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NO. 32091-0-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ROGELIO DELGADO RODRIGUEZ

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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2. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO INSTRUCT THE JURY ON THE OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON?**

B. RESPONSE TO STATEMENT OF THE CASE

The Appellant's Statement of the Case is substantially correct. The State makes the following corrections and amplifications to that record.

As Deputy George Rapp approached the Appellant's vehicle the Appellant popped out of the sun roof and pointed what appeared to be a handgun at the Deputy. Although Rapp could not say with certainty due to the distance, there was not a question in his mind that the Appellant held a firearm and he treated it as such at the time (10/30/13 RP 67). As the Appellant pointed the gun at Rapp, the Appellant yelled, "Get the fuck back." (10/30/13 RP 68). When Rapp served the warrant on the vehicle he found a silver zip gun which looked like the item he saw in the Appellant's hand.

(10/30/13 RP 86). He confirmed that the weapon was the item which had been pointed at him. (10/30/13 RP 88).

At trial, in addition to the testimony of Shawn Guajardo, the State provided a certified copy of a Juvenile Disposition Order showing the Appellant was previously convicted of Malicious Mischief in the Second Degree. (Designation of Exhibits, Exhibit #10). The document listed Malicious Mischief in the Second Degree as a conviction but did not indicate that the charge was a felony. Id.

C. RESPONSE TO ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON A MATTER OF LAW BY INFORMING THEM THAT MALICIOUS MISCHIEF IN THE SECOND DEGREE IS A FELONY.

When looking at the entire written question submitted to the court by the jury, it is clear the jury did not ask the court to resolve a factual issue. The second part of the query clarified the question, stating, "[t]he report does not explicitly say the charges were considered a felony." The jury inquired whether Malicious Mischief in the Second Degree was a felony, not whether the Appellant had actually been convicted of the offense. The trial court correctly clarified a legal matter; it did not resolve *a disputed factual issue*.

The traditional role of a judge in the context of a jury trial is to act as the "arbiter of the law and manager of the trial process." United States v. Evanston, 651 F.3d 1080, 1084 (9th Cir. 2011). The jury's role is to be the finder of fact and check on arbitrary government." Id. The Washington Constitution safeguards this principle by prohibiting judges from commenting on issues of fact. Art. IV § 16. This does not mean that every comment made by the court is considered a comment on the evidence. Appellate courts look at the circumstances and facts of each case to determine whether the court is actually commenting on evidence. State v. Detrick, 55 Wash.App. 501, 778 P.2d 529 (1989).

When examining instructions given to the jury, courts review their legality de novo. State v. Johnson, 152 Wash.App. 924, 935, 219 P.3d 958 (2009). "A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. Id. In this case, the State had offered evidence in the form or testimony and a legal document showing that the Appellant had been convicted of Malicious Mischief in the Second Degree. The State had proven the factual element of the conviction. While it was theoretically possible for the jury to disbelieve the document and the witness,

there is no indication in the record that such a factual issue was contested. Neither party spends time arguing the fact of the conviction during closing argument.

It follows naturally, that because the conviction itself was not in doubt, the only issue the jury might have is whether such a conviction satisfies the requirement of a felony. The question presented to the judge specifically indicates that is the issue. At first glance, the question sounds factual in nature: "Was Rogelio *convicted of a felony* as a juvenile." (Emphasis added). In this case, the second half of the question clarifies: "The report does not explicitly say the charges were considered a felony." The only evidence in the record regarding the prior convictions is a juvenile disposition (the jury refers to it as a report) which cites convictions for Assault in the Fourth Degree and Malicious Mischief in the Second Degree and the testimony of Mr. Guajardo. The disposition form, does not classify whether the convictions cited are felonies. As a result of that, the jurors are asking for clarification on the issue of the legal nature of the Malicious Mischief charge, not on the existence of the conviction. Given the circumstances in this particular case, this is the only reasonable explanation for the wording of the question.

Under RCW 9A.48.080, Malicious Mischief in the Second Degree is a class C felony. The conclusion is a matter of law, and not an issue of fact. When the judge answered "yes," that the Appellant was convicted of a felony, he answered the legal question at issue. This is only possible interpretation of the statute in question. The role of the judge is act as the legal arbiter. In this manner the trial judge answered the legal question, and allowed the jury to concentrate on the factual issues in the case.

In State v. Levy, the Court found the trial court did wrongfully refer to a crowbar as a de facto deadly weapon in its jury instructions. 156 Wash.2d 709, 721-22, 132 P.3d 1076 (2006). A crowbar is a deadly weapon only if it is used a certain manner. Id. at 722. The jury had to decide what manner the weapon had been used in, not the judge. Id. Unlike deciding how a crowbar is used, there is no factual issue or ambiguity in the classification of Malicious Mischief in the Second. The jury need not determine in what circumstances Malicious Mischief in the Second degree is a felony. It is always a felony. The judge correctly clarified a purely legal issue.

The Appellant argues that the judge should have referred the jury back to their instructions and not answered the question. Simply referring a jury back to their previous instructions, and ignoring valid legal questions, is not automatic safe harbor. State v. Tyler, 47 Wash.App 648, 653, 736 P.2d 1090 (1987) overruled on other grounds by State v. Delcambre, 116 Wash.2d 444, 805 P.2d 233 (1991). Nothing in the present instructions specified the nature of a Malicious Mischief in the Second Degree conviction. Referring the jury back to the instructions would have been misleading as nothing in those instructions answered the legal question at hand.

In any event, there was no prejudice to the Appellant because the issue of the conviction was not contested. A juvenile probation counselor confirmed that the Appellant had been under his supervision on a Malicious Mischief in the Second Degree conviction, which is a felony. The Appellant defense to the charge was diminished capacity. He did not attempt to contest the State's evidence of the prior conviction. The Malicious Mischief conviction played a relatively minor role in the proceedings. While the judge's instruction might have speeded up the deliberations, there is no evidence that it had any effect on the outcome.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A LESSER INCLUDED BECAUSE HE COULD NOT SHOW ANY EVIDENCE THAT HE INTENDED ANYTHING OTHER THEN TO CAUSE FEAR AND APPREHENSION OF BODILY INJURY WHEN HE POINTED THE FIREARM AT THE OFFICER WHICH IS ASSAULT IN THE SECOND DEGREE, NOT UNLAWFUL DISPLAY OF A WEAPON.

The jury rejected the Appellant's theory of diminished capacity when it found him guilty of Assault in the Second Degree. Even the Appellant's own expert conceded that he had the capacity to commit Assault in the Second Degree. The record as a whole shows that the Appellant intended to place the approaching officer in fear and apprehension by pointing a firearm at him. The Appellant now asks the appellate court to overlook this record and find that the diminished capacity defense succeeded to the extent that it required a lesser included instruction of Unlawful Display of a weapon. Such a shift is not supported by the law, which requires a rationale inference that the accused committed the lesser offense, to the exclusion of the greater offense. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

RCW 10.61.006 allows the trial court to exercise its discretion in determining if there is a proper legal and factual basis to issue a lesser included instruction. A trial court's decision not to issue a particular jury instruction is reviewed for an abuse of discretion. State v. Prado, 144 Wn.App. 227, 241, 181 P.3d. 901 (2008). The Workman test requires the defendant meet a legal and a factual prong to be entitled to a lesser included instruction. State v. Henderson, 108 Wash.App. 143-44, 138, 321 P.3d 298 (2014). The State concedes that the legal prong of the Workman test is satisfied because each element of the lesser included offense of Unlawful Display of a Weapon is also present in the crime of Assault in the Second Degree. State v. Baggett, 103 Wash.App 564, 569, 13 P.3d 659 (2000).

The second prong of the Workman test requires the evidence presented in the case to support an inference that "only the lesser offense was committed to the exclusion of the charged offense." Henderson at 144 citing State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000). The reviewing court views the evidence that purports to support a lesser included instruction in a light most favorable to the party requesting the lesser included instruction, but the reviewing court reviews the trial's court's

determination of the factual prong using an abuse of discretion standard. Id.

In this instance, the trial court did not abuse its discretion because it acknowledged the difference between an alleged defense, and the actual factual record established during the course of the trial. When considering whether the record actually raises the necessary inference for a lesser included instruction, it is important to take into consideration the reasoning behind the Workman test:

> [t]he purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence... Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

State v. Fernandez-Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000) (citations omitted) (emphasis in original). The Appellant does not specifically deny any elements of the offense of Assault in the Second Degree. His expert speculated that he may have

simply intended to scare the deputy off. This is not a denial of the assault; it is simply an explanation of why he assaulted the deputy.

The key distention between the two crimes can best be evaluated by looking at the elements within the jury instructions. Unlawful Display of a weapon requires that on the day in question the defendant "...displayed a firearm... in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or warranted alarm for the safety of other persons." WPIC 133.41. The Assault charge requires

> "...an act , with unlawful force, 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.

WPIC 35.50. The main distinction between the two charges is the specific intent of the actor. Display of a Weapon can be accomplished by trying to intimidate another with a weapon or by displaying the weapon in a manner which warrants alarm in another. The Assault can only be accomplished by trying to make one fear bodily injury and actually accomplishing that goal.

There is no dispute that the deputy feared bodily harm. His testimony is clear; he was alarmed and took cover. Therefore, the

only way to justify the lesser included to the exclusion of the Assault in the Second Degree would be to show that the evidence allowed one to infer the Appellant had no desire to actually place the deputy in apprehension of bodily harm. There is absolutely no evidence to this effect. The defense expert, Dr. Rubin, opined that the Appellant either wanted to scare off the deputy and escape or wanted the deputy to actually open fire on him. Both of these theories rely on placing the deputy in apprehension of bodily harm.

One could argue the escape theory is more consistent with the surrounding facts. The Appellant did take a number of actions to avoid capture. The final action which was to actually flee the area on foot. In order for the weapon display to aid in his escape, the Appellant had to rely on the deputy actually being placed in apprehension and backing off. This theory then supports and Assault in the Second Degree charge because to believe it, one must accept the element of deliberately placing someone in fear of bodily injury.

The second theory, that the Appellant wanted the deputy to open fire, also supports the charge of Assault in the Second Degree. If the Appellant was actually seeking, "death by cop," as it is often called; he would have needed to place the deputy in actual

fear of death or serious injury, such that the deputy would respond by firing on him. This scenario supports the charge of Assault in the Second Degree because to believe it, one must accept the elements of deliberately placing someone in fear of bodily injury.

In espousing both of these theories, Dr. Rubin steadfastly refused to testify that the Appellant's capacity was diminished to the extent where he could not form intent. He simply speculated the Appellant had not been prepared to actually carry out the threat of shooting at the deputy. The Appellant cannot argue that his diminished capacity defense in any way allowed the jury to infer the lesser offense to the exclusion of the greater offense when all it succeeded in doing was providing a strong motive to commit the greater offense.

D. CONCLUSION

The trial court's rulings in this case reflect an understanding of the trial as it progressed. The issue disputed in the case was diminished capacity. Once it became clear that both experts felt the Appellant had capacity to form intent, his request for a lesser included no longer fit the facts of the case. On the basis of the arguments set forth herein, it is respectfully requested that the

Franklin County Superior Court convictions for Rogelio Delgado-Rodriguez be affirmed.

DATED this 19th day of November, 2014.

SHAWN P. SANT #35535\91039
Prosecuting Attorney for
Franklin County

by: 

Brian V. Hultgrenn, #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 19th day of November, 2014, a copy of the foregoing was delivered to Rogelio Rodriguez #345218, Appellant, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326 by depositing in the mail of the United States

of America a properly stamped and addressed envelope and to Marie Trombley, opposing counsel, marietrombley@comcast.net by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 19th day of November, 2014.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018

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