

NO. 40664-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

COPIES OF THIS
DECISION
10/11/15
BY: [Signature]
DATE: 10/11/15

STATE OF WASHINGTON,

Respondent,

v.

LARRY LLOYD,

Appellant.

BRIEF OF APPELLANT

MICHELLE BACON ADAMS
WSBA #25200
Attorney for Appellant

Law Offices of CRAWFORD,
McGILLIARD, PETERSON,
and YELISH
623 Dwight Street
Port Orchard, WA 98366-4693
(360) 876-9900

TABLE OF CONTENTS

		Page
A.	<u>ASSIGNMENTS OF ERROR</u>	4
1.	Where Mr. Lloyd was charged with assault in the third degree, the trial court erred by failing to instruct the jury on the inferior degree or lesser included offense of assault in the fourth degree.	4
2.	The State failed to disprove the self-defense beyond a Reasonable doubt.	4
3.	There is insufficient evidence to support Mr. Lloyd's conviction for possession of a controlled substance	4
B.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .	4
1.	Did the trial court err in refusing to give a requested jury instruction for assault in the fourth degree where the jury could have found that Mr. Lloyd acted in self defense to avoid further injury while in the custody of Officer Fatt? (Assignment of Error No.1)	4
2.	Did the State fail to disprove self defense when the evidence showed Mr. Lloyd acted to protect himself from further injury? (Assignment of Error No.2)	4
3.	Whether the State's evidence was sufficient to prove that Mr. Lloyd had constructive possession of a pipe containing cocaine residue which was found in a jacket found on the ground at the time of Mr. Lloyd's arrest? (Assignment of Error No.3)	4
C.	STATEMENT OF THE CASE	4
1.	Procedural History:	4
2.	Substantive Facts:	6
D.	ARGUMENT	10
1.	THE TRIAL COURT ERRED IN REFUSING TO	

INSTRUCT THE JURY ON THE OFFENSE OF
ASSAULT IN THE FORTH DEGREE WHICH
REQUIRES REVERSAL OF THE CONVICTION. . . . 10

- a. The jury should have been instructed regarding fourth degree assault as an inferior degree offense of third degree assault. . . 12
- b. The jury should have been instructed regarding fourth degree assault as a lesser included offense of third degree assault. 17
- c. Failure to instruct the jury on the fourth degree assault prejudiced Mr. Lloyd and requires a reversal of his conviction. 18

2. THE STATE FAILED TO DISPROVE MR. LLOYD
ACTED IN SELF
DEFENSE 18

3. THE TRIAL COURT VIOLATED MR. LLOYD'S RIGHT
TO DUE PROCESS WHEN IT ENTERED JUDGEMENT
OF CONVICTION FOR AN OFFENSE UNSUPPORTED
BY SUBSTANTIAL EVIDENCE. 21

E. CONCLUSION 23

TABLE OF AUTHORITIES

	Page
FEDERAL COURT CASES	
<i>Jackson v. Virginia</i> , 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 560 (1979)	11, 19
<i>Schmuck v. United States</i> , 489 U.S. 705, 717-718, 109 S.Ct. 2097, L.Ed. 734 (1989)	11, 12
<i>United States v. Span</i> , 970 F.2d 573, (9 th Cir. 1992)	11, 14

WASHINGTON STATE CASES

<i>State v. Acosta</i> , 101 Wn.2d 612, 616, 683 P.2d 1069 (1984)	11, 19
<i>State v. Berlin</i> , 133 Wn.2d 541, 548, 947 P.2d 700 (1997)	11, 17
<i>State v. Bradley</i> , 141 Wn.2d 731, 10 P.3d 358 (2000)	11
<i>State v. Callahan</i> , 77 Wn.2d 27, 29, 459 P.2d 400 (1969)	11, 21, 22
<i>State v. Cantabrana</i> , 83 Wn.App. 668, 620 P.2d 572 (1996)	11, 22
<i>State v. Collins</i> , 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970) ..	11, 21
<i>State v. Davis</i> , 117 Wn. 702, 708-709, 72 P.3d 1134 (2003), <u>rev. denied</u> , 151 Wn.2d 1007, 87 P.3d 1185 (2004)	11, 21
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 454, 6 P.3d 1150 (2003), 14,	18
<i>State v. Godsey</i> , 131 Wn.App 278, 287 P.3d 11, <u>rev. denied</u> , 158 Wn.2d 1022, 149 P.3d 379 (2006)	11, 12
<i>State v. Gostol</i> , 92 Wn.App. 832, 838, 965 P.2d 1121 (1998)	11, 13
<i>State v. Green</i> , 94 Wn2d 216, 221, 616 P.2d 628 (1980)	11, 19
<i>State v. Hoffman</i> , 116 Wn.2d 51, 99-100, 804 P.2d 577 (1991)	11, 14
<i>State v. Humphries</i> , 21 Wn.App. 405, 407-408, 586 P.2d 130 (1978) 11,	16

State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377, rev. denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993) 11, 13

State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1195) 11, 14

State v. Moore, 8 Wn. App. 1, 499 P.2d 13 (1972) 11, 21

State v. Peterson 113 Wn.2d 885, 891, 948 P.2d 381 (1197) 11, 13

State v. Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003) 11, 18

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 11, 19

State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1979) 11, 21

State v. Turner, 103 Wn.App. 515, 521, 13 P.3d 234 (2000) 11, 22

State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) 11, 12

State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) 11, 13

State v. Westlund, 13 Wn.App. 460, 467, 536 P.2d 20 (1975) . . 11, 19, 20

State v. Williams, 132 Wn. 2d 248, 260, 937 P.2d 1052 (1997) 11, 18

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) . . . 11, 17

CONSTITUTION

Article I, Section 22 Washington State Constitution 19

Fourteenth Amendment to the United States Constitution 19, 23

A. ASSIGNMENTS OF ERROR

1. Where Mr. Lloyd was charged with assault in the third degree, the trial court erred by failing to instruct the jury on the inferior degree or lesser included offense of assault in the fourth degree.
2. The State failed to disprove the self-defense beyond a Reasonable doubt.
3. There is insufficient evidence to support Mr. Lloyd's conviction for possession of a controlled substance.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err in refusing to give a requested jury instruction for assault in the fourth degree where the jury could have found that Mr. Lloyd acted in self defense to avoid further injury while in the custody of Officer Fatt? (Assignment of Error No.1)
2. Did the State fail to disprove self defense when the evidence showed Mr. Lloyd acted to protect himself from further injury? (Assignment of Error No.2)
3. Whether the State's evidence was sufficient to prove that Mr. Lloyd had constructive possession of a pipe containing cocaine residue which was found in a jacket found on the ground at the time of Mr. Lloyd's arrest? (Assignment of Error No.3)

C. STATEMENT OF THE CASE

1. Procedural History:

The road leading to the jury trial in this matter was difficult. Mr.

Lloyd initially plead guilty to the original charges filed in this matter of possession of a controlled substance and driving while license suspended in the first degree. RP 7/28/2009, 3, 6; CP 7; CP 8; CP 16. The plea agreement indicated Mr. Lloyd had an offender score of six and the state's recommendation was a term of 14 months to serve in custody. RP 7/28/2009, 4, CP 16 Mr. Lloyd plead guilty with the intent to request a drug offender sentence alternative (DOSA). RP 7/28/2009 5 The Court signed an order for a pre-sentence investigation to address Mr. Lloyd's request for a DOSA sentence. RP 7/28/2009, 7. Unfortunately, Mr. Lloyd was not eligible for a DOSA sentence. Mr. Lloyd requested to withdraw his plea of guilty. RP 9/16/2009, 2. New counsel was appointed for Mr. Lloyd to represent him on the motion to withdraw the guilty plea. RP 9/16/2009, 3; CP 37.

Mr. Lloyd was allowed to withdraw his plea of guilty. RP 12/04/2009, 12-14. The hearing seeking the withdrawal of the plea was conducted on December 4, 2009. RP 12/04/2009, 1-19. The withdrawal was allowed because Mr. Lloyd had been improperly advised that he was eligible for a DOSA sentence. RP 12/04/2009, 11. In reality, Mr. Lloyd was not eligible for a DOSA sentence, a fact that was discovered after Mr. Lloyd entered a plea of guilty. RP 12/04/2009, 11-12. Immediately after the Court's ruling allowing Mr. Lloyd to withdraw his plea, the state filed a first amended information with added a charge of assault in the third

degree. RP 12/04/2009, 13; CP 60.

Trial began on February 2, 2010. RP 2/02/2010, 1. At the conclusion of the State's case, defense counsel moved to dismiss both the possession of controlled substance and assault in the third degree charges. RP 2/03/2010, 32-33. The motion was denied. 33-34. Defense counsel for Mr. Lloyd presented witnesses and argument on Mr. Lloyd's behalf thereafter. RP 2/03/2010, 51-126. Mr. Lloyd was found guilty of possession of a controlled substance, assault in the third degree, and driving while license suspended in the first degree. CP 135. This appeal timely follows. CP 146.

2. Substantive Facts:

Sergeant Renfro was on patrol with the City of Bremerton on May 28, 2009. While on patrol he saw Mr. Lloyd driving a vehicle. RP 2/02/2010, 18-19. Mr. Lloyd was driving from Alan Copeland Bank's residence after discussing selling his vehicle. RP 2/03/2010, 58-59. Sergeant Renfro executed a traffic stop of Mr. Lloyd's vehicle. RP 2/02/2010, 19. After his vehicle stopped, Mr. Lloyd left the scene and ran from Sergeant Renfro. RP 2/02/2010, 19-20. Sergeant Renfro ran after Mr. Lloyd. RP 2/02/2010, 27. At times Mr. Lloyd was out of Sergeant Renfro's field of vision. RP 2/02/2010, 27. Sergeant Renfro saw Mr. Lloyd wearing a black jacket. RP 2/2/2010, 20. Sergeant Renfro caught up with Mr. Lloyd and arrested him. RP 2/02/2010, 21. When Mr. Lloyd did not turn around as Sergeant Renfro directed him, Sergeant Renfro grabbed Mr. Lloyd and used an arm bar maneuver to place Mr. Lloyd on the ground. RP 2/02/2010, 30. Mr. Lloyd was fairly compliant thereafter according

to Sergeant Renfro. Id., RP 2/02/2010, 37.

Sergeant Renfro handcuffed Mr. Lloyd and turned him over to Sergeant Cronk who arrived at the scene. RP 2/02/2010, 21, 32. Mr. Lloyd was handcuffed at the time Sergeant Cronk assumed control. RP 2/02/2010, 33. Sergeant Cronk moved Mr. Lloyd from the backyard to the front of a residence located at 1709 Synder. RP 2/02/2010, 33. Sergeant Cronk released Mr. Lloyd to Officer Fatt in front of the residence. RP 2/02/2010, 56-57, 73. Mr. Lloyd's hands were cuffed behind his back at that time. RP 2/02/2010, 69. As Officer Fatt secured Mr. Lloyd in his patrol vehicle he adjusted Mr. Lloyd's handcuffs. RP 2/02/2010, 74.

Sergeant Renfro left the area where Mr. Lloyd was arrested to look for items after he relinquished custody of Mr. Lloyd. RP 2/02/2010, 33. Sergeant Renfro found a jacket on the ground on the other side of a fence where Mr. Lloyd was arrested. RP 2/02/2010, 22, 35. Sergeant Renfro searched the area for other items. Id. Officer Rodgers arrived at the scene and assisted with the search as well. RP 2/02/2010, 48. Officer Rodgers searched the jacket found on the ground. RP 2/02/2010, 50. A glass style pipe was found in the right front pocket of the jacket. Id. Officer Rodgers also found documents in the coat. RP 2/02/2010, 60. Officer Rodgers did not recall the name on the documents. Id.

Mr. Lloyd remained in the custody of Officer Fatt. Officer Fatt testified that Mr. Lloyd grabbed and twisted his thumb while Officer Fatt adjusted Mr. Lloyd's handcuffs. RP 2/02/2010, 76. Officer Fatt reported he screamed out in pain and grabbed Mr. Lloyd's fingers to release the grip on his thumb. RP

2/02/2010, 77-78. Officer Fatt applied a finger lock maneuver to Mr. Lloyd's fingers. RP 2/02/2010, 78. Mr. Lloyd complained of pain in his fingers when Officer Fatt applied the finger-lock maneuver. RP 2/02/2010, 85. Officer Fatt recalled the finger struggles between the two of them took less than 30 seconds. RP 2/02/2010, 78.

Mr. Lloyd recalled that Officer Fatt bent Mr. Lloyd's fingers back immediately after he was passed over to Officer Fatt's custody. RP 2/03/2010, 62. That action caused Mr. Lloyd pain. Mr. Lloyd complained of pain in his fingers when Officer Fatt applied the finger-lock maneuver. RP 2/02/2010, 90, 96. RP 2/03/2010, 62-63. Mr. Lloyd recalled that Officer Fatt repeatedly grabbed at his fingers while he was outside the Snyder residence. RP 2/03/2010, 63-64. Mr. Lloyd did not grab Officer's Fatts thumb at that time. Id.

After Officer Fatt "stabilized" the situation, he readjusted Mr. Lloyd's handcuffs and placed Mr. Lloyd in his patrol vehicle. Id. Officer Fatt executed a wrist twist maneuver on Mr. Lloyd when double-locking the handcuffs. Officer Fatt frisked Mr. Lloyd before placing him in the patrol car. RP 2/02/2010, 82. Officer Fatt did not seek medical treatment for his thumb and the pain subsided by the time he arrived at the Kitsap County Jail.

While Sergeant Renfro conducted his search of the area, he heard an altercation between Mr. Lloyd and Officer Fatt. Id. Sergeant Renfro's description of what he heard was as follows:

"A. I heard Officer Fatt scream out in pain and state: "Let go of my thumb," and I then heard Mr. Lloyd react to Officer Fatt obviously taking control of him, and I heard Mr. Lloyd scream out." RP 2/02/2010, 23.

Officer Rodgers heard Officer Fatt yell, but did not see the interaction between Officer Fatt and Mr Lloyd. RP 2/02/2010 54-55. Sergeant Cronk was in the area, but did not hear either Officer Fatt or Mr. Lloyd yell. RP 2/02/2010, 69.

Mr. Lloyd was moved again, this time to the parking lot of a nearby business called Rob's Quick Stop. Id. Officer Rodgers went to the Quick Stop as well. RP 2/02/2010, 54. Mr. Lloyd was taken out of a patrol car at Rob's Quick Stop. RP 2/02/2010, 40-41. Officer Fatt wanted to conduct another search of Mr. Lloyd at the Quick Stop. RP 2/02/2010, 83. Officer Fatt testified that Mr. Lloyd was not cooperative. Id. Officer Fatt put Mr. Lloyd into a goose-neck hold to gain compliance over Mr. Lloyd. Id. Mr. Lloyd was searched, solely by Officer Fatt, and taken to the Kitsap County Jail. RP 2/02/2010, 83-84. 95 Officer Fatt applied a finger lock to Mr. Lloyd while they were at Rob's Quick Stop. Mr. Lloyd complained of pain in his fingers when Officer Fatt applied the finger-lock maneuver. RP 2/02/2010, 95.

Mr. Lloyd recalled Officer Fatts continued to twist his fingers while they were at Rob's Quick Stop. RP 2/03/2010, 64. Mr. Lloyd also testified that while at the Quick Stop, Officer Fatts yanked Mr. Lloyd out of the patrol car and wrenched Mr. Lloyd's hand. RP 2/03/2010, 65. Mr. Lloyd's fingers where painful at that time. Id. Mr. Lloyd was told to unball his hands and Mr. Lloyd called for help. Id. While Mr. Lloyd was handcuffed Officer Fatts grabbed his fingers again and Mr. Lloyd grabbed Officer Fatt's thumb to prevent further injury. RP 2/03/2010, 66. Mr. Lloyd grabbed Officer Fatt's fingers in self defense. Mr. Lloyd's fingers were swollen and he could not feel his hand. Id. Mr.

Lloyd was transported to Harrison Hospital for treatment of his fingers. RP 2/03/2010, 67. The fingers were painful for one week. RP 2/03/2010, 67.

Mr. Raymond Kusumi , a forensic scientist with the Washington State Crime Lab, testified the residue in the glass pipe contained cocaine. The pipe was not examined for fingerprints or DNA evidence. RP 2/03/2010, 26-27 . Officer Hetzel, who is employed with the Kitsap County Sheriff's Department, testified regarding the jacket which had been checked into the jail by law enforcement at the time Mr. Lloyd was arrested. RP 2/03/2010, 52. Officer Hetzel pulled the coat from Mr. Lloyd's personal property and searched the jacket. RP 2/03/2010, 53. A traffic ticket with a name and contact information for a Josh Knalla was found in a jacket pocket. RP 2/03/2010, 53. The date of the violation listed on the ticket was May 12, 2009. RP 2/03/2010, 54. The vehicle listed on the ticket was registered to Kendall Corn. Id. Mr. Lloyd did not know the pipe was in the jacket pocket. RP 2/03/2010, 60.

Defense counsel requested a jury instruction for the crime of Assault in the fourth degree. RP 2/03/2010, 76. That request was denied. RP 2/3/2010, 120.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE OFFENSE OF ASSAULT IN THE FOURTH DEGREE WHICH REQUIRES REVERSAL OF THE CONVICTION.

In this case, the state proceeded on the charge of assault in the third degree based on the theory Mr. Lloyd assaulted a law enforcement officer. RP

2/02/2010, 6-7. The defense theory of the case was the State had not proved third degree assault because the officers used excessive force, therefore the arrest of Mr. Lloyd was not performed in the scope of his authority of a police officer. RP 2/3/2010, 76, 77. Mr. Lloyd requested an jury instruction on the offense of assault in the fourth degree. RP 2/3/2010, 76-79. The trial court denied Mr. Lloyd's request for a jury instruction lesser for the crime of assault in the fourth degree. RP 2/03/2010, 123. The instruction for assault in the fourth degree should have been given as either an inferior degree of assault, or alternatively as a lesser included offense.

The elements for the crime of assault in the third degree are set forth in RCW 9A.36.031. That statute in pertinent provides as follows:

(1) 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:

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault. RCW 9A.36.031.

The general test for self-defense in Washington State is found in RCW 9A.16.020. That statute reads in pertinent part:

The use, attempt or offer to use force upon or toward the person of another is not unlawful in the following cases:

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary; RCW 9A.16.020.

This statute gives rise to an affirmative defense to the charge of assault in the third degree pertaining to an alleged assault of a law enforcement officer. State v Bradley, 141 Wn.2d 731, 10 P.3d 358 (2000); State v. Westlund, 13 Wn.App. 460, 467, 536 P.2d 20 (1975). In the case at hand, Mr. Lloyd argued he acted in self defense and the jury was provided with a self defense instruction. However, his request for an instruction on the offense of assault in the fourth degree was denied.

The elements for the crime of assault in the fourth degree are set forth in RCW 9A.36.041(1). That statute provides as follows:

“ A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. “RCW 9A.36.041(1)

The defense proposed a jury instruction on the issue of self defense, which was allowed, and a jury instruction for assault in the fourth degree, which was denied. The instruction for assault in the fourth degree was submitted under the theory that Officer Fatt used excessive force against Mr. Lloyd and therefore was not acting within the scope of his duties as a law enforcement office. RP 2/3/2010, 76-79. The trial court however, refused to allow the instruction. Defense counsel took exception to the court’s failure to instruct the jury on the inferior degree or lesser included offense of assault in the fourth degree. RP 2/3/2010, 120, 124.

Where the trial court’s refusal to give an instruction is based upon

a ruling of law, a de novo review is appropriate. State v. Walker, 136 Wn.2d 767, 771-72. 966 P.2d 883 (1998); State v. Godsey, 131 Wn.App 278, 287 P.3d 11, rev. denied, 158 Wn.2d 1022, 149 P.3d 379 (2006). In this case the trial court appeared to refuse to give the instruction as a matter of law, so de novo review is appropriate.

a. The jury should have been instructed regarding fourth degree assault as an inferior degree offense of third degree assault.

Generally, an accused person may be convicted only of the offenses contained in the information. Schmuck v. United States, 489 U.S. 705, 717-718, 109 S.Ct. 2097, L.Ed. 734 (1989). However, an exception to that rule has been set forth in RCW 10.61.003, which is known as the inferior degree statute. That statute provides as follows:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.
RCW 10.61.003

Case law in this state has established a three part test to determine whether a jury instruction for an inferior degree offense is appropriate. The test is as follows: (1) the statutes for both the charged offense and the proposed lesser offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees and the proposed lesser offense is an inferior degree of the charged offense; and (3) evidence was presented suggesting the defendant committed only the lesser offense. State v.

Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000), (quoting State v. Peterson, 113 Wn.2d 885, 891, 948 P.2d 381 (1997)).

In the case at hand the facts support giving the inferior degree instruction. First, both the charged offense of assault in the third degree and the proposed inferior charge of assault in the fourth degree “proscribe but one offense” namely assault. Secondly, the crime of assault has been divided into degrees by the legislature as demonstrated by the recitation of the RCW pertaining to both third and fourth degree assault. See above Fernandez-Medina, 141 Wn.2d at 449, 462. Clearly, assault in the fourth degree is an inferior degree of assault in the third degree. Now we are left with the third test to consider, whether evidence was presented to show Mr. Lloyd committed only the offense of assault in the fourth degree.

A jury instruction on an inferior degree offense 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.” State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). The trial court must “consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.” Fernandez-Medina, 141 Wn.2d at 456, see also State v. McClam, 69 Wn.App. 885, 889, 850 P.2d 1377, rev. denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993); State v. Gostol, 92 Wn.App. 832, 838, 965 P.2d 1121 (1998). In reviewing this claim, the appellate court is view the supporting evidence in the light most favorable

to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 455-456. A conviction for assault in the third degree requires a showing that the defendant intended to prevent or resist lawful apprehension or detention by assaulting a law enforcement officer who was performing his official duties at the time of the assault RCW 9A.36.031. Therefore, if the actions of a law enforcement officer are unlawful, the defendant cannot be found guilty of assault in the third degree. A law enforcement officer may not use excessive force to arrest a defendant. The wording of the statute indicates that when an officer acts outside of his official duties assault in the third degree cannot apply. Official duties does not include excessive use of force against an arrestee. Although at the time of the alleged assault Officer Fatt was responding to a call while on duty, he went outside of the scope of his duty by using excessive force, and illegal force, against Mr. Lloyd. The meaning of “official duties” pertinent to RCW 9A.36.031(1)(g) includes all aspects of a law enforcement officer’s good faith performance of job-related duties, but excludes conduct occurring when an officer is on a frolic of his or her own. State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995) (quoting State v. Hoffman, 116 Wn.2d 51, 99-100, 804 P.2d 577 (1991)). In the case of United States v. Span, 970 F.2d 573, (9th Cir.1992) the Ninth Circuit held that “an officer who uses excessive force is not acting in good faith.” United States v. Span, 970 F.2d at 581. Therefore, assault in the third degree applies to an assault of an officer

only if he or she is performing job related duties in good faith. In this case Mr. Lloyd admitted that he grabbed Officer Fatt's thumb, but did so in response to repeated and unnecessary pain inflicted upon Mr. Lloyd by Officer Fatt. In this case the evidence showed that at most Mr. Lloyd committed the crime of assault in the fourth degree.

The evidence when viewed in the light most favorable to Mr. Lloyd supports the inference that he was guilty only of only fourth degree assault and not third degree assault. Although there was some disagreement among the witnesses as to some of the events that transpired, both Mr. Lloyd and Officer Fatt were in acknowledgment that the physical act taken by Mr. Lloyd took was to grab Officer Fatt's thumb. There was a dispute as to whether Mr. Lloyd twisted the thumb as well. No one claimed Mr. Lloyd took any other action against Officer Fatt. Thus the description of the physical act committed by Mr. Lloyd, without consideration of Officer Fatt's status of as a law enforcement officer, provided affirmative evidence that Mr. Lloyd committed the offense of assault in the fourth degree. That leaves the issue of whether Officer Fatt was performing his duties in good faith.

The testimony of Mr. Lloyd supports the giving of an assault in the fourth degree instruction. Mr. Lloyd testified that Officer Fatt repeatedly bent his fingers even while Mr. Lloyd was compliant. Sergeant Renfro testified that Mr. Lloyd became fairly compliant after he handcuffed Mr.

Lloyd. RP 2/2/2010, 30. Some testimony presented at trial indicated Mr. Lloyd was resistant. Officer Rodgers did testify that MR. Lloyd did not want to get out of the patrol car at Rob's Quick Stop. RP 2/2/2010, 55. Officer Rodgers saw Mr. Lloyd go "limp leg" and ended up lying on the ground. Id. Sergeant Cronk indicated Mr. Lloyd continued to struggle after he was handcuffed. RP 2/2/2010, 66. That testimony was not consistent with the testimony presented by Sergeant Renfro. Officer Fatt testified Mr. Lloyd initially did not struggle with him. RP 2/2/2010, 76. At Rob's Quick Stop, Officer Fatt recalled that Mr. Lloyd tried to turn away from him and a compliance hold was performed to get MR. Lloyd out of the patrol car. RP 2/2/2010, 83. Officer Fatt performed another finger lock at Rob's Quick Stop. RP 2/2/2010, 95. Officer Fatt did not require any assistance from any other officer to control Mr. Lloyd either at the residence or Rob's Quick Stop. RP 2/2/2010, 90-91, 94-95. Mr. Lloyd had significant injuries which required medical treatment. Mr. Lloyd testified that he grabbed Officer Fatt's thumb to prevent further injury. The jury in this case could have that the officer's use of excessive force made the arrest unlawful, but that Mr. Lloyd's actions were nevertheless unreasonable, which would make him guilty of only fourth degree assault. See State v. Humphries, 21 Wn.App. 405, 407-408, 586 P.2d 130 (1978). The evidence shows that Mr. Lloyd's minor acts of resistance did not justify the repeated painful maneuvers Officer Fatt executed on Mr. Lloyd.

The jury should have been allowed to decide whether assault in the fourth degree was warranted in light of Officer Fatt's excessive behavior which was outside of the scope of his legitimate duties as a law enforcement officer. The trial court's decision to deny the requested instruction on assault in the fourth degree deprived Mr. Lloyd from arguing that his actions constituted no more than assault in the fourth degree. This error requires reversal of Mr. Lloyd's conviction for assault in the fourth degree.

b. The jury should have been instructed regarding fourth degree assault as a lesser included offense of third degree assault.

A two part test for determining whether a lesser included instruction should be used. A person should be entitled to an instruction on a lesser included offense when (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged and (2) the evidence in the case supports an inference that only the lesser crime was committed. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The State had to prove that Mr. Lloyd committed an assault against Officer Fatt in order to establish the greater offense of assault in the third degree as charged under RCW 9A.36.031. A person cannot commit assault in the third degree without also committing fourth degree assault.

Therefore, the requested assault fourth degree instruction satisfied the first

test, known as the legal prong, of the Workman test cited above.

The test for determining if a defendant is entitled to a lesser included offense instruction differs from the test for entitlement to an inferior degree offense instruction only with respect to the legal prong of the Workman test. The second prong of the Workman test is a factual test. Therefore, under the factual prong of the test, Mr. Lloyd was entitled to an instruction for fourth degree assault as set forth above in the previous discussion regarding assault in the fourth degree as an inferior degree instruction.

c. Failure to instruct the jury on the fourth degree assault prejudiced Mr. Lloyd and requires a reversal of his conviction.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case if evidence has been presented to support that theory. Fernandez-Medina, 141 Wn.2d at 461-462; State v. Redmond, 150 Wn.2d 489, 495, 78 P.2d 1001 (2003). Since substantial evidence was presented which affirmatively raised the inference that Mr. Lloyd was guilty only of fourth degree assault and not third degree assault, the requested instruction should have been given. Id. The trial court's failure to give the requested instruction for assault in the fourth degree constitutes prejudicial error and requires reversal of the third degree assault conviction. Fernandez-Medina, 141 Wn.2d at 462; State v Williams, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

**2. THE STATE FAILED TO DISPROVE MR. LLOYD
ACTED IN SELF DEFENSE**

In this case the State failed to establish all of the elements of the offense of assault in the third degree beyond a reasonable doubt. Specifically, the State failed to prove the absence of self defense because the State failed to show that Officer Fatt's repeated manipulation of Mr. Lloyd's fingers was necessary, and therefore "lawful force".

Individuals are protected from conviction for crimes unless the government proves each element of the charged offense beyond a reasonable doubt through the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. Evidence is sufficient to support a jury verdict if when "viewing in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.,2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. Ed 560 (1979)). In reviewing a challenge to the sufficiency of the evidence, the appellate court is to examine the evidence in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). For the purposes of a challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom. Id.

Mr. Lloyd was convicted of assault in the third degree for grabbing

and/or twisting Officer Fatt's fingers. To prove that charge the State had to establish beyond a reasonable doubt that Mr. Lloyd. Since Mr. Lloyd raised the issue of self-defense, the State was required to disprove that claim. State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

In jury instruction number 11, the trial court instructed the jury that self defense was an available defense if Mr. Lloyd faced actual danger of serious injury. CP106. The standard for self defense for cases involving lawful arrests is set forth in the case of State v. Westlund, 13 Wn.App. 460, 536 P.2d 1069 (1984). In that case the Court held as follows: "An arrestee's resistance of excessive force by a known police officer, effectuating a lawful arrest, is justified only if he was actually about to be seriously injured. of State v. Westlund, 13 Wn.App. at 466.

In the case at hand Mr. Lloyd had his fingers repeatedly manipulated which caused him great pain. Mr. Lloyd cried out for help, which was unresponded to despite the presence of other officers in the area. Mr. Lloyd's use of force was in response to the sadistic attempt by Officer Fatts to continue to cause pain to Mr. Lloyd's fingers. At that point Mr. Lloyd was handcuffed and the State failed to demonstrate that Officer Fatt's tactics were necessary. The testimony of the officers was not entirely consistent. Officer Renfro testified that at the time he turned Mr. Lloyd over to Sergeant Cronk, Mr. Lloyd was compliant. RP2/2/2010, 30. However, Sergeant Cronk testified that Mr. Lloyd continued to struggle.

RP 2/2/2010, 66. Officer Fatt described some minor resistance from Mr. Lloyd. However, he was able to control Mr. Lloyd without any assistance from other officers. RP 2/2/2010, 90-91, 94-95.

Mr. Lloyd felt that he had been seriously injured. At the time he grabbed Officer Fatt's thumb his fingers had been injured and he could not feel his hand. RP 2/3/2010, 66. As acknowledged by Officer Fatt, people in pain do things to protect themselves. Mr. Lloyd complained of pain in his fingers when Officer Fatt applied the finger-lock maneuver. RP 2/02/2010, 103.

Because the State failed to show that Officer Fatt's actions were necessary, or proportionate to Mr. Lloyd's actions, and consequently, failed to prove by evidence beyond a reasonable doubt that Mr. Lloyd did not acting in self-defense, his conviction must be reversed and dismissed.

3. THE TRIAL COURT VIOLATED MR. LLOYD'S RIGHT TO DUE PROCESS WHEN IT ENTERED JUDGEMENT OF CONVICTION FOR AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The standard for examining a sufficiency of the evidence claim is outlined in the previous section and will not be repeated here. "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1979) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.,2d 227, 228

(1970)). Mere possibility, suspicion, speculation, conjecture or even a scintilla of evidence is not substantial evidence. State v. Moore, 8 Wn. App. 1, 499 P.2d 13 (1972).

In the case at hand Mr. Lloyd was charged with the possession of a controlled substance. On this charge the State had the burden of proving beyond a reasonable doubt that Mr. Lloyd “possessed” cocaine. The State may prove possession by establishing that the defendant had either “actual” or “constructive” possession of the controlled substance. State v. Davis, 117 Wn. 702, 708-709, 72 P.3d 1134 (2003), review denied, 151 Wn.2d 1007, 87 P.3d 1185 (2004) . Possession may be actual or constructive. Actual possession occurs when an items is in the personal custody of the person charged. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The State must establish “actual control, not a passing control which is only a momentary handling.” to meet its burden on the element of possession. State v. Callahan, 77 Wn.2d at 29. Constructive possession means that the defendant had dominion and control over the item, even while not physically possessing the substance. State v. Callahan, Id. Constructive possession may be shown by either proving the defendant had dominion and control over the item itself or the premises where the goods were found. State v. Cantabrana, 83 Wn.App. 668, 620 P.2d 572 (1996). The question of whether constructive possession is established is based on the totality of the circumstances. State v. Turner,

103 Wn.App. 515, 521, 13 P.3d 234 (2000).

In this case there was no direct evidence indicating that Mr. Lloyd committed this crime. The jacket in question was checked into the jail when Mr. Lloyd was arrested. RP 2/3/2010, 52. Officer Hetzel, an employee of the Kitsap County Sheriff Department, searched the jacket. 2/3/2010, 52-53. Officer Hetzel found a traffic citation with the offender listed as Josh Knalla upon it. 2/3/2010, 54. The date of the citation was May 12, 2009. Id. That was just over two weeks prior to Mr. Lloyd's arrest which occurred on May 28, 2009. The vehicle involved in the citation was registered to Kendall Corn. Id. Mr. Lloyd testified he borrowed the jacket from Alan Copeland Banks. 2/3/2010, 58-59. Mr. Lloyd did not know there was a smoking pipe in the jacket. 2/3/2010, 58-59. Mr. Lloyd testified that the pipe did not belong to him. 2/3/2010, 59 Mr. Lloyd also testified that he took off a jacket when he was running from the officers. 2/3/2010, 60. Additionally, although Officer Renfro described the jacket he found as a black jacket, he did not identify the jacket presented by Officer Hetzel as the jacket her found. No fingerprints were found on the glass pipe and no DNA was taken either. An unwitting possession jury instruction was given in this matter. 2/3/2010, 12, CP 111. However, the evidence presented at trial did not show that Mr. Lloyd was in possession of the glass pipe with the cocain residue.

E. CONCLUSION

For the reasons cited above, Mr. Lloyd respectfully asks this Court to reverse the convictions entered in this matter.

RESPECTFULLY SUBMITTED this 4 day of November, 2010.



MICHELLE BACON ADAMS

WSBA # 25200

Attorney for Appellant

COURT OF APPEALS
DIVISION II

10/27/15 11:36:15

NO. 40664-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

CERTIFICATION OF MAILING

v.

LARRY LLOYD,

Appellant.

I, ALICIA A. LANOUE, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Delivered To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Copy Mailed To:

Mr. Jeremy Morris
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy Mailed To:

Larry Lloyd
#734941/B-431
Washington State Reformatory
P.O. Box 777
Monroe, WA 98272

DATED this 4th day of November, 2010, at Port Orchard, Washington.

A handwritten signature in cursive script, reading "Alicia Lanoue", written over a horizontal line.

ALICIA A. LANOUE
Legal Assistant