IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER RAY CANTRELL, Appellant.	No. 41662-0-II UNPUBLISHED OPINION

Hunt, J. – Tyler Ray Cantrell appeals his jury conviction and sentence for first degree assault, with a firearm sentencing enhancement. He argues that (1) the State committed prosecutorial misconduct in closing argument by (a) incorrectly implying that he had a duty to retreat or to warn before acting in self-defense and (b) emphasizing a racial slur that Cantrell had made about his victim, appealing to the jury's passions and prejudices; (2) this misconduct produced reversible cumulative error; (3) his trial counsel was ineffective in failing to mitigate the harm caused by the prosecutor's improper closing argument; and (4) the trial court violated his due process rights because a condition of his community custody sentence was unconstitutionally vague. In his Statement of Additional Grounds (SAG), Cantrell asserts that the trial court erred in denying his request for an inferior-degree second degree assault instruction. We affirm.

FACTS

I. Assault

Nineteen-year-old Miguel Ortiz and his girlfriend, Andrea Leija, attended an evening party at their friend Jeremy's Tacoma house, with a large number of people in the garage, house, and backyard. Ortiz drank beer, smoked marijuana, played "beer pong,"[1] and consumed straight shots of vodka. Several hours later, he was in "rough shape," drunker than ever before, "falling all over the place," and "going in and out" of consciousness. II Verbatim Report of Proceedings (VRP) at 80. At Jeremy's request,Ortiz positioned himself near the front door and told people they could not come inside because the party had gotten too large.

When Ortiz later realized his car keys were missing, he became convinced that somebody had taken his keys, threatened "to beat everybody's *ss" if he did not find his keys, and began searching people's pockets before they entered or exited the house. II VRP at 118. Ortiz was severely drunk and acting "belligerent" and "obnoxious" about his keys. II VRP at 198; IV VRP at 567. His pocket searching upset some people, including 19-year-old Tyler Cantrell, whom Ortiz did not know well. Leija, Ortiz's girlfriend, slammed Ortiz into a wall and told him to "calm down" or "something bad would happen." II VRP at 197. When Ortiz told Leija that he was "calm," she left to continue looking for his keys. II VRP at 102.

The party's mood changed: It got a little "wild"; the whole house was in commotion, and everyone at the party was "drunk, acting stupid, talking crap . . . [and] trying to fight everybody."

[1] "Beer pong" appears to be a drinking game where a person takes a shot of alcohol if he throws a ping pong ball into a cup. *See* II Verbatim Report of Proceedings (VRP) at 79.

II VRP at 97. Two of Ortiz's friends started fighting about his keys. There were rumors that the police had been called because the party was out of control. Ortiz, who was much smaller than Cantrell,[2] got into a verbal argument with him: Cantrell leaned into Ortiz's face; they started cursing and calling each other "b*tches" and "punks." II VRP at 101. Leija observed this argument from afar; although she could tell that Ortiz and Cantrell were "yelling" at each other, she did not see either of them make physical contact with the other. II VRP at 195.

Cantrell went outside. Although he lived only three or four blocks away, he did not leave the party in fear for his safety. Instead, he pulled a 9 mm handgun from his backpack, loaded it, and put it on his person. Eventually, Cantrell came back inside, confronted Ortiz a second time, and started arguing with him again. Ortiz went outside to have a "fistfight" with Cantrell. II VRP at 106.

When Cantrell later exited the front door, he saw Ortiz running toward the door and said something about one of Ortiz's friends "tripping" inside. 5 VRP at 671. Ortiz responded, "[W]hat's up, you guys beefing, it's on Hilltop, you'll get smashed right now." 5 VRP at 671. Apparently unaffected by Ortiz's statement, Cantrell told Ortiz to "calm down." 5 VRP at 671. Ortiz then started walking toward Cantrell and reached behind his back to pull up his pants by his belt loop; believing he was about to "get shot," Cantrell fired two shots in Ortiz's direction without warning and without aiming. 5 VRP at 672. Ortiz fell to the ground, convulsing and choking on his blood. Ortiz was unarmed.

[2] Cantrell estimated that Ortiz was between 5'6" and 5'8" and weighed 150 to 160 pounds, compared to Cantrell, who was 6'5" and weighed 220 pounds.

Eleanor Hill and Joseph O'Brien, parked in a car across the street, observed portions of this shooting incident. Hill saw Cantrell approach Ortiz and raise his hand at a downward angle shortly before she heard two "pops" and saw Ortiz lying on the ground. III VRP at 275. Cantrell "just looked at [Ortiz] and walked off to the left to the alley." III VRP at 275. The police arrived less than a minute later.

Ortiz had a gunshot wound to the right side of his chest just below the collarbone, which exited through his spinal cord; an "egg-size"[3] gunshot wound to his neck that exited through his upper neck, missing his jugular vein by three centimeters; and an apparent gunshot wound to his right hand. Without treatment, Ortiz would have died within the hour. Paramedics took him to St. Joseph's Hospital, where he underwent surgery. Ortiz, who now suffers from paraplegia, is confined to a wheelchair.

Cantrell went home, changed his clothes, took his gun apart, and called his friends Monjett Bradley and Haley Thompson, who had also attended the party, to pick him up. Bradley and Thompson drove Cantrell to the Tacoma waterfront, sending false text messages about where they were headed and who was with them. Bradley and Cantrell exited the vehicle, and Cantrell threw his dismantled gun into the water. Unaware of what was going on, Thompson became suspicious and asked Cantrell, "Did you do it [shoot Ortiz]?" IV VRP at 602. Cantrell responded, "Yes." IV VRP at 602. When Thompson asked Cantrell why he had shot Ortiz, Cantrell (1) replied he was "mad" and "wanted [Ortiz] to die so he couldn't say anything," (2) called Ortiz a "[n]igga," and (3) said he "hoped that [Ortiz] would choke on his blood and die."

[3] II VRP at 121.

IV VRP at 603, 604, 605, 630.

Bradley and Thompson eventually dropped Cantrell at another friend's house. Cantrell drank heavily for the rest of the evening and woke up in jail.

II. Procedure

The State charged Cantrell with first degree assault with a firearm sentencing enhancement. Cantrell proceeded to a jury trial.

A. Trial Testimony

1. State

Several State witnesses testified to the facts set forth in the preceding section of this opinion. Thompson testified that Cantrell had called her cell phone after the shooting to speak to Bradley; after Bradley and Cantrell spoke, she and Bradley had picked up Cantrell at his house and had driven to the waterfront. As they were driving, Bradley and Cantrell told her to send false text messages to other friends asking where they were and who was with them; she complied but did not ask why. Cantrell eventually told her that he had shot Ortiz; when she asked why, Cantrell "didn't really have a reason" other than he was "mad." IV VRP at 603. When the prosecutor pressed further about this conversation, Thompson testified that Cantrell had told her that he "hoped [Ortiz] would choke on his blood and die." IV VRP at 605.

On redirect, when the prosecutor again asked Thompson questions about Cantrell's statements immediately after the shooting, she testified that Cantrell had called Ortiz a "[n]igga" when he had told her that he "hoped [Ortiz] would choke on his blood and die." IV VRP at 603, 630. Cantrell did not object to this testimony or seek a curative instruction.

2. Cantrell

Cantrell denied that he and Ortiz had gotten into a verbal altercation at the party where they called each other "b*tches." 5 VRP at 701. He claimed that that he and Ortiz had merely walked past each other at the party and said, "[W]hat's up," without saying more, and that he had not seen any guns or fights at the party that caused him concern. 5 VRP at 667. He further testified that the mood of the party changed almost immediately after he arrived, that Ortiz was being "loud" and "ignorant," and that he was that yelling he would "shut the party down"; again, this apparently caused Cantrell little concern because he did not leave the party. 5 VRP at 669, 695.

Cantrell also testified that, after about two and a half hours of being in Ortiz's presence and without having any altercations with him, he (Cantrell) became afraid for his safety because he and Ortiz had gotten into a disagreement "three years [earlier,]" even though they had not discussed the three-year-old disagreement that evening. 5 VRP at 697. Sober and in complete control of himself at the time, Cantrell (1) took his gun out of his backpack, loaded it, and put it on his person; (2) initiated contact with Ortiz outside; and (3) interpreted Ortiz's statement "you'll get smashed" to mean he (Cantrell) would "get his *ss beat." 5 VRP at 709. Cantrell thought Ortiz had a gun and shot him when Ortiz reached behind his back. Cantrell testified that he had intended to shoot Ortiz and that it was not an accident.

Cantrell also testified that he had repeatedly lied to his mother after the shooting by telling her that he had not been at the party, that he did not know Ortiz, and that the police would not find any gunpowder on his clothes. After about three weeks of maintaining this lie, he told his

mother he had shot Ortiz in self-defense. These phone conversations were taped and played for the jury.

B. Jury Instructions

Cantrell's proposed jury instructions included an instruction for the inferior-degree crime of second degree assault, which the trial court apparently rejected. The trial court, however, did give Cantrell's proposed instruction that Cantrell did not have a duty to retreat.

C. Closing Argument

The prosecutor began his closing argument by reminding the jury that the State had the burden of proving every element of the crime beyond a reasonable doubt; that they should follow the trial court's instructions on the law; and that if they ever believed that he (the prosecutor) said something contrary to their instructions, they should defer to the trial court's instructions. The prosecutor also explained the jury instructions and how the State's evidence satisfied all elements of the crime.

The prosecutor then argued that Cantrell's self-defense claim was not credible and that his use of force was not "reasonable" under the circumstances because (1) Cantrell had brought a gun to a fistfight; (2) he had initiated contact with Ortiz, a person of whom he was supposedly afraid; (3) Ortiz had threatened only to beat Cantrell up; (4) Cantrell had not seen Ortiz with a gun earlier in the evening; (5) Ortiz was much smaller than Cantrell; and (6) Cantrell had shot Ortiz twice in about one second. VI VRP at 824. The prosecutor then continued arguing that Cantrell's testimony was not credible:

> [E]ven if you believe Cantrell, he shoots twice after spending time in Ortiz's presence, seeing no indication, even from his mouth, that Ortiz is armed[,] *without giving a warning, even a warning as he shoots, even as he shoots the first time*, he never said, you know, right, I asked him what happened. He said, I pulled out a gun and I shot him.

VI VRP at 824 (emphasis added). Cantrell neither objected to this argument nor requested a curative jury instruction.

The prosecutor continued to argue that Cantrell's testimony was not credible because he had changed his story several times during the investigation of the case and also while testifying. In doing so, the prosecutor made a passing remark that Cantrell had not left the party even though he claimed he had feared for his safety and he lived only a couple blocks away:

> [*Cantrell*] *didn't leave.* I want to be very careful about this. *I want you to be sure to understand exactly what I* [*am*] *arguing and exactly what I am not arguing. Okay. He does not have a duty to retreat. Nobody has a duty to retreat, okay? He can stand there and*[,] *if, you know, an altercation develops, it's not, it doesn't make it* [*a*] *defect* [*to his*] *self-defense* [*claim*] *if he stands his ground.*
> . . . .
> He doesn't think, you know what, I have been drinking, this guy's an idiot, a drunken fool, I don't want to become a target of this. I live two blocks away, you know. *Again, he doesn't have* [*a duty*] *to retreat, but is the decision that he made, oh, I was just going to hang out and see if* [*it*] *calm*[*s*] *down,* [. . .] *does that make sense in light of everything else* [*that*] *he told you*? Not to be subtle, the answer is no.

VRP at 828-29, 830 (emphasis added). Again, Cantrell neither objected to this argument nor requested a curative instruction.

The prosecutor also argued that Cantrell's most consistent story was the version he had told Thompson immediately after the shooting. The prosecutor then put up a powerpoint slide referencing Cantrell's statement to Thompson, which had included Cantrell's use of the word "nigga," and argued:

> Cantrell shot [Ortiz] twice, not because he reached behind his back[.] He [. . .] shot him for getting in his face, for disrespecting him, for calling him a little [b*tch]. Shocking when I put it up on the screen, isn't it? It's hard to say. *"I hope that nigga chokes on his blood and dies."*
> It's a really loaded word, and I'm not suggesting to you that there was any

> racial component to this. I'm suggesting to you that that's [Cantrell's] way of saying who's the [b*tch] now?
>
> It wasn't self defense, it was Assault in the First Degree.

VI VRP at 837 (emphasis added). Again, Cantrell did not object to this argument, he did not object to the prosecutor's use of the powerpoint presentation, and he did not request a curative instruction.

D. Verdict; Judgment and Sentence

The jury found Cantrell guilty of first degree assault, while armed with a firearm. The trial court imposed (1) a high-end standard range sentence of 123 months for the assault charge and 60 months for the firearm enhancement, resulting in 183 months of total confinement; and (2) 36 months community custody for the assault charge, a condition of which required Cantrell to "participate in crime-related treatment or counseling services." CP at 128. Cantrell appeals his conviction and sentence.

ANALYSIS

I. Prosecutorial Misconduct

Cantrell argues that the State committed prosecutorial misconduct by (1) misstating the law and implying that he had a duty to retreat before engaging in self-defense; and (2) appealing to the jury's passions and prejudices by referring to Cantrell's statement to Thompson as, "I hope that nigga chokes on his blood and dies." Br. of Appellant at 30; VI VRP at 837. He also argues that the "cumulative effect of the [prosecutor's] misconduct prevented the jury from fairly and impartially evaluating [Cantrell's self-defense claim]." Br. of Appellant at 32. These arguments fail.

A. Standard of Review

A prosecutor has wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury. *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003). A defendant claiming prosecutorial misconduct bears the burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008); *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). A prosecutor's improper comments are prejudicial "only where 'there is a *substantial likelihood* the misconduct affected the jury's verdict.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

We evaluate the prejudicial effect of a prosecutor's improper comments by looking at the comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Brown*, 132 Wn.2d at 561. Where, as here, a defendant fails to object and to request a curative instruction at trial, the defendant waives his prosecutorial misconduct claim unless the comment "was so flagrant [and] ill-intentioned that an instruction could not have cured the prejudice." *State v. Corbett*, 158 Wn. App. 576, 594, 242 P.3d 52 (2010) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995)). Cantrell fails to carry his burden here.

B. Alleged Improper Conduct

1. Misstatement of law on duty to retreat

Cantrell first contends that the prosecutor misstated the law of self-defense and committed flagrant misconduct by "repeatedly indicat[ing]" that Cantrell had a duty to retreat to his nearby home or to warn before firing his weapon. Br. of Appellant at 23. Even assuming, without deciding,[4] that such argument was error, it was harmless.

Viewed in the context of the prosecutor's entire argument, the issues in the case, the evidence at trial, and the jury instructions, the prosecutor's passing comments about Cantrell's not leaving the party and not firing a warning shot did not prejudice Cantrell. Cantrell neither objected below nor requested a curative instruction. On appeal, he has not demonstrated that this alleged misconduct was "so flagrant [and] ill-intentioned that an instruction could not have cured the prejudice." *Corbett*, 158 Wn. App. at 594.

On the contrary, the trial court's instructions specifically informed the jury that Cantrell had no duty to retreat and that it should not consider retreat as a "'reasonably effective'" alternative to his use of force. CP at 80. The prosecutor repeated this instruction to the jury during closing argument, undercutting any claim that the alleged misconduct was flagrant and ill-intentioned. *State v. Asaeli*, 150 Wn. App. 543, 597, 208 P.3d 1136 (2009) (prosecutor's no-

[4] Instead of "repeatedly" making these statements, the prosecutor made these comments only twice. Washington law is well settled that "there is no duty to retreat when a person is assaulted in a place where he or she has a right to be." *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Here, it is undisputed that Cantrell had a right to be at the party when he assaulted Ortiz, so Cantrell did not have a duty to retreat before acting in self-defense. The record also shows that despite the two comments about which Cantrell complains, the prosecutor directly and emphatically informed the jury that Cantrell had no duty to retreat.

duty-to-retreat clarification cured any potential earlier error). Furthermore, "[t]he jury is presumed to follow the instructions of the court." *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

2. No appeal to jury's passions and prejudices

Cantrell next argues that the prosecutor appealed to the jury's passions and prejudices when he ended his closing argument by referring to Cantrell's statement to Thompson shortly after the shooting: "I hope that *nigga* [Ortiz] chokes on his blood and dies." VI VRP at 837 (emphasis added). Cantrell contends that, by repeating this quote from Thompson's testimony, the prosecutor emphasized Cantrell's use of the word "nigga"—a racially charged phrase—and thereby enticed the jury to decide the case based on emotion and disgust for Cantrell. Br. of Appellant at 30. We disagree.

A prosecutor has wide latitude in closing argument "*to argue the facts in evidence* and reasonable inferences" to the jury. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985) (emphasis added). "When counsel does no more than argue facts in evidence and suggest reasonable inferences from that evidence, there is no misconduct." *State v. Clapp*, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), *review denied*, 121 Wn.2d 1020 (1993). Here, Thompson had already testified, without objection, that Cantrell had told her shortly after that shooting that he was "mad," that he "hoped that he [Ortiz] would choke on his blood and die," and that Cantrell had called Ortiz a "[n]igga" when he made this statement. IV VRP at 603, 605, 630. The prosecutor's closing argument, therefore, simply pointed out facts that were already in evidence and made a reasonable argument based on those facts—i.e., that the jury could infer from

Cantrell's statements that he was mad and that he had intentionally shot Ortiz because Ortiz had disrespected him by calling him a "b*tch." VI VRP at 837. In so doing, the prosecutor did not inject racial bias or prejudice into the case, but simply made an argument based on the witnesses' previous testimony. Because Cantrell has not shown that the prosecutor's closing argument statements were improper and/or prejudicial, his prosecutorial misconduct and cumulative error[5] arguments fail.

II. Effective Assistance of Counsel

In a related argument, Cantrell contends that his counsel provided ineffective assistance by failing to object to the prosecutor's misconduct or to request a curative jury instruction. He does not meet his burden to show ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873-74, 16 P.3d 601 (2001). To prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A petitioner's failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). As we have just held, the prosecutor's closing argument comments were not improper. Therefore, counsel's failure to object to closing argument was not deficient

[5] The cumulative error doctrine applies only when several trial errors occurred, none of which alone warrants reversal, but the combined errors effectively denied the defendant his right to a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). Because we find no single instance of prosecutorial misconduct, there can be no cumulative error predicated thereon.

performance. Cantrell's ineffective assistance of counsel claim fails.

III. Community Custody Condition

Cantrell contends that we should strike his community custody condition requiring that he "'participate in crime-related treatment or counseling services.'"[6] He argues that the condition is unconstitutionally vague and violates due process because it fails to define the prohibited conduct and to provide ascertainable standards for enforcement. The State responds that (1) Cantrell's vagueness challenge is not ripe for review because it requires further factual development; and (2) RCW 9.94A.703(3)(c), the statutory provision authorizing crime-related treatment or counseling services conditions, is not vague. We agree with the State.

A. Standard of Review

We review vagueness challenges to community custody sentencing conditions under an abuse of discretion standard. *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). If a community custody condition is unconstitutionally vague, it is "manifestly unreasonable" and void for vagueness. *Sanchez Valencia*, 169 Wn.2d at 793, 795. Washington courts allow a defendant to assert a pre-enforcement vagueness challenge to a sentencing condition if the challenge is sufficiently ripe. *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Before addressing the merits of Cantrell's vagueness challenge, therefore, we must first assess whether his pre-enforcement challenge is ripe for review. We hold that his challenge is not ripe.

B. Ripeness

A pre-enforcement challenge to a community custody condition is ripe for review "'if the

[6] Br. of Appellant at 35 (quoting CP at 128).

issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *Sanchez Valencia*, 169 Wn.2d at 786 (internal quotation marks omitted) (quoting *Bahl*, 164 Wn.2d at 751).[7] Cantrell fails to meet the first and second prongs of this ripeness test.

1. Legal prong

Although "[i]n many cases, vagueness questions will be amenable to resolution as questions of law," *Bahl*, 164 Wn.2d at 752, such is not the case here. To decide if a community custody condition raises a "primarily legal" issue, we look to whether the passage of time would sufficiently clarify the condition or whether the defendant would have to discover the meaning of his condition under the continual threat of re-imprisonment in sequential hearings before the court. *See Sanchez Valencia*, 169 Wn.2d at 788. Unlike the defendants in *Bahl* and *Sanchez Valencia*, who had challenged finite conditions restricting their possession of "pornographic materials"[8] and "paraphernalia that can be used for the ingestion or possessing of controlled substances,"[9] respectively, the passage of time will more than likely clarify any ambiguities in Cantrell's community custody condition.

Cantrell appears to argue that his community custody condition is vague because he does not know what specific "crime-related treatment or counseling services" will be required some

[7] "The court must also consider 'the hardship to the parties of withholding court consideration.'" *Sanchez Valencia*, 169 Wn.2d at 786 (internal quotation marks omitted) (quoting *Bahl*, 164 Wn.2d at 751).

[8] *Bahl*, 164 Wn.2d at 743.

[9] *Sanchez Valencia*, 169 Wn.2d at 785 (internal quotation marks omitted).

183 months in the future after he completes the confinement portion of his sentence. Not even the trial court could have known these facts at the time of sentencing because Cantrell's treatment and counseling needs may change between his past sentencing date and his future release date. Because the specifics of Cantrell's community custody condition must necessarily be defined at a future date based on his then-existing treatment and counseling needs, Cantrell fails to show that the issues involved in his pre-enforcement challenge to this condition are primarily legal.

2. Factual prong

To assess whether a pre-enforcement community custody condition challenge requires further factual development, we must determine whether the condition places an "*immediate restriction* on the [defendant's] conduct, *without the necessity that the State take any action*," or whether its validity depends on the circumstances involved in its attempted enforcement. *Sanchez Valencia*, 169 Wn.2d at 789 (emphasis added). For example, a condition requiring a defendant to pay financial obligations requires further factual development because it is dependent on whether or not the defendant is able to pay in the future when the State attempts to sanction him for failure to pay. *See Sanchez Valencia*, 169 Wn.2d at 789 (citing *State v. Ziegenfuss*, 118 Wn. App. 110, 113-15, 74 P.3d 1205 (2003)). Similarly, Cantrell's pre-enforcement challenge requires further factual development in the future because his post-release treatment and counseling needs, if any, could not be assessed at the time of his sentencing.

We hold that Cantrell's pre-enforcement vagueness challenge is not ripe for review. Accordingly, we do not address the merits of his vagueness challenge.

IV. SAG: Inferior-Degree Instruction

In his SAG, Cantrell asserts that the trial court erred in denying his counsel's request for an inferior-degree second degree assault instruction. Again, we disagree.

A trial court's refusal to give a requested instruction, when based on the facts of the case, is a matter of discretion, which we will not disturb on review except on a clear showing of abuse of discretion.[10] A defendant is entitled to an inferior-degree offense instruction 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.'" *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). Our case law is clear that the second degree assault instruction satisfied the first two elements of this test; both the first degree and second degree assault statutes proscribe but one offense: assault. *Peterson*, 133 Wn.2d at 892. Second degree assault is also a lesser degree of first degree assault. Therefore, we concentrate our analysis on this test's third prong.

To satisfy the third prong, "the evidence must raise an inference that *only* the . . . inferior degree offense was committed to the exclusion of the charged offense." *Fernandez-Medina*, 141 Wn.2d at 455. A trial court should give an inferior-degree instruction if the evidence would

[10] *State v. Bosio*, 107 Wn. App. 462, 464-65, 27 P.3d 636 (2001) (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, 947 P.2d 700 (1997)).

permit a rational jury to find a defendant guilty of the inferior-degree offense and acquit him of the greater. *Fernandez-Medina*, 141 Wn.2d at 456. But to make this showing, the evidence must "affirmatively establish the defendant's theory [for the inferior-degree offense]"; it is not enough for the defendant to rely on the mere *possibility* that the jury could disbelieve the State's evidence. *Fernandez-Medina*, 141 Wn.2d at 456; *State v. Ortiz*, 119 Wn.2d 294, 313, 831 P.2d 1060 (1992).

Cantrell asked the trial court to instruct the jury on the inferior-degree offense of second degree assault, specifically RCW 9A.36.021(1)(a) and (c),[11] which provide:

> (1) A person is guilty of assault in the second degree if he or she, *under circumstances not amounting to assault in the first degree*:
>
> (a) Intentionally assaults another and thereby recklessly *inflicts substantial bodily harm*; or
>
> . . . .
>
> (c) Assaults another with a deadly weapon.

(Emphasis added). The evidence, however, does not raise an inference that Cantrell committed *only* second degree assault, which a person can commit only "under circumstances not amounting to assault in the first degree." RCW 9A.36.021(1). Cantrell inflicted great bodily harm on Ortiz, who now suffers from paraplegia and would have died without immediate medical treatment; this infliction of great bodily harm is an element exclusive to first degree assault, precluding an inference that Cantrell committed only second degree assault.[12] Therefore, we hold that the trial

[11] The Legislature amended this statute in 2011 to add a new statutory provision, but this amendment does not affect the issues in this case.

[12] *See* RCW 9A.36.011, RCW 9A.36.021, RCW 9A.36.031, RCW 9A.36.041. Although the Legislature amended RCW 9A.36.021 and RCW 9A.36.031 in 2011, these amendments do not affect the issues in this case.

court did not abuse its discretion in denying Cantrell's request for second-degree assault instruction.

We affirm Cantrell's conviction and sentence.

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.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.