# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JASON JAMES BISHOP,<br><br>Appellant. | No. 41157-1-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Worswick, A.C.J. — Jason Bishop appeals his conviction for second degree assault, arguing that (1) the trial court erred in refusing to instruct the jury on fourth degree assault as an inferior degree offense and (2) the trial court's initial aggressor jury instruction deprived him of his right to argue self-defense. We conclude that Bishop's first contention is without merit. However, because the erroneous aggressor instruction relieved the State of its burden to disprove self-defense, we reverse Bishop's conviction and remand for a new trial.

FACTS

On December 5, 2009, Bishop and his younger sister, Melinda, celebrated their mutual birthday with friends at the New Peking restaurant and lounge in Port Angeles, Washington.[1] Unbeknownst to Bishop and Melinda, Christopher Bair, Melinda's ex-husband, was also at the New Peking that evening with his friends.[2] Bishop, Melinda, and their friends stayed in the New

[1] Because Jason Bishop and Melinda Bishop have the same last name, we refer to Melinda by her first name, intending no disrespect.

[2] Melinda and Bair were involved in a child support dispute.

Peking's lounge area while Bair and his friends watched a televised sporting event in the restaurant area. Bair did not interact with either Melinda or Bishop inside the New Peking.

Eventually, Bair and a few friends went outside. Bair's friends went back inside the restaurant after a few minutes, but Bair decided to stay outside in a covered breezeway to smoke a cigarette. Bishop exited the New Peking and the two men began fighting. Bair suffered a broken jaw, a fractured orbital, a twisted molar, and a chipped tooth.

The State charged Bishop with second degree assault of Bair. At trial, the State and Bishop presented very different accounts of the fight.

Bair testified that Bishop pushed him up against the wall with enough force to "shock" Bair and to chip his tooth. Report of Proceedings (RP) (June 21, 2010) at 103. Bishop then asked Bair "when [Bair would . . .] start paying [Melinda] some child support." RP (June 22, 2010) at 90. Bair testified that he responded by holding out his opened hand and repeatedly saying "whoa." RP (June 21, 2010) at 104. The next thing Bair remembers, apparently because he lost consciousness, is his girl friend picking him up off of the ground.

Ashley Holloway testified that she saw Bishop straddling Bair on the ground in the breezeway, repeatedly punching Bair in the face. Brandon Vaughan testified that he exited the New Peking and saw Bair injured on the ground in the breezeway as Bishop walked away. WhenVaughan asked Bishop what happened, Bishop told Vaughan that "it wasn't any of [his] business." RP (June 22, 2010) at 15. Vaughan also testified that he saw Bishop later that evening with Bair's hat at another bar.

The State also presented Clallam County Sheriff Deputy Michael Backes's testimony that

he photographed Bair's injuries at the hospital and noticed a boot print on the back of Bair's light-colored sweatshirt. Then, Deputy Backes went to the New Peking and asked Bishop to talk to him outside.[3] Bishop agreed and Deputy Backes noticed that the boot print on Bair's sweatshirt matched the prints that Bishop's boots made in the snow.

In contrast, Bishop testified that he was checking his phone as he walked out of the New Peking and accidentally bumped into Bair. Bishop testified that they were both startled by the encounter and that Bishop asked when Bair would start paying Melinda child support. Bishop testified that, in response, Bair swore at him, told him to mind his own business, spit in his face, and pushed him. Bishop has a "phobia against other people's body fluids" and was "freaked out" because Bair's spit "splattered all up [Bishop's] face into [his] mouth . . . [and] eyes." RP (June 22, 2010) at 91-92. Bishop also testified that he and Bair then began punching one another repeatedly until they fell to the ground with Bair landing on top of Bishop. Bishop said that he pushed Bair off of him with his boot and then walked away.

Bishop presented the trial court with proposed jury instructions on self-defense and fourth degree assault as an inferior degree offense to his second degree assault charge. The trial court denied Bishop's proposed inferior degree offense instruction. The trial court gave jury instructions on self-defense and also gave an initial aggressor instruction.

The jury found Bishop guilty of second degree assault as charged. Bishop timely appealed.

[3] Although Bishop left the New Peking shortly after his altercation with Bair, Bishop returned to the New Peking after twenty or thirty minutes at another bar.

## ANALYSIS

### I. Inferior Degree Offense Instruction

Bishop first argues that the trial court violated his statutory and constitutional rights when it denied his request for an inferior degree offense instruction on fourth degree assault. We disagree.

#### A. *Standard of Review*

We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Emery*, 161 Wn. App. 172, 190, 253 P.3d 413 (2011) (quoting *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006)). In evaluating whether all of the evidence at trial supported an inferior degree offense instruction, we view the evidence in the light most favorable to the party who requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

#### B. *Statutory Right to Inferior Degree Offense Instruction*

When the State charges a defendant with an offense that consists of different degrees, the jury *may* find the defendant guilty of an inferior degree than charged. RCW 10.61.003; RCW 10.61.010. But a defendant is only entitled to a jury instruction on an inferior degree offense if:

> "(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."

*Fernandez-Medina*, 141 Wn.2d at 454 (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

The third, factual prong of this test requires that "the evidence must raise an inference that [the defendant committed] *only* the . . . inferior degree offense . . . to the exclusion of the charged offense." *Fernandez-Medina*, 141 Wn.2d at 455 (emphasis in original). Further, the evidence must affirmatively establish the defendant's theory that he or she *only* committed the inferior degree offense and not the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455-56. Argument that the jury might disbelieve the State's evidence of guilt on the offense charged is not enough to entitle a defendant to an inferior degree instruction. *Fernandez-Medina*, 141 Wn.2d at 456. Only the factual prong is at issue here.

In order to convict Bishop of second degree assault as charged, the State had to prove beyond a reasonable doubt that Bishop intentionally assaulted and recklessly inflicted substantial bodily harm on Bair.[4] RCW 9A.36.021(1)(a). However, if Bishop merely assaulted Bair, he would have committed fourth degree assault.[5] RCW 9A.36.041. Thus, in order for Bishop to be entitled to an instruction on fourth degree assault, the evidence must affirmatively show that he merely assaulted Bair but that it did not amount to first, second, or third degree assault. RCW 9A.36.041; *see also Fernandez-Medina*, 141 Wn.2d at 455.

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[4] A person acts recklessly if he knows of and disregards a substantial risk of a wrongful act and that disregard grossly deviates from the care a reasonable person would exercise in the circumstances. RCW 9A.08.010(c).

[5] RCW 9A.36.041(1) provides: "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."

In his briefing, Bishop challenges only that he recklessly inflicted substantial bodily harm on Bair. Bishop argues, "If even one juror believed that Mr. Bishop . . . negligently inflicted substantial bodily harm (without acting recklessly), he would have been convicted of simple assault." Br. of Appellant at 6. But, negligently inflicting bodily harm constitutes third degree assault, not fourth degree.[6] RCW 9A.36.031(d), (f). Bishop neither requested an instruction on third degree assault at trial nor argues on appeal that the facts warranted a third degree assault instruction.

Nonetheless, Bishop's argument that he would have been convicted of an inferior degree assault if even one juror believed Bishop acted negligently in assaulting Bair rests upon the possibility that the jury could have doubted the State's evidence of his guilt. Argument that the jury possibly could have doubted the State's evidence is not enough to entitle a defendant to an inferior degree offense instruction. *Fernandez-Medina*, 141 Wn.2d at 456. Thus, Bishop's argument for an instruction on fourth degree assault fails. Further, even though Bishop testified that he and Bair punched each other repeatedly until they fell to the ground, that evidence does not affirmatively show that Bishop acted only negligently instead of recklessly and, thus, does not show that Bishop committed only third degree assault instead of second degree assault. Thus, Bishop did not have a statutory right to an inferior degree offense instruction.

Moreover, Bishop testified that he "thought it was just a fight and . . . I hit [Bair] in the face a few times . . . figur[ing] . . . that [Bair was] going to be sore." RP (June 22, 2010) at 95.

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[6] A defendant is criminally negligent if he or she acts while unaware of a substantial risk that a wrongful act may occur and that unawareness is a gross deviation from the standard of care a reasonable person would follow under the circumstances. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.04, at 212-13 (3d ed. 2008).

Bishop admitted on cross-examination that it was possible that he hit Bair hard enough to break his nose but stated that he did not recall whether he hit Bair with enough force to break Bair's jaw. Bishop actually did break Bair's jaw and caused other significant injuries. Even taking the evidence in the light most favorable to Bishop, the evidence does not affirmatively show that he *only* committed third or fourth degree assault, to the exclusion of second degree assault. Thus, the trial court did not abuse its discretion in concluding that the evidence did not support an inferior degree instruction and we affirm.

C. *Constitutional Right to an Inferior Degree Offense Instruction*

Bishop next argues that (1) the trial court violated his right to due process by refusing to give an inferior degree offense instruction and (2) the Washington constitutional guarantee of a speedy trial by an impartial jury mandates an inferior degree offense instruction under *Gunwall*. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). We disagree.

1. *Due Process*

Bishop cites a Third Circuit Court of Appeals case in support of his argument that the trial court's refusal to give the jury an inferior degree offense instruction violated his right to due process under the Fourteenth Amendment but, the case to which Bishop cites does not apply because it addresses the similar but distinct question of lesser included offense instructions.[7]

[7] A defendant is entitled to a lesser included offense instruction if the legal elements required to convict for the crime charged are the same as those required to convict for the proposed lesser included offense. *See State v. Tamalini*, 134 Wn.2d 725, 728-29, 953 P.2d 450 (1998). But, a defendant's entitlement to a lesser included instruction does not guarantee entitlement to an inferior degree instruction because the elements necessary to convict for an inferior degree offense are not necessarily the same as those required to convict for the crime charged. *Tamalini*, 134 Wn.2d at 729-30.

*Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). Specifically, *Vujosevic* analyzes whether an aggravated manslaughter defendant was entitled to a lesser included offense instruction for aggravated assault. 844 F.2d at 1027-28. Bishop fails to acknowledge the distinction between a lesser included offense instruction and an inferior degree offense instruction. Bishop also fails to provide any persuasive reasoning for us to apply the Third Circuit's analysis of lesser included offense instructions to inferior degree offense instructions. Thus, Bishop's due process argument fails.

2. *Gunwall*

We generally consider state constitutional issues only if the appellant briefs meaningful arguments analyzing the *Gunwall* factors. 106 Wn.2d at 60-61; *State v. Spring*, 128 Wn. App. 398, 407, 115 P.3d 1052 (2005). If the appellant does not adequately analyze the *Gunwall* factors, we do not analyze whether the state constitution provides greater protection than the federal constitution under the facts of the case. *See Spring*, 128 Wn. App. at 407; *State v. Cantrell*, 124 Wn.2d 183, 190, n.19, 875 P.2d 1208 (1994).

Bishop concedes that the federal constitution does not provide a constitutional right to an inferior degree offense instruction as part of a defendant's right to a jury trial. Furthermore, to date, no Washington case has held that our state constitution guarantees the right to an inferior degree offense instruction. *See State v. Fernandez-Medina*, 141 Wn.2d at 454; *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011) (affirmed by 172 Wn.2d 802, 262 P.3d 1225 (2011)); *State v. Wright*, 152 Wn. App. 64, 214 P.3d 968 (2009); *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141 (2005); *State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995). Instead,

Washington courts have held that the right to an inferior degree offense instruction is statutory. *Fernandez-Medina*, 141 Wn.2d at 453-54.

Here, Bishop's *Gunwall* analysis is conclusory and addresses the *Gunwall* factors with neither meaningful argument nor citation to persuasive authority. Moreover, Bishop cites only to cases addressing lesser included offense instructions, rather than the similar but distinct inferior degree offense instructions. A defendant entitled to a lesser included offense instruction may not be entitled to an inferior degree offense instruction because the legal elements required for conviction of a lesser included offense must be identical to the crime charged, but an inferior degree offense may have different elements from the crime charged. *Fernandez-Medina*, 141 Wn.2d at 454. Accordingly, Bishop's *Gunwall* analysis is inadequate to support a decision that the state constitution guarantees a defendant the right to an inferior degree instruction. Because Bishop's *Gunwall* argument is inadequate, we decline to consider the issue.

II. Initial Aggressor Instruction

Next, Bishop argues that because insufficient evidence supported the initial aggressor jury instruction, the trial court deprived him of his right to argue self-defense as his theory of the case by giving that instruction. [8] We agree.

An initial aggressor instruction must be supported by sufficient credible evidence that the

[8] The trial court's initial aggressor instruction to the jury stated:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP at 40.

defendant provoked the use of force. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Whether sufficient evidence justified an initial aggressor instruction is a question of law that we review de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). In determining whether the evidence was sufficient to justify an initial aggressor instruction, we consider the evidence in the light most favorable to the party who requested the instruction. *Bea*, 162 Wn. App. at 577. Here, the State requested the initial aggressor instruction, thus, we consider the evidence in the light most favorable to the State.

Before a criminal defendant may argue self-defense, he must produce some evidence that he or she acted based on a reasonable apprehension of great bodily harm and imminent danger. *Riley*, 137 Wn.2d at 909. The defendant does not need to show that he was in actual danger. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). But, a defendant who provoked the confrontation cannot later claim his actions were in self-defense. *Douglas*, 128 Wn. App. at 562. Courts should use great care in giving an initial aggressor instruction. *Riley*, 137 Wn.2d at 910 n.2. Although generally disfavored, initial aggressor instructions are appropriate if "there is credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense." *Douglas*, 128 Wn. App. at 563. The State bears the burden of producing evidence showing that the defendant was the initial aggressor. *Riley*, 137 Wn.2d at 910 n.2. The provoking act must be distinct from the assault itself. *Bea*, 162 Wn. App. at 577. But, it may be appropriate for a trial court to give an initial aggressor instruction if there is conflicting evidence on whether the defendant provoked the use of force. *Riley*, 137 Wn.2d at 910.

Here, Bair testified that Bishop pushed him up against the wall, asked why Bair had not paid Melinda child support, to which Bair repeatedly replied "whoa," and then Bair lost consciousness. The State relies on Bishop's testimony that he bumped into Bair and Bair swore at him and spit in his face to argue that there is conflicting evidence on whether Bishop or Bair provoked their fight because Bishop testified that Bair spit in his face, provoking Bishop's need to defend himself. But, neither Bair's nor Bishop's testimony establish a provoking act, *distinct from the assault itself*. Instead, their testimony tends to show that Bishop did not interact with Bair at all until the actual assault. *See State v. Wasson*, 54 Wn. App. 156, 159-60, 772 P.2d 1039 (1989). Thus, the State did not meet its burden of producing evidence that Bishop was the initial aggressor. Therefore, because there is insufficient evidence to support the trial court's initial aggressor instruction, the trial court erred in giving it.

Lastly, the State argues that any error was harmless because "a rational jury could reasonably reject Bishop's self-defense theory." Br. of Resp. at 14-15. We disagree.

When a trial court gives an erroneous initial aggressor instruction, it relieves the State of its burden of disproving a criminal defendant's self-defense theory. *State v. Stark*, 158 Wn. App. 952, 960-61, 244 P.3d 433 (2010). Such an error is subject to constitutional harmless error analysis. *Stark*, 158 Wn. App. at 961. Under this standard, we presume the error was prejudicial and we must reverse, unless we are convinced beyond a reasonable doubt that the error is harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). An error is harmless beyond a reasonable doubt if the evidence is so overwhelming that it necessarily leads to a finding of guilt. *Stark*, 158 Wn. App. at 961; *Guloy*, 104 Wn.2d at 425. Conversely, an erroneous initial

aggressor instruction is harmless if "no reasonable jury could have found that the[defendant's actions] were acts of lawful self-defense." *State v. Kidd*, 57 Wn. App. 95, 101, 786 P.2d 847 (1990).

Here, because the trial court erroneously gave an initial aggressor instruction, it relieved the State of its burden of disproving Bishop's self-defense theory of the case. The State could not produce any independent witnesses of the confrontation to establish that Bishop was the initial aggressor. Instead, Bishop's testimony refuted Bair's testimony on how their dispute arose, leaving the jury with contradictory testimony on how the fight started. Thus, even considering the evidence in the light most favorable to the State, it did not produce overwhelming evidence of Bishop's guilt. Accordingly, we are not convinced that the trial court's erroneous initial aggressor instruction was harmless beyond a reasonable doubt. Therefore, we presume this instructional error was prejudicial, and we reverse Bishop's conviction and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Van Deren, J.

Johanson, J.