No. 32091-0

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROGELIO RODRIGUEZ, Appellant

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

THE HONORABLE JUDGE VANDERSCHOOR

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENT OF ERRORS

A. The trial court violated Art. IV §16 of the Washington Constitution when it impermissibly commented on the evidence.

B. The trial court erred when it denied the defense request for a jury instruction on a lesser- included offense of display of a weapon.

Issue Related To Assignment of Error

1. Did the trial court impermissibly comment on the evidence when it affirmatively answered a jury question, thus establishing one of the elements of the charged crime?

2. Did the trial court err when it denied a request for a jury instruction on the lesser included offense of display of a weapon?

II. STATEMENT OF FACTS

Rogelio Rodriguez was charged by second amended information with second degree assault while armed with a firearm, unlawful possession of a firearm, second degree; possession of stolen property second degree; taking a motor vehicle without permission, second degree; unlawful possession of a short-barreled

shotgun or rifle; and, driving under the influence. CP 118-120. The matter proceeded to a jury trial. (10/30/13 RP 23).

On June 6, 2013 in the early evening, homeowner Patricia Montes-Deoca noticed a silver car come onto her 5-acre property. (10/30/13 RP 27). The vehicle came close to her chicken coop, and then burned rubber as it used the turn around. She went up to the car and asked if the driver and passenger needed something. The driver sped away. (10/30/13 RP 28). She saw the car go to the property next door, and the female passenger tried to open the gate to the property. She was unable to open it and the driver used the car to knock down the gate. (10/30/13 RP 29). Ms. Montes-Deoca called the police and her husband telephoned the neighboring property owner. (10/30/13 RP 29).

The property owner, Jesus Arteaga, testified that he arrived within five minutes of the phone call. (10/30/13 RP 38). He saw the silver car high-centered in the sand, and the female passenger walking away from it. (10/30/13 RP 39; 40-41). Mr. Rodriguez remained in the car, with the music turned up; Mr. Argeaga heard him yelling, and saw him poke his head in and out of the open sunroof. (10/30/13 RP 41;44).

When the officer arrived, he and Mr. Arteaga walked toward the car. They heard Mr. Rodriguez yelling and cussing. (10/30/13 RP 43). Mr. Arteaga testified he heard the deputy say he "thought he saw a gun" and ordered him to stay back. Mr. Arteaga did not see a gun. (10/30/13 RP 44;51).

Deputy Rapp stated that as he approached the silver car, Mr. Rodriguez popped out of the sunroof and "pointed something silver" at him say "Get the F---back" and "shoot me M-f-er, shoot me. (10/30/13 RP 68; 10/31/13 RP 113-114). He said that the item was not "gripped" but rather, "actually held on the top of the hand." (10/30/13 RP 89). The deputy testified he did not know if the silver object was a gun, but it intimidated him and warranted alarm for his safety. (10/30/13 RP 88-89; 10/31/13 RP 113;136-137). He stated that his testimony, that Mr. Rodriguez pointed a gun at him, was based on what he later believed happened, not what he observed at the time. (10/31/13 RP 128).

Sergeant Pfeiffer, who arrived minutes after Deputy Rapp, reported that when Deputy Rapp told him Mr. Rodriguez had a shiny object, it caused him to be fearful and warranted alarm for his safety also. Sgt. Pfeiffer did not see a gun. (10/31/13 RP 206).

Despite the deputy telling Mr. Rodriguez to show his hands, Mr. Rodriguez continued to bounce around inside of the car, turning on the lights, windshield wipers, raising the stereo volume, and yelling cuss words. (10/30/13 RP 68)-69. The officers planned to distract Mr. Rodriguez and shoot pepper spray inside of the vehicle. However, Mr. Rodriguez rolled up the windows and locked the doors. (10/30/13 RP 71).

After the attempt to distract Mr. Rodriguez, Deputy Rapp approached the car and unsuccessfully tried to kick in the window. Mr. Rodriguez quickly opened the driver's door, and ran about a half of a mile, jumping over a four -foot high fence. (10/30/13 RP 71-73). The officers pursued and tackled him, and pepper sprayed his face to subdue him. (10/30/13 RP 73-74). He was reportedly cussing, kicking, singing, and profusely sweating. (10/30/13 RP 75). Officer Rapp believed Mr. Rodriguez was under the influence of a drug and obtained search warrants for both a blood draw and the vehicle. (10/30/13 RP 78;83).

Search of the vehicle yielded recovery of a silver barrel in the cup holder. Another barrel attached to a center trigger piece, along with a firing pin were located in the backseat in an unzipped bag.

(10/30/13 RP 85;91-92). The zipgun was unloaded. (10/30/13 RP 86).

The results of the blood test drug screen flagged positive for amphetamine and methamphetamine. (10/31/13 RP 226). The forensic toxicologist testified that the type of drugs found in Mr. Rodriguez's system could cause his earlier abnormal behaviors. (10/31/13 RP 235).

Several days later Deputy Rapp questioned Mr. Rodriguez at the jail. (10/31/13 RP 120). He asked the deputy if he knew what drugs had been in his system, as he remembered drinking a Pepsi and believed it had been laced with something. (10/30/13 RP 98). Mr. Rodriguez told the deputy that he had been drugged and had difficulty remembering much about the night he was arrested. (10/31/13 RP 120).

Sean Guajardo from the Benton Franklin Juvenile Justice Center testified that Mr. Rodriguez had been adjudicated as guilty in a juvenile case for malicious mischief, second degree, referring to it as a felony conviction. (10/31/13 RP 207;209).

Dr. Grant from Eastern State Hospital (ESH), and Dr. Stephen Rubin both testified they conducted a diminished capacity evaluation for Mr. Rodriguez. (10/31/13 RP 241; 257). Dr. Grant

concluded that Mr. Rodriguez was impaired by drugs at the time of the alleged crimes; he opined that Mr. Rodriguez was capable of forming the intent to take the car, drive the car, and flee from the officers. (11/1/13 RP 10-13). However, he did not know if Mr. Rodriguez intended to harm or intimidate the officer. (11/1/13 RP 28;32).

Dr. Rubin concluded that Mr. Rodriguez was able to form intent, and he did not believe Mr. Rodriguez intended to harm the Deputy Rapp. (10/31/13 RP 281) He stated that it was more likely that Mr. Rodriguez intended to be harmed by the deputy, evidenced by his statement, "go ahead and shoot me". He opined that Mr. Rodriguez was more interested in scaring off the police officer so he could escape, than in harming the officer. (10/31/13 RP 281-82;292;306).

Defense counsel requested jury instructions on display of a weapon as a lesser- included offense of second degree assault. (11/1/13 RP 44). The court initially agreed to include the instruction, but later changed its mind, reasoning that the evidence did not affirmatively establish Mr. Rodriguez's theory of the case. (11/1/13 RP 48).

The court gave Jury Instruction No. 16:

> A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly has a firearm in his or her possession or control and he or she has previously been adjudicated guilty as a juvenile of a felony. CP 44.

And Instruction No. 18:

> To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 5, 2013, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control;
>
> (2) That the defendant had previously been adjudicated guilty as a juvenile of a felony; and
>
> (3) That the ownership or possession or control of the firearm occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
>
> CP 46.

Although not recorded in the verbatim record, at some point during the jury deliberations, the jury submitted the following inquiry:

> "Was Rogelio convicted of a felony as a juvenile? The report does not explicitly say the charges were considered a felony."

The Court's written response was: "Yes." CP 24.

Mr. Rodriguez was convicted on all counts. CP 8-9. He makes this timely appeal. CP 6-7.

III. ARGUMENT

A. The Court Impermissibly Commented On The Evidence Thereby Violating Mr. Rodriguez's Constitutional Rights Under Article IV, § 16 Of The Washington Constitution.

A judge is constitutionally prohibited from instructing the jury that matters of fact have been established as a matter of law. Wash. Const. Art. IV § 16. *State v. Primrose,* 32 Wn.App. 1, 3, 645 P.2d 714 (1982). Because the Washington Constitution expressly prohibits a comment on the evidence, it may be raised for the first time on appeal. The failure to object at the trial level is not a prohibition to appellate review. RAP 2.5(a)(3); *State v. Lampshire,* 74 Wn.2d 888, 893, 447 P.2d 727 (1968); *State v. Bogner,* 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

Mr. Rodriguez pleaded not guilty to each of the charges against him. The jury was instructed that plea put in issue every element of each crime charged. CP 30. In a pre-trial motion hearing, the State informed the court that it intended to offer a prior conviction to prove an element of the charged crime of unlawful possession of a firearm, second degree. The Court responded,

"You have to do that " to which the State responded, "Right." (10/30/13 RP 18). The "to convict" jury instruction required that to find him guilty of unlawful possession of a firearm, the jury must conclude beyond a reasonable doubt that Mr. Rodriguez had been previously been adjudicated as a juvenile of a felony crime. CP 46.

During deliberations, the jury sent a written question to the court:

> "Was Rogelio convicted of a felony as a juvenile? The report does not explicitly say the charges were considered a felony." CP 24.

Rather than referring the jury back to the court's instructions and to use their notes and collective memory to resolve the factual issue, the court instead answered the question in the affirmative. CP 24. The trial court's answer could only be understood by the jury as indicating that the State had already proven that element.

An instruction improperly comments on the evidence if it resolves a disputed issue that should have been left to the jury. *State v. Becker* 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). In *Levy,* the appellant argued that the trial court violated the prohibition on judicial comment when it gave a jury instruction regarding possession of a deadly weapon, "to wit: a .38 revolver or

a crowbar…you must unanimously agree as to which deadly weapon or deadly weapons, (a .38 revolver or a crowbar), he possessed. *State v. Levy,* 156 Wn.2d 709, 717, 132 P.3d 1076 (2006). On review, the Court noted that a crowbar only qualifies as a deadly weapon under particular circumstances, thus the State was required to prove the crowbar was used in a manner consistent with those circumstances. *Levy,* 156 Wn.2d at 722. The Court concluded that the reference to the crowbar as a deadly weapon was likely a judicial comment because the jury was no longer required to consider whether the State proved that its use caused it to be qualified as a deadly weapon. *Id.*

Similarly, here the court's undisguised directive as to the element of previous adjudication of a felony was a judicial comment: the jury was no longer required to consider whether the State proved that particular element.

A judicial comment on the evidence is presumed prejudicial, and the State bears the burden of showing that the jury's decision was not influenced, *even where the evidence is undisputed or overwhelming. Bogner,* 62 Wn.2d at 252. (Emphasis added). A judicial comment is only *not* prejudicial if the record affirmatively shows *no* prejudice could have resulted. *Levy* 156 Wn.2d at 725.

The fundamental question underlying analysis of judicial comments "is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true." *Levy,* 156 Wn.2d at 726. Here, the court explicitly stated in writing that the prior conviction was a fact, proving the State's case.

The stated purpose of Article IV, § 16 "is to prevent the jury from unduly being influenced by knowledge conveyed to it by the court of its opinion regarding the credibility weight, or sufficiency of the evidence." *State v. Sivins,* 138 Wn.App. 52, 58, 155 P.3d 982 (2007)(internal citations omitted). It is presumed that juries follow all instructions given. *State v. Stein,* 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Assuming the jury followed the court's instruction here, that a factual issue had been established, the court's written comment clearly unduly influenced the jury; the jury note made it clear the jury had not found that element. This was an impermissible comment on the evidence in violation of the stated purpose of Article IV, § 16.

Moreover, the error was not cured by the admonishment to the jury given in instruction number 1[1]. The court directly and

[1] (in pertinent part): "The state constitution prohibits a trial judge from making a comment on the evidence. It would be

expressly informed them that in addition to the jury instructions, it was an established fact that Mr. Rodriguez had been adjudicated guilty of a felony as a juvenile.

In *Levy,* the Court concluded the written 'to-wit' instruction regarding the deadly weapon was an impermissible comment on the evidence. However, because the jury found that Levy did not *possess* the crowbar, he could not have been prejudiced even if the jury had improperly concluded that the crowbar was a deadly weapon. *Levy,* 156 Wn.2d at 726. Further, the Court found the court's comment on the evidence harmless because it did not relieve the jury of determining all of the elements of the offense. *Id.* at 727.

By contrast, in this case the trial court relieved the jury from finding that Mr. Rodriguez had been previously adjudicated guilty of a felony. In *Becker,* the Court noted that *whether or not the State had produced sufficient evidence was not the issue and did not cure the error*. *Becker,* 132 Wn.2d at 65. (Emphasis added).

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improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely." CP 28.

Here, the judicial comment is presumptively prejudicial. The record shows that the jury had not found the necessary element of a prior conviction. The court conveyed that an element of the crime had been proven as a matter of law. Mr. Rodriguez is entitled to a reversal of his conviction for unlawful possession of a firearm. *Becker,* 132 Wn.2d at 65.

B. The Court Erred When It Denied The Defense Request For An Instruction On Display Of A Weapon.

A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. *State v. Prado,* 144 Wn.App. 227, 241, 181 P.3d 901 (2008). A jury must be fully instructed on the law and a defendant is entitled to an instruction on a lesser-included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that the defendant committed the lesser crime. *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Berlin,* 133 Wn.2d 541, 547-49, 947 P.2d 700 (1997); *Prado,* 144 Wn.App. at 241. If these two requirements are satisfied, "a lesser included offense instruction is required as a matter of right." *In re Personal Restraint of Crace,* 157 Wn.App. 81,

106, 236 P.3d 924 (2010). Where a trial court determines that the factual prong of the test is not satisfied, it is generally reviewed for abuse of discretion. *State v. LaPlant,* 157 Wn.App. 685,687, 239 P.3d 366 (2010).

To convict Mr. Rodriguez of second-degree assault, the State was required to prove that Mr. Rodriguez assaulted Deputy Rapp with the specific intent to create reasonable fear and apprehension of bodily injury. RCW 9A.36.021(1). To convict Mr. Rodriguez of the misdemeanor offense of unlawful display of a weapon, the jury must find the defendant displayed a weapon in a manner manifesting intent to intimidate another or warranting alarm for another's safety. RCW 9.41.270(1). As charged and prosecuted here, the legal prong the *Workman* test was met: each of the elements of the lesser crime are a necessary element of the greater offense. *State v. Ward,* 125 Wn. App. 243, 248, 104 P.3d 670 (2004), abrogated on other grounds, *State v. Grier,* 171 Wn.2d 17, 246 P.3d 1260 (2011).

The second prong of the *Workman* test, the factual prong is satisfied when substantial evidence in the record supports a rational inference that the defendant committed only the lesser

included offense, to the exclusion of the greater offense. *State v*. *Fernandez-Medina,* 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

Here, substantial evidence affirmatively established Mr. Rodriguez's theory on the lesser-included offense. Deputy Rapp testified that he saw Mr. Rodriguez point something silver at him and he did not know until later that it was the barrel of a zip gun. In his report he wrote, "could be a handgun." (10/31/13 RP 128). He also testified that when he saw the silver object he was intimidated, took cover, and it warranted alarm for his own safety. (10/31/13 RP 136-37). Sgt. Pfeiffer testified that the deputy told him that Mr. Rodriguez *displayed* a shiny object. (10/31/13 RP 199-200). Sgt. Pfeiffer also testified that information caused him to concerned or warrant alarm for his own safety. (10/31/13 RP 206).

The defense expert, Dr. Rubin, concluded that it was more likely that Mr. Rodriguez was intent on scaring off the police officers so he could escape, rather than intending to harm them. Displaying a shiny object that could be construed as a gun had the initial effect of causing the officers to back away from the car.

In *Fowler,* a road rage case, the victim testified that Fowler got out of his car, pulled out a handgun, and pointed the gun at him. The victim's wife corroborated the testimony. *State v. Fowler,* 114

Wn.2d 59, 61, 785 P.2d 808 (1990) *overruled on other grounds by* State *v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). At trial, the defendant offered no evidence that would support a theory he only intended to intimidate the victims or that he displayed his gun in a manner which would cause them alarm. Rather, the testimony of the defendant addressed whether he even had a gun, and if he did, whether it would have been visible to the victims when he began to remove his outer clothing. *Fowler,* 114 Wn.2d at 813. The defendant's testimony only served to discredit the victim testimony. The evidence produced at trial was that either he inadvertently revealed the gun or the only other possibility, he pointed the weapon at the victim. *State v. Barker,* 103 Wn.App. 893, 901, 14 P.3d 863 (2000).

The Court held that it was not enough that a jury simply disbelieve the State's evidence. *Fowler,* 114 Wn.2d at 813. Because the evidence presented did not affirmatively establish the defendant's theory on the lesser-included instruction, Fowler was not entitled to such. *Id.* at 814.

By contrast, the Court found the evidence in *Baggett* satisfied the factual prong of the *Workman* analysis. *State v. Baggett,* 103 Wn.App. 564, 13 P.3d 659 (2000). There, Baggett

was discovered by police officers as he leaned out of his car window with a rifle apparently trying to shoot a cat in the street.

When Baggett noticed the patrol car, he ordered his wife to drive away, which she did; but she stopped when the officer activated the siren. *Id.* at 566. Baggett got out of the car with his rifle, and was ordered to drop the weapon. He turned around, holding the rifle at hip level, with the barrel pointing directly at the officer. *Id.* at 567. The officer took cover and continued to order him to drop the weapon. After a series of events, the officer eventually arrested Mr. Baggett. The court found that Mr. Baggett's capacity was sufficiently diminished that he was unable to form the intent necessary to be convicted of second-degree assault. However, the court did find him guilty of unlawful display of a firearm. On review, the court pointed out that Baggett held his rifle with the barrel pointing out rather than up in the air or aimed at the ground. The manner in which he held the rifle warranted alarm for the safety of the officer. *Id.* at 571.

Similarly, here there was substantial evidence that Mr. Rodriguez was impaired by the drugs in his system. He was sweating, kicking, cussing, singing, and bouncing around in the vehicle. When he popped his head out of the sunroof, he displayed

or pointed (but did not "grip") something that caused Deputy Rapp to go for cover and, to be intimidated and alarmed for his own safety. Like *Baggett,* here there was substantial evidence that supported Mr. Rodriguez's theory that he lacked the intent to cause the officers reasonable apprehension of bodily harm. The officers' testimony was substantial evidence to support an inference that he committed only the offense of unlawful display of a firearm. The evidence is viewed in the light most favorable to the party requesting the instruction. *Fernandez-Medina,* 141 Wn.2d at 455-56.

The remedy for failure to give a lesser- included instruction when one is warranted is to set aside the conviction and remand for a new trial. *State v. Ginn,* 128 Wn.App. 872, 878, 117 P.3d 1155 (2005).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rodriguez respectfully asks this Court to reverse his conviction for unlawful possession of a firearm, and set aside his conviction for second degree assault with a deadly weapon, remanding for a new trial on that matter.

Respectfully submitted this 3rd day of September, 2014.

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Certificate of Service

I, Marie Trombley, do hereby certify that on September 3, 2014, I mailed by first class USPS mail, postage prepaid, a copy of the brief of appellant to: Rogelio Rodriguez, DOC # 345218, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and to Shawn P. Sant, Franklin County Prosecutor's Office, 1016 N. 4th Ave, Pasco, WA 99301-3706.

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