



29364-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CEDRIC E. BURTON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
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Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred in refusing to instruct the jury regarding the lesser included offense of fourth degree assault.

II.

ISSUE PRESENTED

- A. Did the trial court err in deciding that there was insufficient evidence to support instructing the jury regarding a lesser included offense?

III.

STATEMENT OF THE CASE

For purposes of this appeal only, the State accepts the Appellant's statement of the case.

IV.

ARGUMENT

- A. THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY REGARDING A LESSER/INFERIOR DEGREE CRIME BECAUSE IT WAS LEGALLY AND FACTUALLY UNSUPPORTED BY THE RECORD.

The defendant contends that a lesser/inferior degree instruction should have been given based upon a review of the evidence. A trial court's decision regarding a jury instruction is reviewed for abuse of discretion, if the decision is based on factual issues and *de novo* where the decision is based on questions of law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883(1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). Here, there was no factual basis for instructing on the lesser/inferior degree offense, so there was no error by the trial court.

Statutes confer the right to have a lesser offense considered by the jury making an adjudication of a criminal charge on both the defendant and the prosecution. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 383

(1978); *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). As the defendant noted, the governing statute is RCW 10.61.003:

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.

A “lesser included” offense is distinctly different from an “inferior degree” or “lesser degree” offense which necessarily involves a different legal analysis. The Supreme Court described “lesser included offense” as:

A lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.

(Citations omitted) *State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978) (*quoting State v. Roybal*, 82 Wn.2d 577, 583, 512 P.2d 718 (1973)). Nevertheless, it is possible to commit a greater degree offense without committing an “inferior” or “lesser degree” offense. *State v. McPhail*, 39 Wash. 199, 203, 81 P. 683 (1905).

The Washington State Supreme Court has provided the following guidance when resolving issues of this type:

We have long applied the two-pronged *Workman* test to determine whether a lesser offense is included within the charged offense: "First, each of the elements of the lesser

offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978) (*citations omitted*).

State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004).

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Court stated that the evidence requirement for a lesser included is different than the factual requirement typically applied to jury instructions. "Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.* at 455. (emphasis in original).

"Our case law is clear, however, that the evidence must affirmatively establish the defendant's theory of the case--it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina, supra* at 457. "Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). Accordingly, an instruction on an inferior degree offense is proper when (1) the statutes for the charged offense and the proposed inferior degree offense prohibit the same conduct, (2) the proposed offense is an inferior degree of the charged

offense, and (3) evidence supports a finding that the defendant committed only the inferior offense. *State v. Fernandez-Medina, supra*.

Here, the defendant requested an instruction on a crime of an inferior degree fourth-degree assault. Initially, it is of note that defendant was charged pursuant to RCW 9A.36.011(1)(A) with first degree assault committed by use of a deadly weapon, to-wit: a motor vehicle, to intentionally inflict great bodily harm. CP 4-5. Defendant was not separately charged with second degree assault. Rather, the trial court exercised its discretion in finding a factual basis existed to instruct the jury regarding the inferior degree offense of second degree assault. CP 82-109 (instruction no. 19). The trial court conformed the definition of the lesser degree offense to that means of committing of second degree assault which corresponded to the means of committing the charged offense of first degree assault. CP 82-109 (instruction no. 20 and no. 22). The trial court thus carefully exercised its discretion in evaluating the evidence in light of the version of first degree assault charged and instructed the jury. The trial court's same exercise of its discretion led it to determine that neither defendant's theory of the case nor the evidence supported instructing the jury regarding the lesser/inferior degree offense of fourth degree assault.

Legally, the manner of charging the first degree assault limited the trial court to instructing the jury with regard to that specific means of committing the charged offense. That same manner of charging also legally limited the trial court to instructing the jury with regard to the specific means of committing any lesser/inferior degree of the charged offense. The offense of fourth degree assault shares the *mens rea* of the intent to assault another with first and second degree assault; however, it does not share the *actus reus* as charged herein. Specifically, the charged offense was committed by the defendant intentionally assaulting Mr. Hollibaugh with using a deadly weapon. Hence, the trial court instructed the jury that it could find that the defendant committed the lesser/inferior degree offense of second degree assault pursuant to RCW 9A.36.021(1)(c). CP 82-109 (instruction nos. 20 and 22).

Factually, the trial court was limited by the evidence before the jury with regard to what lesser/inferior degree offenses it could include. The evidence was that the defendant intentionally drove his motor vehicle, a deadly weapon, at Mr. Hollibaugh. The defendant testified that he had no intention of inflicting bodily harm or of even scaring Mr. Hollibaugh. RP 136-160; Brf. of App. 7. Despite that testimony, defendant argues on appeal that the trial court committed reversible error when it exercised its discretion and declined to instruct the jury regarding fourth degree assault

as a lesser/inferior degree offense of second degree assault. The evidence before the jury from defendant's own testimony did not support instructing on fourth degree assault.

As noted, the defendant is entitled to a jury instruction on a lesser/inferior degree offense only when both the legal *and* factual prongs are satisfied. Here, the trial court had a record with evidence that established that either a first or second degree assault occurred based upon the defendant's intentional use of a deadly weapon with regard to Mr. Hollibaugh. There was no evidence that would support a fourth degree assault. The trial court properly exercised its discretion when it reviewed the evidence produced in light of the defendant's theory of the case before deciding not to instruct the jury regarding the lesser offense of fourth degree assault.

B. THE TRIAL COURT EXCEEDED ITS JURISDICTION WHEN IT IMPOSED A NON CRIME-RELATED PROHIBITION AS A CONDITION OF COMMUNITY CUSTODY.

Appellant correctly notes that RCW 9.94A.505 restricts a trial court to imposing conditions of community custody that relate specifically to the circumstances of the crime for which the defendant has been convicted. Herein, the record contains no evidence that the crime involved gang-related activities, motives, or lifestyle. Accordingly, the

State respectfully agrees that Judgment and Sentence §4.2(C)(6) be excised as a condition of defendant's community custody.

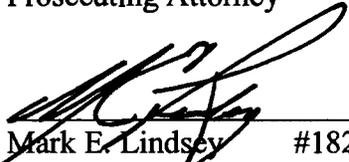
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed and §4.2(C)(6) of the Judgment and Sentence be corrected.

Dated this 17th day of February, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 29364-5-III
v.)	
)	CERTIFICATE OF MAILING
CEDRIC E. BURTON,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on February 17, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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2/17/2011
(Date)

Spokane, WA
(Place)


(Signature)