused bodily harm . . . by means of a weapon." (Emphasis added.) Defense counsel objected:

[DEFENSE COUNSEL]: My primary objection is . . . *the defense, for the record, has requested that the "lesser included" . . . Fourth Degree instruction be included.*

. . . .

To make my record very clear, the amended information in this case included reference to language from two separate prongs of the Assault in the Third Degree charge -- charges. . . . However, the actual amended information included the language and did not include the disjunctive . . . .

The instructions that the Court has given here includes the disjunctive allowing the jurors to find one of two alternative meanings of committing Assault in the Third Degree. That is not the language that . . . the defendant was put on notice of in the charging documents.

Furthermore, given the language of the charging document, the defense argues that *Assault in the Fourth Degree is the lesser included of that language, and is certainly the lesser included of the lawful -- the Loss Prevention alternative.*[1]

If the Court is doing an alternative means instruction, and is allowing the -- is allowing that "or" language, in order to convict 2(A) or 2(B), I believe the Court indicated, then we would request that we add a (inaudible) [Petrich[2]] instruction.

. . . .

[THE COURT]: What language exactly do you want?

. . . .

[THE COURT]: That they have to find 2(A) and 2(B)?

[DEFENSE COUNSEL]: The elements as set forth in the charging document, yes.

[THE COURT]: Okay, what's the State's response?

[PROSECUTOR]: Your Honor, I do see what defense is referring to. There is an "and" between the lawful [apprehension and] criminal negligence. However, I believe that it's a clerical error. . . . And I have absolutely no idea how defense would be prejudiced by fixing -- if defense requests we file a second amended information before there. However, I'm of the opinion that defense was well aware at this point, and we are proceeding under both prongs.

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[1] Consistent with her arguments to the court, defense counsel's proposed "to convict" instructions for the third degree assaults required the jury to find that Rogers acted with intent to resist her lawful apprehension *and* with criminal negligence.

[2] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

> [THE COURT]: Yeah, and I think under both Count I and Count III which is Assault in the Third Degree, even though it does have the "and" with criminal negligence instead of "or" with criminal negligence, the RCW directs you to look at 1(A) and 1(D) which are both prongs of that Assault III statute. So, I think it's – I'm going to give the "or".
>
> And, now I'm again asking the defense: What exactly do you think you need in addition to what's already in the "to convict"?
>
> [DEFENSE COUNSEL]: Given the amended information language, I request that the jury be instructed that they just be unanimous to either 2(A) or 2(B).

(Emphasis added.)

The court did not give a fourth degree assault instruction. The court's to-convict instructions on the third degree assault counts required the State to prove that Rogers was not acting in self-defense.

The jury acquitted Rogers of assaulting Malabuen—the plain clothed loss prevention officer—but convicted her of assaulting Chirino-Alamo and of third degree theft. Rogers appeals.

II

Initially, the State contends that Rogers waived any claim of error in the trial court's failure to give a lesser degree offense instruction on fourth degree assault. The State acknowledges that Rogers proposed the instruction but faults her for not renewing her request "after the parties became distracted with another issue" and for failing to "take exception to the court's instructions, which did not include the fourth degree [assault] instruction." We disagree.

A party waives an alleged instructional error if he or she does not object to the refusal to give a proposed instruction, as required by CrR 6.15(c). State v. Johnson, 188 Wn.2d 742, 761-62, 399 P.3d 507 (2017). Contrary to the State's assertions, Rogers expressly objected to the court's proposed instructions, arguing that she was entitled to a lesser offense instruction for fourth degree assault. While the court never expressly ruled on the objection, it implicitly did so. The State cites no authority requiring Rogers to obtain an express ruling to preserve her objection. Rogers did not waive the alleged error.

III

Rogers contends that the trial court erred in failing to give the lesser degree offense instruction on fourth degree assault. An instruction on an inferior degree offense is warranted where: (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez–Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Only the third prong of this test is at issue here.

To establish the third prong, there must be "substantial evidence" supporting a "rational inference" that only the inferior degree offense was committed "*to the exclusion of the charged offense.*" Fernandez–Medina, 141 Wn.2d at 455, 461 (emphasis added). "[T]he evidence must affirmatively

establish" that the defendant committed the lesser-degree offense. Fernandez–Medina, 141 Wn.2d at 456. In making this determination, we view the evidence in the light most favorable to the party requesting the instruction. Fernandez–Medina, 141 Wn.2d at 455-56. Whether to instruct a jury on an inferior degree offense requires the application of law to facts and is reviewed de novo. State v. Corey, 181 Wn. App. 272, 276, 325 P.3d 250 (2014).

Here, the charged offense is third degree assault by two means: an assault with intent to prevent or resist lawful apprehension or detention, or an act, with criminal negligence, that causes bodily harm by means of a weapon. The inferior degree offense—fourth degree assault—requires proof that, "under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, [the defendant] assault[ed] another." RCW 9A.36.041 (1). Rogers contends substantial evidence supported an inference that "she sprayed Chirino-Alamo out of fear rather than with the intention to resist lawful apprehension," and therefore she was entitled to a lesser degree instruction.

Viewed in a light most favorable to Rogers, the record supports rational inferences that she intentionally sprayed Chirino-Alamo, that she did so out of fear of harm, and that she did not intend to prevent her lawful apprehension. The evidence thus demonstrates an assault to the exclusion of the third degree assault with intent to prevent or resist lawful apprehension or detention. RCW 9A.36.031(1)(a). The evidence does not, however, exclude the other charged means of third degree assault, i.e., assault with criminal negligence causing

bodily harm by means of a weapon likely to produce bodily harm. RCW 9A.36.031(1)(d). This is so because proof of intent also proves criminal negligence, RCW 9A.08.010(2), and because it is undisputed that Chirino-Alamo suffered bodily injury by means of a weapon likely to produce bodily harm. For the same reason, the evidence fails to establish fourth degree assault, which requires proof that the assault *did not amount to a higher degree of assault*, including assault by criminal negligence.[3] Accordingly, the trial court did not err in refusing to give Rogers' proposed instruction on fourth degree assault.

Affirmed.

We concur:

[3] Citing State v. Condon, 182 Wn.2d 307, 323-26, 343 P.3d 357 (2015), Rogers states that when, as here, the greater degree offense is charged in the alternative, a lesser degree instruction must be given if the evidence proves the lesser degree offense to the exclusion of any one alternative. The Condon majority held that where a defendant is charged with first degree premeditated murder and first degree felony murder for the same conduct, a defendant is entitled to a lesser included offense instruction for second degree intentional murder if there is evidence that the lesser was committed to the exclusion of premeditated murder; the defendant need not show that the lesser was also committed to the exclusion of felony murder. Condon's holding is inapplicable here because, as mentioned above, the lesser offense in this case—fourth degree assault—requires proof of an assault *not amounting to the higher degrees of assault*. Thus, to establish the lesser degree offense, Rogers had to establish that she did not commit *any* charged greater degree of the offense.