

70243-2

70243-2

NO. 70243-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GRUNDY,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. GRUNDY'S TESTIMONY THAT HE PUNCHED BABCOCK WHILE TRYING TO ESCAPE A THREATENING CROWD SUPPORTS INSTRUCTION ON FOURTH-DEGREE ASSAULT.

a. The Standard of Review Is De Novo, and the Facts Must Be Viewed in the Light Most Favorable to Grundy.

The State argues the decision whether to instruct the jury on fourth-degree assault should be reviewed solely for abuse of discretion because it rests on an issue of fact. Brief of Respondent (BoR) at 10. But the State's main argument is a legal one: that intentional assault plus bodily harm is necessarily at least third-degree assault. BoR at 13, 14. This issue involves interpretation of the assault statutes and application of those statutes to the facts, both of which are reviewed de novo. See, e.g., State v. Marohl, 170 Wn.2d 691, 697, 246 P.3d 177, 179 (2010) ("Whether a floor can be an 'instrument or thing likely to produce bodily harm' for purposes of third degree assault is a matter of first impression. The meaning of a statute is a question of law we review de novo.") (citing Delyria v. State, 165 Wn.2d 559, 562, 199 P.3d 980 (2009)); State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (application of law to facts is reviewed de novo).

The State also argues Grundy "cannot prove that he committed only fourth degree assault." BoR at 13. As this Court is well aware, a defendant has no burden to *prove* anything; the burden is one of production, not

persuasion. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Grundy has an unqualified right to have the jury instructed on fourth-degree assault so long as there is “[E]ven the slightest evidence” he may have committed only that offense.<sup>1</sup> State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276 77, 60 P. 650 (1900)).

b. Evidence Was Presented That Grundy Committed Only Fourth Degree Assault.

Grundy’s own testimony is evidence he committed fourth-degree assault and only fourth-degree assault. Assault in the fourth degree requires intentional physical contact that is offensive and does not amount to any of the higher degrees of assault. RCW 9A.36.041; State v. Jarvis, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011) (citing State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000)). Grundy’s testimony that he intentionally punched Babcock is evidence of the intentional assault required for fourth-degree assault. Jarvis, 160 Wn. App. at 119; RP 513.

His testimony also provides evidence he did not commit the charged offense of second-degree assault because his account of what happened negates the mental state required for that offense. Second-degree assault, as charged in this case, requires both intentional assault and reckless infliction

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<sup>1</sup> The State appears to agree fourth-degree assault is an inferior degree of the charged offense, namely, second-degree assault. BoR at 13.

of substantial bodily harm. RCW 9A.36.021(1)(a). Recklessness requires conscious disregard of a substantial risk. RCW 9A.08.021(1)(c). Without awareness of the risk, there can be no second-degree assault. RCW 9A.36.021(1)(a); RCW 9A.08.021(1)(c); State v. R.H.S., 94 Wn. App. 844, 847-49, 974 P.2d 1253, 1256 (1999). In R.H.S., the trial court excluded the defendant's testimony that he was unaware of the risk of injury from a punch to the face. 94 Wn. App. at 847-48. This Court reversed because the testimony, if believed, would have defeated the charge of second-degree assault. Id. at 847-49. As in R.H.S., Grundy's testimony that he was unaware that his punch could injure someone is evidence he did not commit second-degree assault. Id.; RP 513, 524.

Grundy was not required to present evidence tending to disprove third-degree assault because that was not the charged offense. See Fernandez-Medina, 141 Wn.2d at 454 (test is whether "the statutes for both *the charged offense* and the proposed inferior degree offense 'proscribe but one offense.'") (emphasis added). Additionally, while the fourth-degree assault statute would appear to require proof of circumstances "not amounting to" any of the higher degrees of assault, that phrase does not create an element of the offense. See State v. Keend, 140 Wn. App. 858, 872, 166 P.3d 1268 (2007) (conviction for second-degree assault does not require proof of conduct "not amounting to assault in the first degree").

Thus, the court was required to grant Grundy's request for instruction on fourth-degree assault even if there were no evidence tending to disprove third-degree assault.

However, if this Court should nonetheless conclude the evidence must also tend to exclude third-degree assault, Grundy met that burden of production as well. Conviction for third-degree assault requires that a person "with criminal negligence, causes bodily harm." RCW 9A.36.031. Criminal negligence occurs when a person "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). Specifically, "in a criminal negligence case, the State must show that the defendant's actions were at least a gross deviation from what a normally careful person would have done." State v. Bauer, 174 Wn. App. 59, 68, 295 P.3d 1227 (2013), review granted, 177 Wn.2d 1019, (2013) (citing RCW 9A.08.010(1)(d)).

Grundy testified that, when he punched Babcock, he was only trying to get out of the threatening crowd. RP 514. This explanation was at least some evidence that his actions were not a gross deviation from what a reasonably careful person would have done while in fear and under such threatening circumstances. The trial court implicitly found there was

evidence Grundy's conduct was at least arguably reasonable because it found sufficient evidence to warrant instructing the jury on lawful use of force and necessity. CP 98, 99. Because the court instructed the jury on self-defense, it must necessarily have found some evidence Grundy's conduct was not a gross deviation from a reasonable standard of care, which would be required for third-degree assault. Because Grundy's testimony, if believed, is evidence he committed only fourth-degree assault, instruction on that offense was required. Fernandez-Medina, 141 Wn.2d at 461; R.H.S., 94 Wn. App. at 847-49.

c. Fourth Degree Assault Can Occur When Accidental Injury Results.

The State argues fourth-degree assault requires the absence of bodily harm, and that if harm results, there can be no fourth-degree assault. BoR at 13, 14. There is no legal support for this assertion, and it is contradicted by statute. Fourth-degree assault requires intentional assault "not amounting to assault in the first, second, or third degree." RCW 9A.36.041. An intentional assault does not amount to one of the higher degrees if *any* of the essential elements of those higher degrees are missing, including the mental state. See R.H.S., 94 Wn. App. at 847-49 (testimony defendant was unaware of the risk of injury would have defeated second-degree assault charge even though victim's jaw was broken in three places). Even if there is substantial

bodily harm and intentional assault, the absence of recklessness precludes conviction for second-degree assault. Id.; RCW 9A.36.021.

Similarly, absence of criminal negligence defeats a charge of third-degree assault, regardless of resulting harm. RCW 9A.36.031(f). In short, evidence Grundy committed intentional assault but lacked the mental state required for the higher degrees necessitated instruction on fourth-degree assault. By contrast, the State proposes a sort of strict liability for assault that results in injury, regardless of the defendant's actual mental state vis-à-vis that injury. But that is not the law.

The State argues Grundy's defense that the injury was accidental could only exonerate him and could not form the basis for conviction of fourth-degree assault because that offense requires intent. BoR at 12. But the State conflates two different mental states. One mental state does not include another when the two mental states pertain to different facts or circumstances. See State v. Hayward, 152 Wn. App. 632, 643-45, 217 P.3d 354 (2009) (recklessness as to infliction of bodily harm is not established merely by proof that assault was intentional). In fourth-degree assault, the mental state of intent applies to the contact or offensive touching. RCW 9A.36.041; Jarvis, 160 Wn. App. at 119. By contrast, in second- and third-degree assault, the mental states of recklessness and criminal negligence apply to the causing of bodily harm. RCW 9A.36.031. As the State points

out, Grundy testified he intentionally punched Babcock; this satisfies the mental state for fourth-degree assault. RP 513; RCW 9A.36.041. According to Grundy, the accident was the degree of injury that resulted; if believed, this negates the mental states for second and third degree assault. RP 513-14; R.H.S., 94 Wn. App. at 847-49.

Due process requires jury instructions on the defense theory of the case when requested and supported by the evidence. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Wash. Const. art I, § 3. An “all or nothing” approach, where the jury must either convict of a greater crime or acquit entirely might have been a valid trial strategy. State v. Grier, 171 Wn.2d 17, 20, 246 P.3d 1260 (2011). But it was reversible error to force Grundy to run that risk when he clearly admitted the elements of the lesser offense: “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.” Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973).

Based on the facts presented, a reasonable juror could have found Grundy committed a misdemeanor, fourth degree assault. But the jury was not given that opportunity. Instead, it was presented with the false choice of completely condoning Grundy’s conduct or convicting him of a felony. The

jury's inquiry about lesser offenses suggests that it "resolve[d] its doubts in favor of conviction." Id. Grundy's due process right to jury instructions on the law supporting his theory of the case was violated and his conviction must be reversed. Koch, 157 Wn. App. at 32-33.

2. REVERSAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR'S ARGUMENT APPEARED CONSISTENT WITH THE WRITTEN JURY INSTRUCTIONS YET CONTRADICTED THE LAW SUPPORTING THE DEFENSE THEORY OF THE CASE.

The prosecutor repeatedly argued the events before the police arrived were "irrelevant." RP 672-73, 721-22. This clearly misstates the law that events substantially predating the offense are part of the totality of the circumstances that the jury must consider. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495, 504 (1993) (citing State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) and State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548, 557 (1977)). The State argues the prosecutor only meant that a reasonable person would no longer have felt threatened once the police arrived. BoR at 16. But that is not what the prosecutor said. Instead, the prosecutor told the jury that this was irrelevant, arguing the jury should only consider what was happening right at the moment, and ignore anything that happened even two or three minutes earlier. RP 673. That is a misstatement of the law.

The written jury instructions failed to correct the prosecutor's misstatement, and even appeared to support it. As the State points out, the written jury instructions refer to the circumstances as they appeared "to the actor at the time." CP 99. The prosecutor appeared to be not contradicting this instruction, but clarifying it to mean that "at the time" could not include events happening even a few minutes earlier. Since this declaration came from the prosecutor, who lay persons would presume to be knowledgeable about the law, was not objected to by defense counsel, and appeared consistent with the written jury instructions, it was likely to influence the jury's deliberations.

In the context of self-defense instructions, this court has repeatedly held that a defense attorney should not be placed in the position of arguing to the jury what the law is. See, e.g., State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996); State v. Summers, 120 Wn.2d 801, 819, 846 P.2d 490 (1993); State v. Acosta, 101 Wn. 2d 612, 621-22, 683 P.2d 1069 (1984); see also State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987). The prosecutor's argument placed the defense in precisely that position here. The prosecutor directly contradicted well-established precedent and did so in a way that was likely to mislead the jury. Grundy's conviction should be reversed for prosecutorial misconduct, or, alternatively, for ineffective assistance of counsel in failing to object.

3. THE EVIDENCE DOES NOT SUPPORT THE RESTITUTION AWARD.

There is no indication in the record that Grundy agreed to the restitution amount. The only utterance attributed to defense counsel on this topic refers to the need for a restitution hearing to review the new records. BoR at 19-20. Absent that restitution hearing and the presentation of substantial evidence to support the amount awarded, the restitution order should be reversed. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

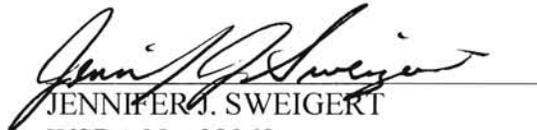
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Grundy's conviction.

DATED this 7<sup>th</sup> day of April, 2014.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
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v.	)	COA NO. 70243-2-1
	)	
MICHAEL GRUNDY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF APRIL 2014.

X *Patrick Mayovsky*