IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LARRY LLOYD, Appellant.	)	No. 67436-6 DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2011
In the Matter of the Personal Restraint of LARRY LLOYD, Petitioner.	)	

Becker, J. — When a police officer is securing or searching a person under arrest, the officer is acting in performance of official duties. Absent evidence the officer was on a "frolic," testimony indicating that an officer used excessive force against a person under arrest is insufficient to prove the officer was not acting in performance of official duties. Thus, we reject appellant Lloyd's argument that the jury should have been instructed on the inferior degree offense of fourth degree assault as an alternative to third degree assault. The only evidence was that the officer was acting in performance of official duties

while he was securing and searching Lloyd. As Lloyd's challenges to the sufficiency of the evidence also fail, we affirm the convictions. We also deny Lloyd's consolidated personal restraint petition challenging his sentence.

FACTS

According to testimony at trial, sometime after midnight, while he was on patrol in Bremerton, Sergeant Billy Renfro saw a green minivan. He recognized the driver as Larry Lloyd. Believing Lloyd's license was suspended, he followed Lloyd. After Lloyd failed to signal before turning, Sergeant Renfro activated his emergency lights. Lloyd pulled over on North Callow Avenue. Lloyd stepped out of the van. He was wearing a black jacket at the time. Lloyd sprinted away through a yard toward Snyder Avenue. Sergeant Renfro pursued him on foot.

Sergeant Renfro caught up with Lloyd in the backyard of a residence on Snyder Avenue. Lloyd was no longer wearing a jacket. Sergeant Renfro arrested Lloyd and placed him in handcuffs. He did not "double-lock" the handcuffs. Double-locking handcuffs prevent the cuffs from tightening up or loosening.

Sergeant Richard Cronk, Officer Donnell Rogers, and Officer Daniel Fatt arrived at the scene. Control of Lloyd was passed to Officer Fatt, who was in front of the residence.

Officer Fatt testified that after custody of Lloyd was passed to him, he noticed Lloyd's handcuffs were not double-locked. Officer Fatt explained that it was important to double-lock handcuffs because it helps prevent escape and

injury to the person in the handcuffs. As Officer Fatt was readjusting the handcuffs securing Lloyd, Lloyd grabbed Officer Fatt's left thumb and twisted it, causing extreme pain. Both Officers Renfro and Rogers testified that they heard Officer Fatt scream.

After regaining control over Lloyd, Officer Fatt finished readjusting the handcuffs, frisked Lloyd, and placed him in his police car. Officer Fatt testified that Sergeant Cronk told him to get Lloyd out of the area. Officer Fatt drove to a nearby convenience store. After other officers arrived, Officer Fatt ordered Lloyd to get out of the car so he could search him. Lloyd was uncooperative. Officer Fatt used a "goose-neck" hold and gained control over Lloyd. He admitted that he also probably applied a finger-lock maneuver on Lloyd to gain compliance.

Lloyd testified to a different version of these events. He explained that he ran from police because he did not want to go to jail. He knew his license was either suspended or revoked. He stopped running after he got tired. He was placed in handcuffs and handed over to Officer Fatt. Officer Fatt bent two of Lloyd's fingers on his left hand, causing him excruciating pain. In contrast to Officer Fatt's testimony, Lloyd said he did not grab Officer Fatt's thumb then. After transferring him to the convenience store, Officer Fatt again grabbed Lloyd's fingers and wrenched them back. In response, Lloyd grabbed Officer Fatt's thumb. Lloyd complained that the pain in his fingers lasted about a week. He sought and later received medical attention at Harrison Hospital.

Police found a black jacket at the scene of Lloyd's arrest. Inside the jacket, police found a glass pipe. Analysis of the pipe revealed that residue in the pipe contained cocaine.

The State charged Lloyd with possession of a controlled substance and driving while license revoked in the first degree. Lloyd pleaded guilty. The court allowed Lloyd to withdraw his plea after Lloyd was erroneously advised that he was eligible for sentencing under the Drug Offender Sentencing Alternative statute, RCW 9.94A.660. The State amended the information to include a third degree assault charge. At trial, Lloyd asserted self-defense and asked for an instruction on the inferior degree crime of fourth degree assault. The trial court allowed an instruction on self-defense, but refused to give an inferior degree instruction on fourth degree assault. The jury convicted Lloyd as charged.

Lloyd appeals his assault and possession convictions. He contends the court erred by not giving an inferior degree instruction and that there is insufficient evidence to sustain his appealed convictions. Lloyd also filed a personal restraint petition challenging his sentence and the court's calculation of his offender score. The personal restraint petition has been consolidated with the appeal.

JURY INSTRUCTION

The State alleged that while Lloyd was under arrest, he assaulted a law enforcement officer and thereby committed third degree assault. 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, 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(1)(g).

Lloyd requested the trial court instruct the jury on the inferior degree crime of fourth degree assault. 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).

Lloyd argued the jury could find he committed only fourth degree assault based on his testimony that he grabbed Officer Fatt's thumb in response to Officer Fatt bending his fingers backward. The trial court denied the requested instruction.

A trial court's refusal to give an instruction to a jury, if based on a factual dispute, is reviewable for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the trial court's refusal to give an instruction is based upon a ruling of law, review is de novo. Walker, 136 Wn.2d at 772.

An instruction on an inferior degree is proper 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).

Both the third and fourth degree assault statutes proscribe one

offense—assault. Fourth degree assault is an inferior degree offense of third degree assault. The issue is whether there was evidence that Lloyd committed only fourth degree assault.

When substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or included inferior degree offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied. Fernandez-Medina, 141 Wn.2d at 461. When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court must view the supporting evidence in the light most favorable to the party that requested the instruction. Fernandez-Medina, 141 Wn.2d at 456. A requested jury instruction on a lesser included or inferior degree offense should be administered if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. Fernandez-Medina, 141 Wn.2d at 456. However, 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. Fernandez-Medina, 141 Wn.2d at 456.

Lloyd's argument that he was entitled to an inferior degree instruction rests on the premise that when an officer uses excessive force against a person under arrest, the officer is not performing "official duties." Thus, in his view, an assault against the officer in response to the use of excessive force does not amount to third degree assault under RCW 9A.36.031(1)(g).

The Supreme Court addressed a similar argument in State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995). There, the court rejected the argument that an officer is not performing "official duties" when making an illegal arrest and held that

> "official duties" as used in RCW 9A.36.031(1)(g) encompass all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own. [State v.]Hoffmann, 116 Wn.2d [51,] 99-100[, 804 P.2d 577 (1991)]. RCW 9A.36.031(1)(g) includes assaults upon law enforcement officers in the course of performing their official duties, even if making an illegal arrest.

Mierz, 127 Wn.2d at 479.

Lloyd's argument is not that his arrest was unlawful. Instead, he argues that while he was handcuffed and acting cooperatively, Officer Fatt used excessive force against him by repeatedly bending his fingers backward and that he responded grabbing Officer Fatt's thumb. But an allegation of excessive force does not necessarily render Lloyd's arrest outside the scope of an officer's performance of official duties. Officer Fatt was not on a "frolic." He was among the officers responsible for securing and searching Lloyd after police lawfully arrested him. Securing or searching a suspect after an arrest is in performance of an officer's official duties. Other than denying that he grabbed Officer Fatt's thumb while at scene of his arrest, Lloyd did not contradict Officer Fatt's testimony about readjusting the handcuffs securing him. Nor did his testimony contradict testimony that Lloyd was moved to the convenience store in order to search him more thoroughly. Thus, the evidence did not support a conclusion

that Lloyd committed fourth degree assault to the exclusion of third degree assault. The trial court did not err by refusing the requested instruction.

SUFFICIENCY OF THE EVIDENCE

Lloyd contends there was insufficient evidence to disprove his claim of self-defense. We disagree.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. 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.

When a defendant properly raises self-defense, the State must disprove self-defense as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984). Here, the jury was instructed that self-defense to resist an arrest was met only if the person being arrested is in actual and imminent danger of serious injury from an officer’s use of excessive force.

Viewed in the light most favorable to the State, there was sufficient

evidence to disprove Lloyd's self-defense claim beyond a reasonable doubt. Officer Fatt did not testify that he grabbed Lloyd's fingers and bent them back. Officer Fatt testified that he held onto Lloyd's wrist while he adjusted the handcuffs securing Lloyd. Lloyd then grabbed Officer Fatt's thumb, causing him pain. Two officers testified they heard Officer Fatt scream. While Lloyd testified to a different version of events, the jury was free to reject his version and accept the competing narrative presented by the State. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal.").

Lloyd also argues there was insufficient evidence presented at his trial to sustain his conviction for one count of possession of a controlled substance—cocaine. Specifically, Lloyd contends there was insufficient evidence to establish that he possessed cocaine because the cocaine was not on his person when it was found at the scene of his arrest. Again, we disagree.

Officer Renfro testified that Lloyd was wearing a black jacket when he got out of the van and ran away. When he apprehended Lloyd, Lloyd was not wearing a jacket. Police found a black jacket near a fence in the area Lloyd was apprehended. Inside the jacket, police found a glass pipe containing cocaine.

Possession may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has

dominion and control over the goods. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession is proved when the person charged with possession had dominion and control of either the drugs or the premises upon which the drugs were found. State v. Sanders, 7 Wn. App. 891, 892-93, 503 P.2d 467 (1972). Constructive possession may be proved by circumstantial evidence. Sanders, 7 Wn. App. at 893.

In this case, Lloyd admitted he was wearing a jacket when he ran from police. Lloyd testified at trial that he borrowed the jacket from a friend and that he took it off while he was running because he was hot. Given the fact that Lloyd wore the jacket and took it off shortly before being apprehended, a jury could rationally conclude that Lloyd constructively possessed the cocaine found on the pipe inside the jacket.

PERSONAL RESTRAINT PETITION

Lloyd filed a personal restraint petition challenging his sentence. It has been consolidated with the appeal.

To prevail on a claim of constitutional error, Lloyd must demonstrate actual and substantial prejudice. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). And to prevail on a nonconstitutional claim, he must show a fundamental defect which inherently results in a complete miscarriage of justice. Davis, 152 Wn.2d at 672.

Lloyd argues the trial court incorrectly determined his offender score as 8 rather than a 7. Lloyd's judgment and sentence lists two convictions for failure to

register as a sex offender. The dates listed for these two offenses are respectively November 17, 2003, and April 7, 2005. Lloyd contends these two previous convictions should have counted as one under the same criminal conduct analysis. We disagree.

Statute describes when multiple prior convictions should be counted as one offense:

> In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> . . . Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

RCW 9.94A.525(5)(a)(i).

These rules were not violated. First, neither the record nor Lloyd's personal restraint petition shows that any previous court determined these two crimes encompassed the same criminal conduct. Thus, the current sentencing court was not required to count them as one offense. Second, the judgment and sentence indicates that the sentences for these two crimes were not served concurrently. Therefore, the trial court was not required to conduct a "same criminal conduct" analysis. Finally, even assuming the sentences for the two crimes were served concurrently, the two crimes did not encompass the same

criminal conduct because the crimes were committed at two different times.

Lloyd also argues that because his 2003 conviction was an "unranked" class C felony and his 2005 conviction was a "ranked" class C felony, the two convictions should have only counted as one. This argument is also without merit. Whether a crime is unranked or ranked has significance regarding the standard range when an offender is being sentenced for that crime. Unranked offenses have a standard range of 0 to 12 months. In re Pers. Restraint of Acron, 122 Wn. App. 886, 888, 95 P.3d 1272 (2004). Ranked offenses have established statutory standard ranges. Whether a prior offense was ranked or unranked is immaterial here, where Lloyd was being sentenced for his current offenses. What matters is whether the prior conviction was a felony or not. See RCW 9.94A.525. In this case, both prior convictions were felonies. Thus, the court properly counted them both. Lloyd is not entitled to relief.

We affirm the convictions and deny the personal restraint petition.

Becker, J.

WE CONCUR:

Grau, J.

Cox, J.