NO. 47206-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT A. CREECH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COURT
The Honorable Barbara D. Johnson, Judge
Cause No. 14-1-02303-1

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340
(360) 626-0148

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I from the jury for lack of sufficiency of the evidence.

02. The trial court erred in not taking count II from the jury for lack of sufficiency of the evidence.

03. The trial court erred in permitting Creech to be represented by counsel who provided ineffective assistance by failing to request an instruction on the lesser included offense of unlawful display of a weapon.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to support Creech's convictions for assault in the second degree as charged in counts I and II? [Assignments of Error Nos. 1 and 2].

02. Whether Creech was prejudiced as a result of his counsel's failure to request an instruction on the lesser included offense of unlawful display of a weapon? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Robert A. Creech was charged by amended information filed in Clark County Superior Court January 8, 2015, with two counts of assault in the second degree while armed with a deadly

weapon, contrary to RCWs 9A.36.021(1)(c), 9.94A.533(4), 9.94A.825. [CP 4-5].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced January 12, the Honorable Barbara D. Johnson presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 110]. Creech was found guilty, including weapon enhancements, sentenced within his standard range, and timely notice of this appeal followed. [CP 2, 26-29, 42-43].

02. Substantive Facts

On November 10, 2014, around noon, 51-year-old Robert Creech approached Frederick Williamson and Michael Steubs, who were sitting together at a sidewalk table drinking coffee in front of Starbucks in downtown Vancouver, Washington. [RP 44; CP 5]. When Creech, who was standing within arm's distance of the two, asked for a dollar to buy coffee, Steubs told him no. [RP 46].

> He may have have said, "Fuck you" or something. There was probably more said than just that, a couple more words, you know, but it - - yeah.
> .....
> Told him I wouldn't. Uh, insinuated he was a homosexual probably was - - well, I would guess that's how he took it.

[RP 58].

After Creech called Steubs a "motherfucker," Steubs told him there was no way he (Creech) would know anything about his relationship with his mother. [RP 58].

> I was trying to make light of the tension. That was - - you know, trying to make it so it would be funny kind of - - but still it was - - I didn't treat him with the dignity he probably deserved.

[RP 58].

> [H]e wanted a cup of coffee. I - - the right thing probably would have been to invite him to sit down - - we had room for him to sit - - and bought him a cup of coffee and enjoyed a cup of coffee with him. That would have been the right thing to do.
> ....
> Treat him with the dignity he deserves as a human being.

[RP 67].

Creech pulled out a closed knife from his pocket and opened the blade and said, "'I'd cut you and kill you, but I don't want to go to jail.'" [RP 48]. He made eye contact with both of them. [RP 52, 63] Williamson said the knife was "pointed down and forward." [RP 49]. Steubs testified that Creech "had the knife like this and it was probably pointed up like that [RP 63](,)" agreeing the knife was not extended out and that it remained fairly close to Creech's body. [RP 70]. Williamson felt in danger, thinking "somebody was going to get hurt." [RP 49]. Similarly, Steubs thought he might be cut or stabbed. [RP 61]. When Steubs

suggested Creech put the knife away before the police arrived, he complied and then walked to the park across to street, where he was soon arrested by the police, who seized possession of the knife, which had a 6-inch blade. [RP 48, 61, 79-80, 105].

Creech rested without presenting evidence. [RP 113].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT CREECH ASSAULTED EITHER WILLIAMSON OR STEUBS.[1]

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence,

[1] As the sufficiency argument is the same for each of the two counts, the counts are addressed collectively herein for the purpose of avoiding needless duplication.

and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

> As instructed in this case, an 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.

[CP 16].

01.1 Reasonable Apprehension and Fear

Whether Creech actually intended to inflict bodily injury is immaterial under this instruction. What is at issue, however, is whether there was sufficient evidence to prove that Williamson's and Steubs's fear of bodily injury was reasonable or that Creech intended to place them in fear of bodily injury. The answer is no.

Though Creech did display a knife, he never threatened to use it and neither Williamson nor Steubs ever said the knife was pointed at them. There was no evidence of a stabbing or thrusting motion, no evidence that Creech reached toward either individual, no evidence of any physical contact, and no evidence that Creech was forced to leave the

scene. He did nothing more than display his knife before saying, in essence, that he wasn't going to do anything. This is not an alternative interpretation of the facts, which would be irrelevant, but a statement of what did not happen. Under these circumstances, there was insufficient evidence to prove that either Williamson's or Steubs's apprehension and fear were reasonable.

01.2 Intent

Similarly, there was an absence of facts sufficient to find that Creech intended to create a fear of bodily injury. If he had said nothing, what remained would be insufficient to establish his intent. And what he did say added nothing to this: "I'd cut and kill you, but I don't want to go to jail." [RP 48]. In other words, he was saying that he wasn't going to do anything because he was unwilling to face the legal consequences of incarceration. This was not combined with anger and movement but proceeded his walking to the park across the street. The evidence did not establish the requisite intent.

Sufficient evidence did not support Creech's two convictions for assault in the second degree.

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02. CREECH WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO REQUEST AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Creech proposed no instructions. [RP 107]. A defendant is entitled to an instruction on the elements of a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal test); and (2) the evidence supports an inference that only the lesser crime was committed. (factual test). State v. Berlin, 133 Wn.2d 541, 545-46, 548, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The first or legal test of Workman is satisfied as to the crimes here at issue. See State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659 (2000) (all of the elements of the unlawful display statute are elements of second degree assault with a deadly weapon); State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991). RCW 9.41.270(1) provides:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm … in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

Creech was charged under RCW 9A.36.021(c), wherein a person is guilty of second degree assault if he or she "(a)ssaults another with a deadly weapon." Jury Instruction No. 8 defined assault as "an act, done with 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. [CP 16]. Thus, since each element of unlawful display of a weapon is a necessary element of second degree assault with a deadly weapon, unlawful display of a weapon is a lesser included offense of second degree assault with a deadly weapon.

Evidence in this case also satisfies the Workman factual test. Under this prong, "(t)he test is whether there is evidence supporting an inference that the defendant is guilty of the lesser included offense instead of the greater one." State v. Bergeson, 64 Wn. App. 366, 369, 824 P.2d 515 (1992). And this evidence need not come from the defendant; it may also come from the State's evidence. State v. Fernandez-Medina, 141 Wn. 2d 448, 456, 6 P.3d 1150 (2000). The record supports a rational inference that Creech committed only the offense of unlawful display of a weapon.

See State v. Fernandez-Medina, 141 Wn. 2d at 455. In this context, the evidence must be viewed in the light most favorable to the party requesting the instruction. Id. Moreover, "(i)n evaluating the adequacy of the evidence [to support a proposed instruction], the court cannot weigh the evidence." State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1034 (1999).

As instructed in this case, to convict Creech of second degree assault with a deadly weapon, the jury had to find specific intent to create in another apprehension and fear of bodily injury. [CP 16]. Such intent may be inferred from pointing a gun, but not from the mere display of a gun. State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). And to convict a defendant of unlawful display of a weapon, the jury must determine that the defendant displayed a weapon in a manner manifesting an intent to intimidate another person or warranting alarm for another's safety. RCW 9.41.270(1).

Creech was clearly in possession of the knife when confronting Steubs and Williamson. The evidence did not prove, however, that he aimed the knife at either individual. Steubs said the knife was pointed up, agreeing it was not extended out and remained close to Creech's body [RP 63]; Williams asserted the knife was "pointed down and forward." [RP 49]. Construing this evidence in Creech's favor, the jury could have found

that he displayed the knife in a manner that manifested an intent to intimidate or that warranted alarm for Steubs's and Williamson's safety. Unlawful display of a deadly weapon is defined by the way Creech used the knife and not by Steubs's and Williamson's response. If he displayed the knife only in a manner to intimidate, he committed only the offense of unlawful display of a deadly weapon. Creech was entitled to an instruction on unlawful display of a weapon because both the legal and factual prongs of the Workman test were satisfied.

While the State may contend that counsel's failure to request the lesser included instruction was legitimate trial strategy—an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser—an examination of the record does not support such a claim. Though our Supreme Court, in State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), did explain that an "all or nothing" strategy may constitute a legitimate trial tactic, this is not that case, given that a failure to request a lesser included instruction may constitute ineffective assistance if the failure was objectively unreasonable. State v. Hassen, 151 Wn. App. 209, 218-219, 211 P.3d 441 (2009). The potential jeopardy for Creech included the "stigma of a felony conviction," State v. Radan, 143 Wn.2d 323, 331, 21 P.3d 255 (2001), in addition to future consequences should he reoffend,

such as the potential impact on his future offender score under the Sentencing Reform Act, which scores prior felonies in determining a defendant's standard range sentence. His sentence for the two assaults resulted in concurrent terms of 22 months in addition to two consecutive 12-month deadly weapon enhancements, which results in a 46-month prison term, in addition to 18 months community custody. [CP 43]. By contrast, unlawful display of a weapon is merely an unscored gross misdemeanor. RCW 9.41.270(2).

Under these circumstances, trial counsel was ineffective in failing to request an instruction on the lesser included gross misdemeanor of unlawful display of a weapon. The "all or nothing strategy" unreasonably exposed Creech to a substantial risk that the jury would convict on the only option presented, second degree assault, with deadly weapon enhancement. It was objectively unreasonable to rely on such a strategy, particularly given counsel's statement during closing argument that he was aware that the case was "not charged as an unlawful display of a weapon." [RP 135].

As the United States Supreme Court has stated:

> (I)t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser

> offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction … precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d. 844 (1973).

The prejudice here is self evident and it is reasonably probable that the outcome would have been different had counsel requested an instruction on the lesser included offense of unlawful display of a weapon. Counsel's performance was deficient, which was highly prejudicial to Creech, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his two convictions for assault in the second degree while armed with a deadly weapon.

E. CONCLUSION

Based on the above, Creech respectfully requests this court to dismiss his convictions or remand for retrial.

DATED this 30th day of July 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant, WSBA 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Anne M. Cruser Prosecutor@Clark.wa.gov	Robert A. Creech #828497 Coyote Ridge Corrections Center P.O. Box 769 Connell, WA 99362

DATED this 30th day of July 2015.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

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