

NO. 38675-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT THOMASON,

Appellant.

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

The Honorable John Nichols, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant a fair trial by refusing to instruct the jury on the lesser offense of third degree assault.

2. The court erred in entering the following findings of fact in support of the exceptional sentence¹:

“Angela Wilde fled upstairs to where her 12 year old daughter was sleeping in her room.” Finding of Fact 5.

“Defendant kept [T.R.W.] and Angela Wilde in [T.R.W.]’s room. Angela testified that the defendant yelled “vile” words to both of them....” Finding of Fact 7.

“...When Angela Wilde wished to use the bathroom he insisted he watch her on the toilet....” Finding of Fact 9.

3. The court’s reasons for imposing an exceptional sentence are not supported by the record and do not justify a departure from the standard range.

4. The no contact order exceeds the maximum sentence for the underlying offense and must be corrected.

Issues pertaining to assignments of error

1. Appellant was charged with second degree assault. Where the evidence, viewed in the light most favorable to appellant, supported an inference that the assault was criminally negligent rather than intentional,

¹ The court entered written findings of fact and conclusions of law after the record in this case was perfected. This document is designated in a Supplemental Designation of Clerk’s Papers, and a copy is attached as an appendix to this brief.

did the court err in refusing to instruct the jury on third degree assault?
(Assignment of Error 1)

2. The trial court imposed exceptional sentences based on the jury's findings of deliberate cruelty. Where the court failed to identify substantial and compelling reasons to justify a sentence above the standard range, must the exceptional sentence be vacated? (Assignments of Error 2 and 3)

3. Where the court imposed a no contact order which exceeded the statutory maximum sentence for the underlying offense, is remand necessary to correct the error? (Assignment of Error 4).

B. STATEMENT OF THE CASE

1. Procedural History

On July 29, 2008, the Clark County Prosecuting Attorney charged appellant Albert Thomason with first degree robbery, second degree assault, and unlawful imprisonment of Angela Wilde; and unlawful imprisonment of T.R.W. CP 7-9; RCW 9A.56.200(1)(a)(iii); RCW 9A.36.021(1)(a); RCW 9A.40.040(1). The information also alleged aggravating factors relating to domestic violence and deliberate cruelty as to the offenses involving Wilde. CP 7-9. The robbery charge and domestic violence allegations were subsequently dismissed, and the case proceeded to jury trial before the Honorable John Nichols. CP 94. The

jury returned guilty verdicts and special verdicts finding deliberate cruelty. CP 81-85.

With Thomason's offender score of 3, the standard range on the assault was 13 to 17 months, and the standard range for the unlawful imprisonment convictions was nine to 12 months. CP 94. The court imposed exceptional sentences of 48 months on the assault and the unlawful imprisonment involving Wilde and a standard range sentence of 12 months on the remaining count. CP 96. Thomason filed this timely appeal. CP 107.

2. Substantive Facts

On June 13, 2008, Albert Thomason and his son Jeremiah Thomason spent the evening drinking at the Cornerstone Bar in Vancouver. 1RP² 44, 108. Jeremiah's girlfriend Angela Wilde joined them around 11:00 p.m., and they stayed until the bar closed at 2:00 a.m. 1RP 22, 24. Thomason, Jeremiah, and Wilde were introduced to a friend of the bartender's, and the group drank a few pitchers of beer and some shots of liqueur. 1RP 24-25, 46. Wilde was "feeling good," but Thomason was far more intoxicated. 1RP 25, 46, 108. When the bar closed, they went to Wilde's home to drink a few more beers. 1RP 26. At

² The Verbatim Report of Proceedings is references herein as follows: 1RP—11/24/08; 2RP—11/25/08; 3RP—12/3/08; 4RP—12/5/08.

that point, although Thomason was able to walk and talk, he was noticeably “buzzed.” 1RP 27-28.

After their friend left, Wilde cleaned up and started getting ready for bed, expecting that Jeremiah would take Thomason home. 1RP 30. Instead, a confrontation erupted between Wilde and Thomason. 1RP 31, 112. There was some dispute as to the details of the altercation, but it was undisputed that Thomason assaulted Wilde, leaving her left eye swollen and bleeding. 1RP 36. According to Wilde, Thomason kicked her in the eye with his cowboy boot as she was lying on a mattress in the living room. 1RP 32. She said this came out of the blue and she had no reason to expect it. 1RP 48. Wilde said Thomason then accused her of cheating on Jeremiah, and he called her “filthy names.” 1RP 32. When she stood up, he grabbed her throat, accused her again, and called her a “stupid bitch.” 1RP 33. Thomason denied kicking Wilde but admitted punching her in the eye, causing her injuries. 1RP 112.

Wilde ran upstairs looking for a phone to call the police, and Thomason ran after her, grabbing at her ankle as she got to the top of the stairs. 1RP 34. Wilde went into the room where her 14-year-old daughter T.R.W. was sleeping. 1RP 34. When T.R.W. woke up, Wilde told her to call 911, but Thomason took her phone. 1RP 35. Thomason stood in the doorway and would not let them leave the room. 1RP 36, 59. He did not

say anything to Wilde or T.R.W. but yelled to Jeremiah to load his belongings into his truck so they could leave. 1RP 39-40.

At one point, Wilde told Thomason she had to use the bathroom. 1RP 37. Thomason agreed to let her, as long as she left the door to the bathroom open. 1RP 37. He stood in the hallway guarding both rooms. 1RP 130. According to Wilde, when she was finished in the bathroom, she ran into the adjoining master bedroom to try to climb out the window, but Thomason grabbed her ponytail and brought her back into her daughter's room. 1RP 38-39. T.R.W. did not see Thomason grab Wilde's hair. 1RP 58. There was a dispute as to how long Thomason held Wilde and T.R.W. in the room while Jeremiah loaded the truck. Wilde estimated it took two hours, T.R.W. felt it was about an hour, while Thomason said it took ten to 15 minutes. 1RP 41, 64, 113.

When Jeremiah was done loading the truck, Thomason went downstairs, and Wilde and T.R.W. followed. 1RP 41-42. T.R.W. asked Thomason where her phone was, and Thomason told her she would find it in the garage. 1RP 43. TRW found the phone between the cushions of a couch in the garage, and she called 911. 1RP 43, 61.

A patrol officer responded and took statements and photographs. 1RP 79. He offered to call an ambulance for Wilde, but she declined, instead having her sister drive her to the hospital. 1RP 49. Medical

records showed Wilde had sustained a nondisplaced fracture of her left orbital floor. 1RP 124. Wilde testified that she has a ringing in her ears that is permanent. 1RP 52.

Thomason was charged with second degree assault against Wilde and unlawful imprisonment of Wilde and T.R.W. The State also alleged the offenses against Wilde involved deliberate cruelty. CP 7-9.

Thomason testified at trial that he was intoxicated when they left the bar that night, and he continued to drink at Wilde's house. 1RP 108, 110. He and Wilde got into an argument, Wilde called his daughter a "thieving cunt," and he instantaneously reacted by punching her. 1RP 112, 122, 135. Thomason testified he did not mean to hit her, but he got angry, and that was his reaction. 1RP 124-25. He then followed Wilde upstairs to T.R.W.'s room and blocked the doorway so they could not get out. 1RP 125, 128. Thomason admitted his intent was to prevent them from calling the police before he and Jeremiah were ready to leave. 1RP 126.

C. ARGUMENT

1. THE TRIAL COURT DENIED THOMASON A FAIR TRIAL BY REFUSING TO INSTRUCT THE JURY ON THIRD DEGREE ASSAULT.

The constitutional right to due process of law provides all defendants the right to a fair trial. U.S. Const. amends. V, XIV; Wash.

Const. art. I § 3. Defendants are also constitutionally entitled to a trial by jury. U.S. Const. amend. VI; Wash. Const. art. I § 21. Jury instructions are designed to “furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict, ...to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved.” State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). A defendant is entitled to jury instructions embodying his theory of the case if there is evidence to support that theory. State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). A trial court’s refusal to so instruct the jury constitutes reversible error. Warden, 133 Wn.2d at 564.

Thomason was charged with committing second degree assault by intentionally assaulting Wilde, thereby recklessly inflicting substantial bodily harm. CP 7; RCW 9A.36.021(1)(a). Trial counsel proposed instructions on third degree assault and criminal negligence, arguing the evidence supported a finding that Thomason acted with criminal negligence when he assaulted Wilde, in that he was extremely intoxicated

and threw a punch as a spontaneous reaction to Wilde's insults. CP 15-18; 2RP 10-11. Although the State conceded that third degree assault meets the legal prong for instructing on lesser degree offenses, it argued that there was no factual basis for a lesser offense instruction. The prosecutor argued that the evidence showed the assault was intentional, and the level of injury made it second degree assault. 2RP 12-13. The court agreed with the State's analysis and declined to instruct the jury on third degree assault. 2RP 13. Defense counsel took exception to the court's ruling. 2RP 10.

Under RCW 10.61.003, a defendant is entitled to an instruction on an inferior degree offense 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. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (citing State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). As the parties and court below recognized, the first two prongs of this test are satisfied, because third degree assault is an inferior degree of the charged offense. See Fernandez-Medina, 141 Wn.2d at 545-55.

The factual prong is established when the evidence in the case supports an inference that only the lesser offense was committed to the exclusion of the greater offense. Fernandez-Medina, 141 Wn.2d at 455. Specifically, an inferior degree offense instruction should be given "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Id. at 456 (quoting Warden, 133 Wn.2d at 563(citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980))). When determining whether the evidence at trial warranted an inferior degree offense instruction, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Under the statutory provision applicable in this case, "[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree...[w]ith 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). "A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(d).

There was evidence at trial from which the jury could have found Thomason committed third degree assault, rather than second degree assault, because his actions were negligent rather than intentional. The defense theory of the case was that the assault against Wilde was a spontaneous reaction, not an intended act. 2RP 46-47. Counsel argued that both Wilde and Thomason were very drunk. In her intoxication, Wilde insulted Thomason's daughter, and in his intoxication, Thomason spontaneously reacted by hitting Wilde. 2RP 47-48. There was evidence of too much drinking, but no evidence that Thomason acted with an objective or purpose. 2RP 54.

Under RCW 9A.16.090, "whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of [the defendant's] intoxication may be taken into consideration in determining such mental state." Washington courts have recognized that intoxication can negate a person's capacity to act intentionally or knowingly, rendering his actions criminally negligent. State v. Coates, 107 Wn.2d 882, 892, 735 P.2d 64 (1987);

In Coates, the defendant struck another vehicle while driving. An off-duty police officer stopped his car behind Coates's car and encouraged him to walk back to the scene of the accident. As they were approaching the scene, Coates changed his mind, and the officer agreed he could wait

in his car. Coates stabbed the officer in the back two times and then returned to his vehicle. When he was arrested, Coates was obviously intoxicated and said he could not believe anyone was stabbed, claiming he and the officer fell. Coates, 107 Wn.2d at 883-84.

Coates was charged with second degree assault. At trial he testified he had no memory of the accident or the stabbing and stressed that he had consumed a great deal of alcohol that evening. Coates, 107 Wn.2d at 885-86. The trial court instructed the jury that it could consider Coates's intoxication in determining whether he acted intentionally, with knowledge, or recklessly. It specifically precluded the jury from considering intoxication in determining whether Coates was guilty of the lesser offense of third degree (negligent) assault. Coates, 107 Wn.2d at 886.

Coates was convicted of third degree assault. On appeal, the Washington Supreme Court recognized that intoxication may affect a defendant's capacity to act intentionally or knowingly. Because negligence is based on a reasonable person standard, however, intoxication does not negate this mental state. "[I]f a reasonable person would have avoided the wrongful act, and the defendant's failure to do so [due to intoxication] is a gross deviation from this reasonable course of conduct, the defendant has acted with criminal negligence." Coates, 107

Wn.2d at 892. Coates's reason for failing to be aware that the victim was being stabbed was his own intoxication. Since a reasonable person would not have stabbed the victim, Coates's actions were criminally negligent. Coates, 107 Wn.2d at 893.

In addition to intoxication, Washington courts have recognized that provocation may affect a defendant's capacity to act intentionally. See State v. Van Zante, 26 Wn. App. 739, 740-742, 614 P.2d 217 (1980) (instructions on first degree murder, second degree murder, and manslaughter afforded defendant opportunity to argue that when he discovered his wife's adultery, he was so overcome with the heat of passion he neither premeditated nor intended his act); State v. Frederick, 20 Wn. App. 175, 182, 579 P.2d 390, review denied, 91 Wn.2d 1001 (1978).

In this case, there was evidence of both intoxication and provocation. As in Coates, Thomason assaulted Wilde while in a state of extreme intoxication. Thomason testified that he was intoxicated and as a result he lost control. 1RP 108, 112, 135. According to Wilde, Thomason was more intoxicated than she was, and it was undisputed that her blood alcohol content was .137 hours after the incident. 1RP 25, 47, 94. There was also evidence that Wilde's insults provoked Thomason's actions. Wilde testified that she gets loose-lipped and less inhibited when she is as

intoxicated as she was that night. 1RP 47. Thomason testified Wilde called his wife a “whore” and his daughter a “thieving cunt,” and he instantaneously reacted by hitting her. 1RP 112. He did not intend to hit her, and it only happened once in response to Wilde’s offensive comment. 1RP 114-15, 124-25.

Given this evidence, the jury could have found Thomason was guilty of third degree assault. Due to his intoxication and provocation, he did not act intentionally. Rather, he failed to be aware that there was a substantial risk he would assault Wilde, causing bodily harm, substantial pain, and considerable suffering. Because a reasonable person would not have assaulted Wilde, Thomason was criminally negligent. See Coates, 107 Wn.2d at 893.

A defendant is entitled to jury instructions embodying his theory of the case if there is evidence to support that theory. Warden, 133 Wn.2d at 563. Where the evidence supports an inference that the lesser offense was committed, the defendant has the right to have the jury consider that lesser offense. Warden, 133 Wn.2d at 564. Because the evidence, viewed in the light most favorable to Thomason, supported an inference that Thomason committed third degree assault rather than second degree assault as charged, he had the right to have the jury consider the lesser offense. See Warden, 133 Wn.2d at 564.

Even though the court below instructed the jury on intoxication³ and permitted defense counsel to argue that intoxication and provocation negated Thomason's ability to form intent⁴, the court's failure to instruct the jury on criminal negligence and third degree assault disarmed the defense theory of the case. Without those instructions, the jury was required to choose between convicting Thomason of second degree assault and acquitting him. See Warden, 133 Wn.2d at 564 (court's failure to instruct on lesser offense precluded defendant from arguing theory of case and required jury to choose between conviction on greater offense and acquittal). Since Thomason admitted assaulting and injuring Wilde, it is not likely the jury would vote to acquit, even if it felt there was a question as to whether he acted intentionally. Instead, the jury would resolve its doubts in favor of conviction. See State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004) ("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.").

A court commits reversible error when it refuses to instruct the jury on an inferior degree offense where the evidence supports such instructions. Warden, 133 Wn.2d at 563-64. There was evidence in this case to support an inference that Thomason committed only third degree

³ CP 69.

⁴ 2RP 9.

assault. The court below eviscerated the defense theory by failing to instruct the jury the lesser offense, and reversal is required.

2. THE REASONS GIVEN BY THE TRIAL COURT FOR IMPOSING AN EXCEPTIONAL SENTENCE ARE NOT SUPPORTED BY THE RECORD AND DO NOT JUSTIFY A SENTENCE OUTSIDE THE STANDARD RANGE.

At the close of evidence, trial counsel took exception to the state's proposed instruction on deliberate cruelty, arguing that there was insufficient evidence to support that aggravating factor. 2RP 3. The court found the evidence sufficient, and it gave the following instruction:

“Deliberate cruelty” means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

CP 80; 2RP 8. It also instructed the jury to determine whether Thomason manifested deliberate cruelty in committing the assault and unlawful imprisonment as to Wilde. CP 78-79.

After the special verdicts were entered, the defense again argued the evidence was insufficient to support the findings of deliberate cruelty and argued that the jury's findings did not justify an exceptional sentence in this case. 4RP 6-8; CP 86-90. The court disagreed and imposed an exceptional sentence of 48 months on both counts involving Wilde. 4RP 22; CP 96.

In its oral ruling on the exceptional sentence, the court found that Wilde's injury was greater than contemplated by the second degree assault statute. It noted that the assault was completely unprovoked and found it was unduly cruel because Wilde was in a defenseless position. 4RP 20-21. The court also found deliberate cruelty in that Thomason did not leave immediately after the assault but instead restrained Wilde for 45 to 60 minutes while she was bleeding. 4RP 21. The court found Thomason used humiliation during the unlawful imprisonment by making Wilde leave the door open when she used the bathroom, grabbing her, and putting his hands on her throat. It found that all this was done in front of Wilde's daughter. 4RP 22. Finally, the court found that Thomason was deliberately cruel in hiding the phone, in that he denied Wilde the ability to call for help. 4RP 22. The court entered written findings of fact and conclusions of law consistent with its oral ruling. Supp. CP (Sub. No. 73, Findings of Fact and conclusions of Law for Exceptional Sentence, filed 1/30/09).

Under RCW 9.94A.535, the trial court may impose a sentence outside the standard range if it finds substantial and compelling reasons justifying an exceptional sentence. That statute sets forth an exclusive list of aggravating factors which, when found by the jury, may support a sentence above the standard range. RCW 9.94A.535(3). Deliberate

cruelty is one of those factors. RCW 9.94A.535(3)(a). On appeal, the reviewing court must reverse an exceptional sentence when the reasons given for imposing an exceptional sentence are not supported by the record or do not justify a sentence outside the standard range. RCW 9.94A.585. The exceptional sentences must be vacated in this case because the record does not support the court's findings regarding deliberate cruelty, and those findings do not justify an exceptional sentence.

Some of the court's written findings of fact are clearly erroneous. First, the court found that "Angela Wilde fled upstairs to where her 12 year old daughter was sleeping in her room...." Supp. CP (Finding of Fact 5). The undisputed evidence shows that T.R.W. was 14, not 12. 1RP 62.

Next, the court found, "Defendant kept [T.R.W.] and Angela Wilde in [T.R.W.]'s room. Angela testified that the defendant yelled "vile" words to both of them...." Supp. CP (Finding of Fact 7). In fact, Wilde testified Thomason did not say anything to them while they were in the room. 1RP 39. Although she testified he called her filthy names (without specifying what those were) when she was downstairs, T.R.W. testified she did not hear anything until Wilde jumped on her bed. 1RP 32, 63.

The court also entered a finding that “When Angela Wilde wished to use the bathroom he insisted he watch her on the toilet....” Supp. CP (Finding of Fact 9). Again, no one testified Thomason watched Wilde use the toilet. The testimony was that Thomason made Wilde leave the door open, but he stood in the hallway between the two rooms he was guarding. 1RP 37, 130.

Some of the court’s oral findings were unsupported by the evidence as well. The court found that Thomason grabbed Wilde and put his hands on her throat in front of T.R.W. 4RP 22. Wilde testified, however, that she was downstairs when Thomason grabbed her neck, and T.R.W. testified she did not see that. 1RP 33, 63. T.R.W. also testified that she did not see Thomason grab Wilde’s hair. 1RP 55.

Even the findings by the court which were supported by the evidence do not justify an exceptional sentence on the basis of deliberate cruelty. “Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself.” State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192(2003). To justify an exceptional sentence, the cruelty must go beyond that normally associated with the charged offense or inherent in the elements of the crime. Id. (citing State v. Ferguson, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001)).

The court below relied heavily on its finding that the assault was unprovoked in determining that an exceptional sentence was warranted. 4RP 16, 20-21; Supp. CP (Finding of Fact 4). While that finding is supported by the evidence, it does not establish that Thomason's conduct manifested deliberate cruelty. That the attack was completely unprovoked describes many, if not most, assaults and cannot be used to justify a departure from the standard range. State v. Kidd, 57 Wn. App. 95, 105, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990).

The court below also relied on the severity of Wilde's injury in imposing an exceptional sentence. 4RP 20; Supp. CP (Findings of Fact 6, 12). Where the injury sustained is the injury contemplated by the statute defining the offense, however, this factor does not support an exceptional sentence. Ferguson, 142 Wn.2d at 647-48.

In Ferguson, the defendant was convicted of second degree assault by exposing someone to HIV with intent to inflict bodily harm. Ferguson, 142 Wn.2d at 652. The trial court imposed an exceptional sentence, finding that the defendant's intentional exposure of the victim to HIV was deliberately cruel. Ferguson, 142 Wn.2d at 647. The Supreme Court reversed the sentence stating, "An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial." Ferguson, 142 Wn.2d at 648. The defendant's

intent to cause bodily harm was an element of the offense already considered by the Legislature in establishing the standard range, and it therefore did not justify a departure from that range. Ferguson, 142 Wn.2d at 648.

In this case, as in Ferguson, the fact relied on by the court to justify the exceptional sentence was an element of the offense contemplated by the Legislature in establishing the standard range. Thomason was convicted of second degree assault by recklessly inflicting substantial bodily harm. See RCW 9A.36.021(1)(a). Substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part”. RCW 9A.04.110(4)(b). Because serious injury is inherent in a conviction for second degree assault as charged in this case, it cannot justify a departure from the standard range. See State v. Armstrong, 106 Wn.2d 547, 550-51, 723 P.2d 1111 (1986).

In Armstrong, the trial court imposed an exceptional sentence on a conviction for second degree assault (grievous bodily harm) where the defendant threw boiling coffee on a 10-month-old infant then held the baby’s foot in the coffee. Armstrong, 106 Wn.2d at 548. The trial court gave four reasons for imposing the exceptional sentence, and the Supreme

Court upheld two. It held, however, that “the nature of the injuries inflicted were already accounted for in determining the presumptive sentence range for second-degree assault; they cannot be counted a second time to justify an exceptional sentence.” Armstrong, 106 Wn.2d at 551.

Here, Thomason was convicted of recklessly inflicting substantial bodily harm. The seriousness of the harm was accounted for in determining the standard range sentence, and thus the fact that Wilde sustained substantial bodily harm cannot be used to justify a departure from the standard range.

The court also indicated that it considered Wilde’s injuries more severe than contemplated by the second degree assault statute. Supp. CP (Conclusion 4 (a) in Exhibit A); 4RP 20. Under RCW 9.94A.535, this is a separate aggravating factor which must be found by the jury. RCW 9.94A.535(3)(y) (“The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.”). Since the jury was not instructed on this factor and entered no verdict finding it to be established, the court cannot rely on it to justify the exceptional sentence in this case. See RCW 9.94A.535(3); RCW 9.94A.537.

Next, the court found an exceptional sentence was justified on the unlawful imprisonment conviction because Thomason used humiliation in not allowing Wilde to close the bathroom door, restrained Wilde for 45

minutes to an hour, and would not let her call for help. 4RP 21-22. The unlawful imprisonment statute contemplates more than just a petty annoyance or inconvenience, however; the offense necessarily involves a substantial interference with the victim's liberty. State v. Washington, 135 Wn. App. 42, 49, 143 P.3d 606, review denied, 160 Wn.2d 1017 (2006); RCW 9A.40.040(1). Moreover, the presence of a means of escape may defeat a charge of unlawful imprisonment. Washington, 135 Wn. App. at 49. The facts relied on by the court established the substantial interference with liberty, while eliminating the means of escape, inherent in the elements of the offense. They do not justify a departure from the standard range. See Tili, 148 Wn.2d at 369.

Finally, the State argued at sentencing that the assault was deliberately cruel because it was accompanied by the unlawful imprisonment, and the unlawful imprisonment was deliberately cruel because Wilde was injured and restrained with her daughter. 4RP 10. The court adopted this reasoning, finding an exceptional sentence was justified because Thomason did not simply leave after the assault, but held Wilde captive, and her daughter had to witness the offense. 4RP 21-22. The fact that a defendant committed multiple current offenses justifies an exceptional sentence only when "the defendant's high offender score results in some of the current offenses going unpunished," however.

RCW 9.94A.535(2)(c). That is not the case here. Thomason had an offender score of 3. CP 94. Thus, the fact that he committed multiple offenses, assaulting Wilde and unlawfully imprisoning both her and her daughter, was taken into account when establishing his standard range. CP 94.

The reasons given by the trial court for imposing an exceptional sentence are not supported by the record and do not justify a sentence outside the standard range. The exceptional sentence must therefore be reversed. See RCW 9.94A.585.

3. THE TEN-YEAR NO CONTACT ORDER AS TO T.R.W. EXCEEDS THE STATUTORY MAXIMUM TERM FOR THE OFFENSE, AND IT MUST BE CORRECTED.

As a condition of Thomason's sentence, the trial court imposed 10-year no contact orders as to both Wilde and T.R.W. CP 96. A sentencing court is authorized to impose no contact orders as crime related prohibitions. RCW 9.94A.505(8). A no contact order imposed under this provision may not exceed the statutory maximum for the underlying offense, however. State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201(2007).

A ten-year order was appropriate as to Wilde, because the maximum sentence for second degree assault is ten years. See RCW 9A.36.021(2)(a); RCW 9A.20.021(1)(b). Thomason was not convicted of

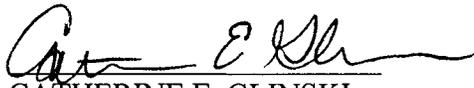
assaulting T.R.W., however. She was the subject of one of the unlawful imprisonment convictions. The statutory maximum sentence for unlawful imprisonment is five years. RCW 9A.40.040(2) (unlawful imprisonment is class C felony); RCW 9A.20.021(1)(c) (maximum sentence for class C felony is five years). Because the ten-year order imposed by the court was not authorized by statute, remand is necessary to correct the order.

D. CONCLUSION

The court's refusal to instruct the jury on third degree assault denied Thomason a fair trial, and his conviction on second degree assault must be reversed as the case remanded for a new trial. In addition, the exceptional sentences must be vacated, and the excessive no contact order must be corrected.

DATED this 30th day of April, 2009.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

APPENDIX

**COPY
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JAN 30 2009

Sherry W. Parker, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,)	No. 08-1-01004-0
Plaintiff,)	
v.)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
ALBERT LAYTON THOMASON,)	FOR EXCEPTIONAL SENTENCE
Defendant.)	

The parties appeared for sentencing on December 5, 2008. The defendant appeared personally and by and through his attorney, James J. Sowder.

The state was represented by Deputy Prosecuting Attorney, Tony Golik. The victim, Angela Wilde, spoke at sentencing. She was not sworn in and it was agreed her statement was not a factual basis for an exceptional sentence. The defendant objected to an exceptional sentence and asked for a sentence within the standard range of 13 to 17 months. The state asked for an exceptional sentence of 60 months. The court having heard argument of counsel and being cognizant of the facts of the trial as the trial judge, not considering any statements of the victim as part of the exceptional sentence, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant and his son, Jeremiah, met Angela Wilde and her friend, Akrista, at a local bar. Angela Wilde is the mother of Tia Wilde. Jeremiah Thomason had been living with Angela Wilde and had property at her apartment.

2. All parties consumed an excessive amount of alcohol and agreed to return to Angela Wilde's apartment at approximately 2:30 a.m. Akrista left within approximately one half hour.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR EXCEPTIONAL SENTENCE - 1

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3. Angela Wilde did not have a bed so she had a mattress in the front room. There was no animosity between the parties. An argument ensued at some point where defendant accused Angela Wilde of cheating on his son.

4. Unexpectedly and without provocation the defendant kicked Angela Wilde, while she was in the laying position in the living room. He kicked her in the left eye area while wearing cowboy boots.

5. Angela Wilde fled upstairs to where her 12 year old daughter was sleeping in her room. As Angela attempted to flee, Defendant grabbed her by the ankle, took control of her and took her to her daughter's room and threw her on the daughter's bed which woke her daughter up.

6. Angela Wilde was bleeding profusely from the eye throughout this time from the kick.

7. Defendant kept Tia Wilde and Angela Wilde in Tia Wilde's room. Angela testified the defendant yelled "vile" words to both of them. He would not let them leave the room. He at the same time was yelling down to his son to pick up his property so they could leave.

8. Defendant took, disabled, or hid any telephones in the house.

9. Defendant did not tie up either Tia Wilde or Angela Wilde. He did maintain steady visual observation of them and did not allow them to leave Tia's room while Jeremiah collected his belongings. When Angela Wilde wished to use the bathroom he insisted he watch her on the toilet. Angela attempted to escape through a window. The defendant grabbed her by the hair and drug her back to Tia's room.

10. After a period of approximately 45 minutes to an hour, the defendant and Jeremiah left.

11. Tia found a telephone ^{which had been hidden in the garage} and called the police. Angela Wilde declined ambulance service and went to the hospital on her own.

12. Angela Wilde sustained a fracture in her eye area. She had a blood alcohol content of .135.

DISPUTED FACTS

1. Defendant testified he back-hand slapped Angela Wilde after she insulted his ex-wife and child in a drunken tirade.

COURT'S CONCLUSIONS OF LAW

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR EXCEPTIONAL SENTENCE - 2

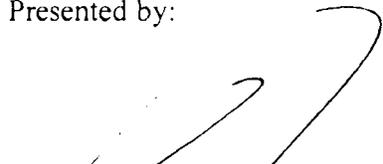
1. The Court has jurisdiction over the parties and the subject matter. All acts occurred in Clark County, Washington, within the statute of limitations.
2. The jury made a factual finding by special interrogatory finding there was deliberate cruelty by the defendant with reference to his assault on Angela Wilde and his restraint of Angela Wilde.
3. The defendant's actions were deliberately cruel in both the Assault and unlawful imprisonment of Angela Wilde.
4. A sentence above the standard range is justified. The court sentenced the defendant

to a term of 48 months in prison. COURT INCORPORATED BY REFERENCE DEFENDANT'S PROPOSED CONCLUSIONS ON LAW SEE PAGE 3, LINE 10-20, PARAGRAPH 4(D) (b) (c) (d), ATTACHED AS EXHIBIT A. *JN*

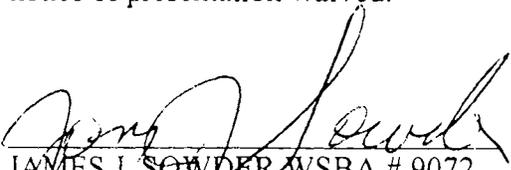
Dated this 30 day of January, 2009


 JUDGE JOHN NICHOLS

Presented by:


 ANTHONY F. GOLIK WSBA # 25172
 Deputy Prosecuting Attorney

Service accepted and consent to entry,
 notice of presentation waived.


 JAMES J. SOWDER WSBA # 9072
 Attorney for Defendant
 FINDINGS OF FACT AND CONCLUSIONS
 OF LAW FOR EXCEPTIONAL SENTENCE - 3

COURT'S CONCLUSIONS OF LAW

1
2 1. The Court has jurisdiction over the parties and the subject matter. All acts occurred in
3 Clark County, Washington, within the statute of limitations.

4 2. The jury made a factual finding by special interrogatory there was deliberate cruelty by
5 the defendant with reference to his assault on Angela Wilde and his restraint of Angela Wilde
6 and Tia Wilde. *JJA 1-21-09*

7 3. The court considered defendant's sentencing memorandum that argued under the real
8 facts doctrine and applicable case law cited in the motion the crimes charged covered all the
9 criminal acts and there is not substantial compelling reasons for exceptional sentence.

10 4. The substantial compelling reasons justifying the exceptional sentence are:

11 a) The injuries inflicted upon Angela Wilde are more than substantial bodily harm required for
12 assault in the second degree (RCW 98.36.021). Substantial bodily harm requires "a fracture
13 of any bodily part" (RCW 98.04.110(4)(b)). Angela Wilde's fracture is greater than the norm.

14 b) The assault was unprovoked.

15 c) Although particular vulnerability was not found by the jury the defendant objects to using
16 that as a basis for an exceptional sentence. The court interprets while she was laying on the
17 ground as deliberate cruelty.

18 d) Deliberate cruelty is additionally shown by defendant's conduct of not providing aid for
19 Angela Wilde while she is bleeding profusely and not allowing her to obtain aid after he left.
20 He kept her at the house for a minimum of 45 to 60 minutes and hid her cell phone.

21 5. Her 14 year old daughter witnessed her mother being dragged by the hair and detained.

22 6. The above cumulatively is beyond the norm of assault in the second degree and violates
23 the sense of decency particularly when the incident is prolonged by hiding the cell phone.

24 7. Based on the above a sentence of 48 months is justified and is substantial and
25 compelling.
26
27

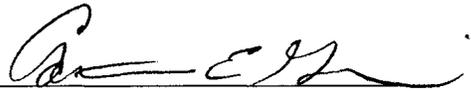
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Designation of Clerk's Papers and Brief of Appellant in *State v. Albert Thomason*, Cause No. 38675-5-II directed to:

Michael C. Kinnie
Attorney at Law
PO Box 5000
Vancouver, WA 98666-5000

Albert Thomason DOC# 307475
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 1, 2009

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STATE OF WASHINGTON
BY  DEPUTY
COURT OF APPEALS
DIVISION II