IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29364-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CEDRIC E. BURTON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — This appeal follows a conviction for second degree assault. The State alleged and showed that the defendant here tried to run over his victim in a parking lot. The court refused to instruct the jury on fourth degree assault after it concluded that the necessary factual predicate was missing. Specifically, the court concluded that the defendant either committed the assault with a deadly weapon (a car) or he did not commit the assault at all. But there was no possibility that he committed any assault without the deadly weapon (the necessary factual predicate for fourth degree assault). The trial judge was correct and we therefore affirm the conviction for second degree assault.

FACTS

Cedric E. Burton and his cousin, Charles W. Jackson, left a nightclub in downtown Spokane, Washington, in the early morning hours of November 22, 2009. They walked through a nearby parking lot to their car. The lot was crowded with people, also walking to their cars. Mr. Burton started his car and began to back out of the parking space. His windows were fogged up, which obscured his rear view. Someone smacked the back of the car and yelled, "Watch the f--- where you are going." Report of Proceedings (RP) at 142. Mr. Burton hit his brakes and got out of the car. Mr. Jackson also got out of the car.

Jacob Schreiber and Michael Ryan stood behind the car. Both had also just left a nearby nightclub and were intoxicated. Mr. Ryan's uncle, Bradley Hollibaugh, saw the confrontation and approached the group. Mr. Hollibaugh is a professional body builder and trainer. He had been drinking that night with Mr. Schreiber and Mr. Ryan. Mr. Hollibaugh told Mr. Burton and Mr. Jackson to watch where they were going and to get back into the car. Mr. Burton and Mr. Jackson got back in the car. Mr. Burton then slowly drove through the parking lot, revving the engine and exchanging verbal insults with Mr. Hollibaugh through the driver's-side window. At one point, Mr. Hollibaugh moved toward the car, hit the side window with his hand, and kicked the car. Mr. Burton

hit the gas pedal on the car at least two different times.

Eye witness accounts varied on whether Mr. Burton tried to navigate through the parking lot to an exit, or instead tried to follow Mr. Hollibaugh through the parking lot to drive into him. Mr. Burton testified that he was afraid and was trying to get away from Mr. Hollibaugh. Mr. Hollibaugh testified that Mr. Burton had gunned the car engine as he "tried to line up on me." RP at 85.

Mr. Burton was arrested for second degree assault. He was later charged with two counts of attempted murder in the first degree, or in the alternative first degree assault. The first count was based on the initial incident where he backed the car out of the parking space and almost hit Mr. Schreiber, and the second count was based on his use of the car to attempt to hit Mr. Hollibaugh.

Mr. Burton requested an instruction on fourth degree assault. The judge refused to instruct on fourth degree assault but did instruct on second degree assault. The judge concluded that the use of a deadly weapon (the car) eliminated the necessary factual predicate for fourth degree assault:

> It is not as if the defense took the position, Yeah, I committed an assault, but I wasn't trying to do so with a deadly weapon or in a manner to injure anybody. That is not the way the evidence came in.

RP at 175.

The jury found Mr. Burton guilty of second degree assault of Mr. Hollibaugh but acquitted him of the attempted murder and first degree assault charges of Mr. Hollibaugh and Mr. Schreiber. The court sentenced Mr. Burton to 63 months in jail and 18 months of community custody. As a condition of community custody, the court ordered:

> [T]he defendant shall not wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle.

Clerk's Papers (CP) at 129.

DISCUSSION

Fourth Degree Assault Instruction

Mr. Burton contends that he was entitled to an instruction on an inferior degree offense—fourth degree assault. The contention presents a question of law that we will review de novo. *State v. Fernandez-Medina*, 141 Wn.2d 448, 452-54, 6 P.3d 1150 (2000) (reviewing the same question as a question of law de novo).

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) the evidence supports a finding that the defendant committed only the inferior offense. *Id.* at 454.

The legal prong of this test was satisfied here. The assault statutes proscribe the

single offense of assault, and fourth degree assault is an inferior degree offense of first and second degree assault. *See* RCW 9A.36.011, .021, .041; *see also Fernandez-Medina*, 141 Wn.2d at 455.

Mr. Burton also had to show that he committed *only* fourth degree assault to be entitled to an instruction on fourth degree assault. *Fernandez-Medina*, 141 Wn.2d at 461. Mr. Burton committed fourth degree assault if, under circumstances not amounting to first, second, or third degree assault, he assaulted another. RCW 9A.36.041(1). He committed first degree assault if, with intent to inflict great bodily harm, he intentionally assaults another with a deadly weapon. RCW 9A.36.011(1)(a). He committed second degree assault if, under circumstances not amounting to first degree assault, he intentionally assaulted another with a deadly weapon. RCW 9A.36.021(1)(c); RCW 9A.04.110(6) (a car is a deadly weapon). The factual prong is then satisfied, and Mr. Burton is entitled to a fourth degree assault instruction if, considering all the evidence, the record supports an inference that he committed an assault that did not involve a deadly weapon. The record here does not support such an inference.

The assault charge was based on the State's allegation and proof that Mr. Burton used his car to assault Mr. Hollibaugh. Mr. Burton followed Mr. Hollibaugh in his car for some time and gunned the gas pedal on at least two occasions. One witness testified:

> Q. That is exactly what they did [left the parking lot]?

> A. No. They did not get in the car and leave. They followed [Mr. Hollibaugh] around.

RP at 57. Another witness testified:

> Q. You specifically remember the blue car trying to hit your uncle?
> A. Yes. Two kids in a blue car.

RP at 66. Mr. Hollibaugh testified:

> Q. At that point, did you think you were going to be hit [by the car]?
> A. Yeah. When I jumped out of the way. Like I said, I was worried for the safety of me and my family, my fiancée and my family members right in front of me. So if he would have hit me, he probably would have hit them too.

RP at 85. That evidence is proof of at least second degree assault with a deadly weapon (the car). But the evidence does not show that Mr. Burton committed *only* fourth degree assault. *Fernandez-Medina*, 141 Wn.2d at 461. Indeed, there was no showing that Mr. Burton assaulted Mr. Hollibaugh with anything other than his car. So, regardless of whether Mr. Burton intended to hit Mr. Hollibaugh or not, he could not commit fourth degree assault because he used his car. *See* WPIC[1] 35.50 (Assault is "an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury."). Mr. Burton either

[1] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC).

committed first degree assault, second degree assault, or nothing at all when we view the evidence here in a light most favorable to him.

The trial court, then, properly denied his request for a fourth degree assault instruction.

Community Custody Condition

The court ordered that Mr. Burton refrain from wearing or displaying gang-related materials as a condition of community custody. Mr. Burton argues that there is no evidence that the crime involved gang-related activities, motives, or lifestyle. The State agrees. And we therefore reverse the imposition of that condition.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

Right to Speedy Trial

Mr. Burton contends that the trial court violated his right to a speedy trial. A trial court's decision to grant a continuance under CrR 3.3 will not be disturbed absent a showing of manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990).

Mr. Burton's argument is conclusory and he shows no prejudice, in any event. We cannot tell anything from this record regarding the continuances. All we know is that on March 4, 2010, the State requested a continuance because of the "witnesses'

unavailability due to vacations or medical leave." CP at 14. And on June 4, 2010, the State again requested a continuance because of "[s]cheduled vacations, trials, and unforeseen circumstances." CP at 25. Mr. Burton argues: "To require Mr. Burton to request a continuance under these circumstances would be to present him with a Hobson's choice: He must either sacrifice his right to a speedy trial or right to be represented by counsel who had sufficient opportunity to prepare a defense." SAG at 3. That is not helpful. We reject the assignment of error.

Ineffective Assistance

Mr. Burton next asserts that his lawyer was ineffective because he presented a self-defense but failed to request a self-defense instruction.

"To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Counsel's representation is presumed reasonable, and all major decisions by counsel are presumed to be an exercise of reasonable judgment. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Mr. Burton contends that there was no strategic reason not to request self-defense instructions, particularly when his counsel basically argued a self-defense theory. Defense counsel's performance is not deficient when he does not request jury instructions

that are unsupported by the evidence. *See State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). The evidence did not show that Mr. Burton acted in self-defense. There is simply no factual support for the notion that Mr. Hollibaugh attempted to injure Mr. Burton after he walked away from the conflict and toward his own car. In fact, the evidence may have shown that Mr. Burton was the initial aggressor when he initially got out of his car and confronted Mr. Schreiber and Mr. Ryan. Mr. Burton's counsel was not then obligated to request jury instructions on self-defense.

We affirm Mr. Burton's conviction for second degree assault and strike the community custody condition relating to gang lifestyle.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Korsmo, A.C.J.

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Siddoway, J.