FILED
SEP 20 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY

No. 29010-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL ALFRED POSEY, JR.,

Appellant.

On Appeal from the Yakima County Superior Court
Cause No. 10-1-00140-4
The Honorable Michael McCarthy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it imposed an exceptional sentence because the record does not support the jury's special verdict finding the rapid recidivism aggravating sentencing factor.
2. The trial court erred when it imposed an exceptional sentence because the record does not support the trial court's finding that substantial and compelling reasons exist which justify an exceptional sentence.
3. The trial court erred when it gave Jury Instructions 5 and 6, and when it failed to properly define attempt.
4. The trial court relieved the State of its burden of proving every element of the charged crime when it failed to give a jury instruction explaining that both intent and a substantial step are elements of an attempt to commit a crime.
5. The trial court erred when it denied Appellant's motion to dismiss, because the State failed to meet its burden of proving that the victim suffered bodily injury.
6. The State failed to meet its burden of proving that the victim suffered bodily injury, which is an essential element of attempted first degree robbery.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the State's evidence only established that Appellant committed a new crime two days after being released from a 16-day jail term for failing to register as a sex offender, does the record support a finding that Appellant flagrantly exhibited disdain for the law, and that substantial and compelling reasons justify an exceptional sentence? (Assignments of Error 1 & 2)

2. Did the trial court improperly relieve the State of its burden of proving every element of the crime of attempted first degree robbery when it gave its own flawed to-convict instruction and then failed to give a jury instruction explaining that both intent and a substantial step are elements of an attempt to commit a crime? (Assignments of Error 3 & 4)

2. Where the State presented no evidence of any marks or bruising or other injury to the victim as a result of being punched by Appellant, did the State fail to prove infliction of bodily injury, which is an essential element of attempted first degree robbery? (Assignments of Error 5 & 6)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Daniel Alfred Posey, Jr. by Amended Information with attempted first degree robbery (RCW 9A.56.190, .200). (CP 98) The State also alleged that the crime was committed shortly after Mr. Posey's release from incarceration, which could justify an exceptional sentence. (CP 98)

After the State rested its case-in-chief, Mr. Posey moved to dismiss, arguing that the State failed to prove that the alleged victim suffered bodily injury. (TRP 100) The trial court denied the motion. (TRP 101)

The jury found Mr. Posey guilty of attempted first degree robbery, and affirmatively found the rapid recidivism aggravating sentencing factor. (CP 38-39; TRP 152, 172)[1] Mr. Posey requested but was denied an exceptional sentence below the standard range. (CP 21-26; SRP 11) The trial court instead granted the State's request for an exceptional sentence above the standard range, and sentenced Mr. Posey to 106.5 months of confinement. (CP 15; SRP 13-14) This appeal follows. (CP 6)

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[1] The transcript of the pretrial and trial proceedings on April 6, 7 and 8, 2010, will be referred to as "TRP." The transcript of the sentencing hearing on April 23, 2010, will be referred to as "SRP."

B. SUBSTANTIVE FACTS

On the night of January 24, 2010, Susan Maltos and her husband, Ray Maltos, went shopping together at a Yakima, Washington Wal-Mart store. (TRP 25, 33, 61) As they were leaving the store, Mr. Maltos noticed a man loitering around the food court. (RP 61-62)

Mr. and Ms. Maltos continued outside to the parking lot with their shopping cart. (TRP 26) Ms. Maltos' purse was resting in the child-seat area of the cart. (TRP 45) A man approached and grabbed Ms. Maltos' purse by one of its straps. (RP 27) Ms. Maltos grabbed the other strap and pulled the purse back towards her, and the strap in the man's hand broke off. (TRP 29, 30) The man then punched Ms. Maltos on her forehead. (TRP 29, 30, 64)

Mr. Maltos stepped between his wife and the man, and assumed a fighting stance. (TRP 30, 65) When Mr. Maltos told his wife to get the store security guard, the man turned and ran away. (TRP32, 65) Mr. and Ms. Maltos saw the man get into the passenger side of a white, four-door vehicle, which then drove away. (TRP 33, 65, 67)

A short time later, a Yakima police officer took Mr. and Ms. Maltos to identify a person resembling the suspect. (TRP 70, 39-

40, 95-96) They both identified the man, Daniel Posey, as the person who tried to take Ms. Maltos' purse. (TRP 27, 39-40, 70)

Ms. Maltos did not seek immediate medical attention as a result of the punch. (TRP 39) But the next day she went to the emergency room because her neck felt stiff, and she wanted to be sure that she had not exacerbated a preexisting condition in her neck and back. (TRP 52) An examination revealed no new injuries. (TRP 52)

IV. ARGUMENT & AUTHORITIES

A. MR. POSEY'S EXCEPTIONAL SENTENCE SHOULD BE VACATED BECAUSE THE JURY'S SPECIAL VERDICT IS NOT SUPPORTED BY THE RECORD AND DOES NOT PROVIDE A SUBSTANTIAL AND COMPELLING REASON JUSTIFYING AN EXCEPTIONAL SENTENCE.

In April of 2003, Mr. Posey was arrested and charged with three counts of second degree rape and one count of first degree assault while armed with a firearm. (CP 22, 27) The case originated in Juvenile Court because Mr. Posey was 16 years old at the time, but first degree assault is classified as a "serious violent offense" so the case was automatically declined and transferred to adult Superior Court. (CP 22, 27)

A jury found Mr. Posey guilty of two counts of second degree rape, but found him not guilty of first degree assault and not guilty

of the remaining second degree rape charge. (CP 22, 27) Although Mr. Posey was still a juvenile at the time of sentencing on May 21, 2004, the trial court sentenced Mr. Posey as an adult to a life sentence with a minimum term of 119 months of confinement. (CP 22, 27) Mr. Posey appealed, and argued that the Superior Court did not have jurisdiction to sentence him as an adult after he was acquitted of the automatic-decline offense. (CP 27, 28; see also State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007)).

On September 20, 2007, Washington State Supreme Court unanimously agreed that Mr. Posey was improperly sentenced as an adult, holding that the Legislature intended to impose more severe punishment only on juveniles who are actually convicted of, not just charged with, certain criminal offenses; and that the court did not have jurisdiction to sentence Mr. Posey as an adult. (CP 30; see also Posey, supra.) Mr. Posey was released from confinement, and on January 9, 2008, a juvenile disposition order was entered in the adult Superior Court. (Exh. SE-A)

Mr. Posey appealed to this Court, arguing that neither the adult court nor the juvenile court had jurisdiction to enter judgment because the adult court lost jurisdiction upon his acquittal of the automatic-decline offense, and that the juvenile court lost

jurisdiction upon his 21st birthday. State v. Posey, COA No. 26771-7-III. The State filed a Motion on the Merits to Affirm, which a Commissioner granted in a written ruling issued January 29, 2009. State v. Posey, COA No. 26771-7-III. However, Mr. Posey's subsequent Petition for Review was granted by the State Supreme Court, and is currently pending. See State v. Posey, Sup. Ct. No. 82957-8.

In the more than two years following his release, Mr. Posey fulfilled his registration requirements and consistently worked and supported himself in the community. (CP 23) But in December of 2009, Mr. Posey was arrested for allegedly failing to register in November of 2009. (CP 23) Mr. Posey pleaded guilty to the charge, and was sentenced to 16 days of confinement after serving 38 days in custody. (CP 23; Exh. SE-B) He was released on January 22, 2010. (CP 23, TRP 164) The incident in this case occurred on January 24, 2010. (CP 98, TRP 24)

Mr. Posey's criminal history consists entirely of the two juvenile rape convictions and the adult failure to register conviction. (CP 14) Because of the violent offense multiplier and the fact that Posey was on community supervision, his offender score is six and his standard range for the current crime is 57.75-76.5 months. (CP

15, SRP 5)

Mr. Posey requested an exceptional sentence below the standard range. Mr. Posey pointed out that, if he had been correctly sentenced as a juvenile in 2004, he would have served 60-80 weeks (no more than a year and a half) in a rehabilitative juvenile facility. (CP 23; Exh. SE-A) Instead, due to mistakes made by the State and the courts, he served more than four years in custody, including significant time confined at McNeil Island and Walla Walla State prisons. (CP 22-23) Mr. Posey asked the court to consider these facts, and take the opportunity to give Mr. Posey back some of the time he lost as a result of those mistakes. (CP 24, 25; SRP 11)

The State requested an exceptional sentence based on the rapid recidivism aggravating factor. (CP 35-36, 98; SRP 7) The prosecutor argued that Mr. Posey showed a "flagrant disregard for the law" when he committed the current crime two days after being released for failing to register. (SRP 7; CP 35-36) Mr. Posey argued that an exceptional sentence was not justified in this case, noting that he was released from jail with no place to live, no job and no money, and that he has shown remorse for his actions. (SRP 9, 11, 12) The trial court declined Mr. Posey's request for a

downward departure, and instead granted the State's request for an exceptional sentence above the standard range. (SRP 12-13, CP 15)

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). A court may only impose a sentence that exceeds that sentencing range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); RCW 9.94A.535.

In this case, the court made the following finding in support of its decision to impose a 106.5-month exceptional sentence:

> The jury in this matter found beyond a reasonable doubt that the defendant committed this crime shortly after being released from incarceration. The rapidity of the re-offense reflected a disdain for the law which renders the defendant particularly culpable in committing the current offense.

(CP 15) The court further found that "substantial and compelling reasons exist which justify an exceptional sentence." (CP 15)

When reviewing the imposition of an exceptional sentence, the appellate court performs a three-pronged analysis to determine:

(1) whether the record supports the jury's special verdict on the aggravating circumstances; (2) whether the trial court's reasons for imposing an exceptional sentence are substantial and compelling; and (3) whether the sentence was clearly excessive or clearly lenient. State v. Hale, 146 Wn. App. 299, 305-06, 189 P.3d 829 (2008); RCW 9.94A.585(4).

The statutory aggravating factor found by the jury and relied upon by the trial court is that "[t]he defendant committed the current offense shortly after being released from incarceration." RCW 9.94A.585(3)(t). Only a few cases have interpreted this factor.

For example, in State v. Butler, the defendant committed two new offenses (a robbery and an attempted rape) within hours of his release from prison after completing a three-year sentence for a first degree robbery conviction. 75 Wn. App. 47, 48, 876 P.2d 481 (1994). The trial court imposed an exceptional sentence based on several aggravating factors, including rapid recidivism. 75 Wn. App. at 49. Division 1 upheld the exceptional sentence, stating:

> [A]n exceptional sentence is justified if the circumstances of the crime indicate a greater disregard for the law than otherwise would be the case. Here, Butler's immediate reoffense, within hours of his release, reflects a disdain for the law so flagrant as to render him particularly culpable in the commission of the current offense.

> Thus, we hold that the commission of a crime shortly after release from incarceration on another offense may properly be used to distinguish that crime from others in the same category. Hence, under circumstances such as those in the present case, rapid recidivism constitutes a sufficiently substantial and compelling reason to justify the imposition of an exceptional sentence.

75 Wn. App. at 54 (citing State v. George, 67 Wn. App. 217, 224, 834 P.2d 664 (1992)).

In State v. Saltz, the defendant was released after serving a jail term for violating a no-contact order, and within 30 days he committed malicious mischief against the same victim. 137 Wn. App. 576, 579, 585, 154 P.3d 282 (2007). The defendant stipulated that the conduct was committed "shortly after being released from incarceration." 137 Wn. App. at 585. This court agreed that the short period of time between offenses, and the fact that it involved the same victim and was similar to the previous crime, "shows the disregard for the law referenced in Butler." 137 Wn. App. at 585.

In State v. Combs, this Court reversed an exceptional sentence based on rapid recidivism, where the defendant committed the crime of eluding a police officer six months after his release from prison for drug possession, noting that "the gravamen of the [aggravating factor] is disdain for the law." 156 Wn. App.

502, 506-07, 232 P.3d 1179 (2010) (citing Butler 75 Wn. App. at 54).

Mr. Posey's actions in this case did not show the flagrant disdain for the law that the statute and these cases require. After his long-overdue release for his juvenile offenses, Mr. Posey spent two years as a productive, crime-free member of the community, until he lost his job and his home. His subsequent crime was failing to register as a sex offender, which was committed during a time when he was homeless, and which is a victimless nonviolent offense. (Exh. SE-B; SRP 9) Mr. Posey took responsibility for his failure to register by entering a guilty plea and serving a 16-day jail sentence. (Exh. SE-B; TRP 9)

Upon his release from jail he still had no place to live, no job and no money. (TRP 11) His current crime was not of the same nature, did not target the same victim, and did not involve the use of a firearm or weapon. This is not the sort of behavior, and these are not the sort of circumstances, that the legislature meant to punish when it included rapid recidivism as an aggravating factor. See Butler 75 Wn. App. at 54, Saltz, 137 Wn. App. at 585, Combs, 156 Wn. App. at 506-07.

The facts of this case simply do not provide substantial and

compelling reasons to justify a nearly 9-year sentence; a sentence approximately four years above the minimum and two and one-half years over the maximum standard range sentence. (CP 15) The jury's special verdict is not supported by the evidence, and the trial court's reliance on the verdict is not supported by the law. Mr. Posey's exceptional sentence should be reversed, and his case remanded for imposition of a standard range sentence.

B. THE TRIAL COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN OF PROVING THAT MR. POSEY INTENDED TO COMMIT THE CRIME OF FIRST DEGREE ROBBERY, WHICH IS A REQUIRED ELEMENT OF ATTEMPTED FIRST DEGREE ROBBERY

The State must prove each essential element of a crime beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970)). The jury may not be instructed in a manner that relieves the State of this burden. Cronin, 142 Wn.2d at 580 (citing State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999)).

The State charged Mr. Posey with attempted first degree robbery. (CP 98) "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1). In line with this statute, Washington's pattern jury instructions state that a person attempts to commit a specific crime when "with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." WPIC 100.01.

Thus, an attempted crime involves two elements: (1) the intent to commit a specific crime; and (2) the taking of a substantial step toward the commission of that crime. State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). It is constitutional error not to give an instruction defining attempt and informing the jury that both intent and a substantial step are elements of an attempt to commit a crime. See State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991) (citing the Note on Use to WPIC 100.01 with approval); State v. Stewart, 35 Wn. App. 552, 555, 667 P.2d 1139 (1983); State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995).

Accordingly, Washington's pattern jury instructions recommend the following to-convict instruction be given when a person is charged with attempting to commit a crime:

> To convict the defendant of the crime of attempted [specific crime], each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about [date], the defendant did an act that was a substantial step toward the commission of

> [specific crime];
> (2) *That the act was done with the intent to commit [specific crime]*; and
> (3) That the act occurred in the State of Washington.

WPIC 100.02 (emphasis added).

In this case, both the prosecution and the defense proposed instructions mirroring WPIC 100.02, and the prosecution also proposed an instruction based on WPIC 100.01. (CP 79, 114, 120) But over objection from both the prosecutor and defense, the trial court gave the following to-convict instruction:

> To convict the defendant of the crime of Attempted First Degree Robbery, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about January 24, 2010, the defendant attempted to unlawfully take personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the attempted taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) That force or fear was used by the defendant to attempt to obtain or retain possession of the property or to attempt to prevent or overcome resistance to the taking;
> (5) That in the commission of these acts the defendant inflicted bodily injury; and
> (6) That the acts occurred in The State of Washington.

(CP 53, Court's Instruction No. 5) The court's instruction defining

attempt stated: "An attempt to commit a crime requires a substantial step that strongly indicates a criminal purpose and that is more than mere preparation." (CP 54, Court's Instruction No. 6) The trial court's to-convict instruction and its definition of attempt were improper because they failed to inform the jury that it must find that Mr. Posey intended to commit the crime of first degree robbery.

This case is similar to Jackson, where the trial court also failed to include an instruction defining attempt and informing the jury that intent and a substantial step are elements of an attempt to commit a crime. 62 Wn. App. at 59. As in this case, the to-convict instruction in Jackson inserted the word "attempted" into a standard to-convict instruction for the crime of second degree rape:

> To convict the defendant Michael Lynn Jackson of the crime of attempted rape in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 1st day of December, 1988, the defendant attempted to engage in sexual intercourse with [Z];
> (2) That the attempted sexual intercourse occurred by forcible compulsion; and
> (3) That the acts occurred in King County, Washington.

62 Wn. App. at 59. The Jackson trial court also instructed the jury on the definitions of sexual intercourse, forcible compulsion,

substantial step and intent. But the appellate court found that this was constitutional error and reversed Jackson's conviction, stating:

> "Although it is not necessary to give an instruction defining an element whose meaning is one of common understanding, we cannot say that the average juror knows as a matter of common knowledge that 'attempt' contains the two separate elements. The court's failure to set out these elements was an error of constitutional magnitude."

62 Wn. App. at 59 (quoting Stewart, 35 Wn. App. at 555 (holding constitutionally insufficient a to-convict instruction substantially the same as that given in Jackson)).

The trial court's instructions in this case relieved the State of its burden of proving beyond a reasonable doubt that Mr. Posey intended, and therefore attempted, to commit the crime of first degree robbery. "[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden[.]" Cronin, 142 Wn.2d at 580 (citing Jackson, 137 Wn.2d at 727). Mr. Posey's conviction must therefore be reversed.

C. THE STATE FAILED TO MEET ITS BURDEN OF PROVING THAT MR. POSEY INFLICTED BODILY INJURY WHEN HE PUNCHED MS. MALTOS.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826,

849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

Both second degree robbery and first degree robbery require the use or threatened use of force. RCW 9A.56.190; RCW 9A.56.200; RCW 9A.56.210. Robbery is elevated to first degree if an offender is armed with or displays a firearm or weapon, or if the offender inflicts bodily injury during the commission of or flight from the robbery. RCW 9A.56.200(1)(a); WPIC 37.02.

Therefore, while it is true that any force however slight is sufficient to support a conviction for robbery, see State v. Handburg, 119 Wn.2d 284, 293, 830 P.2d 641 (1992) (citing State v. Ammlung, 31 Wn. App. 696, 704, 644 P.2d 717 (1982)), it is not necessarily true that any use force is sufficient to sustain a conviction for robbery in the first degree. As charged in this case,

the State was also required to prove "bodily injury," which is defined as "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4).

For example, in Handburg, the Court upheld a second degree robbery conviction even though the victim suffered a split lip, bloody nose, and black eye. 119 Wn.2d at 286. In State v. O'Donnell, the court found sufficient evidence of bodily injury, and upheld a first degree robbery conviction, where the defendant choked the victim, which left red marks and bruising. 142 Wn. App. 314, 326, 174 P.3d 1205 (2007).

Ms. Maltos did not suffer the type of injury present in Handburg and O'Donnell as a result of being punched by Mr. Posey. (RP 39, 52) Ms. Maltos testified only that her "head hurt" and her neck "stiffened up more than usual." (TRP 39, 52) There was no assertion or evidence of any marks or bruising or other injury caused by the punch. Even viewing this testimony in the light most favorable to the State, there was insufficient evidence to establish that Ms. Maltos suffered bodily injury as defined by RCW 9A.04.110(4)(a), and as required to support a conviction for first degree robbery.

Without "bodily injury" to Ms. Maltos, the evidence was only

sufficient to support a conviction for second degree robbery. This court should reverse Mr. Posey's first degree robbery conviction and remand for imposition of the lesser included offense of second degree robbery. See State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550 (1979) (second degree robbery is a lesser included offense of first degree robbery); State v. Gilbert, 68 Wn. App. 379, 384, 842 P.2d 1029 (1993) (quoting RAP 12.2) (the appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require).

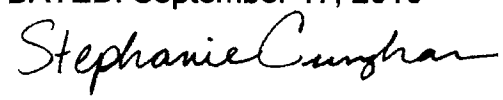
V. CONCLUSION

The trial court improperly relieved the State of its burden of proving the elements of attempted first degree robbery when it altered the to-convict instruction and omitted the element of intent from the instruction defining attempt. Furthermore, the State failed to meet its burden of proving that Mr. Posey inflicted "bodily injury" upon Ms. Maltos because there was no evidence of anything other than a sore head and neck. For these reasons, Mr. Posey's conviction should be reversed.

Alternatively, an exceptional sentence is not justified in this case. Although Mr. Posey's new crime was committed shortly after

his release on a prior crime, the remaining facts do not support the jury's special verdict or the trial court's finding that substantial and compelling reasons exist for an exceptional sentence of 106.5 months. Mr. Posey was making every effort to lead a productive, crime-free life, but after two years of fulfilling his registration requirements, he failed to comply after he lost his home and his job. He accepted responsibility and served his sentence. His subsequent attempt to steal a purse does not exhibit the flagrant disdain for the law that the rapid recidivism aggravating factor requires. Mr. Posey's exceptional sentence should be vacated.

DATED: September 17, 2010



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CERTIFICATE OF MAILING

I certify that on 09/17/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) (Attorney for Respondent) David B. Trefry, Attorney at Law, P.O. Box 4846, Spokane , WA 99220-0846; and (2) Daniel A. Posey Jr.,# 867232, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

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