SUPREME COURT NO. 92165-2

Court of Appeals No. 32091-0

IN THE SUPREME COURT OF

THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ROGELIO RODRIGUEZ, Petitioner

Franklin County Cause No. 13-1-50254-1

THE HONORABLE JUDGE VIC VANDERSCHOOR

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Rogelio Rodriguez, asks this Court to accept review of the Court of Appeals decision, designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Rodriguez seeks review of the Court of Appeals unpublished decision in *State v. Rogelio Rodriguez,* No. 32091-0, filed July 21, 2015.

III. ISSUE PRESENTED FOR REVIEW

A. Was Mr. Rodriguez entitled to a jury instruction on unlawful display of a weapon as a lesser-included charge to assault in the second degree while armed with a firearm?

B. Did the court impermissibly comment on the evidence, thereby violating Mr. Rodriguez's constitutional rights under Article IV, §16 of the Washington Constitution?

IV. STATEMENT OF THE CASE

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, homeowner Patricia Montes-Deoca noticed a silver car enter her 5-acre property, sometime in the early evening. (10/30/13 RP 27). The vehicle drove close to her chicken coop and then burned rubber as it used the turn-around. She approached the car and asked the driver if he needed something. The driver sped away. (10/30/13 RP 28). She saw the car go to the property next door, and watched the female passenger try to open the gate to that 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 5 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. He turned the music up, could be heard yelling, and Mr. Arteaga saw him poke his head in and out of the open sunroof. (10/30/13 RP 41;44).

When the deputy arrived, he and Mr. Arteaga walked toward the car. They heard Mr. Rodriguez yelling and cussing. (10/3013 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 car, Mr. Rodriguez popped out of the sunroof and "pointed something silver" saying "Get the F---back" and "Shoot me M-f-er, shoot me." (10/30/13 RP 68; 10/31/13 RP 113-114). The deputy reported he did not know at that time if the silver object was a gun, but he believed Mr. Rodriguez thought it was a gun. (10/31/12 RP 112). He testified that when he saw the object it intimidated him and warranted alarm for his safety. (10/31/14 RP 136-37). His later belief that it was a gun was not based on what he observed at that time. (10/31/13 RP 128).

Sgt. Pfeiffer, who arrived within minutes, 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. Pfieffer did not see a gun. (10/31/13 RP 206).

Despite the deputy ordering Mr. Rodriguez to show his hands, Mr. Rodriguez continued to bounce around inside of the car,

turning on the lights, windshield wipes, 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 the vehicle. However, Mr. Rodriguez managed to roll up the windows and lock the doors. (10/30/13 Rp 71).

After the attempt to distract, 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 kicking, and alternatively singing and cussing, as well as profusely sweating. (10/30/13 RP 75). Deputy 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 and no shells were found in the vehicle[1]. (10/30/13 RP 86;94).

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 have caused his abnormal behaviors. (10/31/13 RP 235).

When questioned at the jail, Mr. Rodriguez told Deputy Rapp that he remembered drinking a Pepsi and believed it may have been laced with a drug. (10/30/13 RP 98). He had difficulty remembering much about the night he was arrested. (10/31/13 RP 120).

Dr. Grant, from Eastern State Hospital, and Dr. Rubin both testified they conducted a diminished capacity evaluation for Mr. Rodriguez. (10/31/13 RP 241;257). Dr. Grant concluded that drugs impaired Mr. Rodriguez at the time of the alleged crimes; he opined that Mr. Rodriguez was capable of forming intent to take and drive the car, and flee from officers. (11/1/13 RP 10-13).

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[1] In its opinion, the Court of Appeals incorrectly stated that a shotgun shell was found with the disassembled zip gun parts in the car. *Slip Op. *5.*

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 he did not believe Mr. Rodriguez intended to harm the Deputy. (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 believed that Mr. Rodriguez was more interested in scaring off the police so he could escape. (10/31/13 RP 281-82; 292;306).

Defense counsel requested a jury instruction on unlawful 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 relying on *State v. McJimpson,* 79 Wn.App.164, 901 P.2d 354 (1995), later changed its mind:

> "I will indicate I did change my mind about giving the lesser included. I've reviewed the case cited by Mr. Hultgrenn and I was focusing on a different case and this case makes it clear that the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charges. The evidence must affirmatively establish the defendant's theory of the case. It's not enough that the jury might construe the evidence..." (11/1/13 RP 48).

The court gave jury instruction No. 18, the to-convict instruction for the crime of unlawful possession of a firearm, second degree. In pertinent part, the instruction included the second

element "That the defendant had previously been adjudicated guilty as a juvenile of a felony." (CP 46). Although not recorded in the verbatim record, at some point during 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." (CP 24). The court's written response was: "Yes". (CP 24). The jury convicted Mr. Rodriguez on all counts. (CP 8-9). He made a timely appeal. (CP 6-7).

The Court of Appeals affirmed the trial court's decision to not give the lesser included instruction holding:

> "Thus, to obtain an instruction on this offense, Mr. Rodriguez needed to show evidence in the record that he did not assault Deputy Rapp, but only intended either to intimidate him or acted in a manner that warranted alarm for the safety of others.
>
> He did not make that showing. Mr. Rodriguez did not testify, so there was no evidence of his purpose in drawing the zip gun on Deputy Rapp. Dr. Rubin testified that Mr. Rodriguez did have the ability to intend his actions, but simply had a distorted view of reality. Thus, there was no evidence to suggest that he did not intend to create fear and apprehension in Deputy Rapp (and thus not assault him), but did intend to intimidate him. Absent evidence that he was not intending to assault the deputy, there simply was no factual basis for concluding that only unlawful display of a weapon was committed." (*Slip Op.* * 5).

The Court also held if the jury instruction comment was error, it was harmless. *Slip Op.* 9.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review because it is in direct conflict with decisions by this Court in *State v. Henderson,* 182 Wn.2d 734, 344 P.3d 1207 (2015); and *State v. Bogner,* 62 Wn.2d 247, 382 P. 2d 254 (1963); RAP 13.4(b)(1)

A. The Refusal To Instruct On The Inferior Defense Of Unlawful Display Of A Weapon Denied Mr. Rodriguez His Right To Have The Jury Consider An Applicable Inferior-Degree Offense.

A defendant is entitled to an instruction on a lesser-included offense when (1) each of the elements of the lesser offense is a necessary element of the charged offense, and (2) the evidence in the case supports an inference that the lesser crime was committed. *State v. Workman,* 90 Wn.2d 443. 447-48, 584 P.2d 382 (1978). The *Workman* rule helps to ensure that juries considering defendants who are "plainly guilty of some offense" do not set aside reasonable doubts on a greater charge in order to convict them and avoid letting them go free. *State v. Henderson,* 182 Wn.2d at 742. (internal citation omitted).

A trial court's decision regarding the second or factual prong of the rule is reviewed for abuse of discretion. *State v. Walker,* 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When evaluating

whether the evidence supports an inference that the lesser crime was committed, courts review the evidence in the light most favorable to the party who requested the instruction. *State v. Fernandez-Medina,* 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). This Court has held that where a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury *must* be instructed on the lesser offense. *Id.*

The rulings by both the trial court and the Court of Appeals acknowledge that unlawful display of a weapon is a lesser included offense of second degree assault, satisfying the legal prong of the *Workman* analysis. As to the factual prong, the trial court initially reasoned,

> "The assault intent is required. That's the intent is required in assault. In unlawful display the intent required is to intimidate or create an alarm [f]or safety. *I think the jury could find either one of those in both psychiatrist and psychologist said they could find either one.* It wasn't their place to say which intent it was."

(11/01/13 RP 44)(emphasis added).

However, the court reversed position after reviewing the *McJimpson* case. (11/01/13 RP 47). In *McJimpson,* the evidence did not permit the inference the defendant committed only the offense of unlawfully displaying a weapon. Not only did McJimpson

admit that he pointed the loaded gun at someone to scare them, he relied on a theory of self defense. *McJimpson,* 79 Wn.App. 164,174-175, 901 P.2d 354 (1995). This required the jury to either convict him as charged or acquit. "That complete defense negated the required inference that McJimpson committed only a lesser included offense." *Id.* at 175.

Similarly, 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 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).

Like *McJimpson,* the *Fowler* 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.

Unlike *McJimpson* and *Fowler*, Mr. Rodriguez did not present a self-defense theory. Nor did he ask the jury to simply disbelieve the State's evidence. In fact, if the jury believed the State's evidence it could have easily made a rational inference that he was guilty of the lesser crime.

Here, the Court of Appeals places the burden on Mr. Rodriguez to present evidence that would show an absence of intent to assault, concluding that because Mr. Rodriguez did not testify there was no way to know whether his intent was to assault or to simply intimidate; and, one of the psychologists testified Mr. Rodriguez had the ability to intend his actions but suffered from a distorted view of reality. *Slip Op.* *5.

This reasoning is mistaken on three levels: first, it ignores all the evidence produced at trial. Second, evidence to support a lesser crime may come from any source, including, but not limited to the defendant. *Fernandez-Medina,* 141 Wn.2d at 456. Third, the evidence that is presented by all parties must be seen in the light most favorable to the party requesting the instruction. *Id.*

Under the "factual prong", the defendant must only point to some evidence that would support an alternative theory on the lesser-included offense. As this Court has noted, "Regardless of the plausibility of this circumstance, the defendant had an absolute right to have the jury consider the lesser included offense on which there is evidence to support *an inference* it was committed." *State v. Parker,* 102 Wn.2d 161, 166, 683 P.2d 189 (1984).

Here, taken in a light most favorable to Mr. Rodriguez, there was more than sufficient evidence to support a reasonable inference that only the lesser crime had been committed. The evidence clearly showed that Mr. Rodriguez did not threaten to shoot anyone, the weapon was not loaded and there were no shells in the car. Mr. Rodriguez popped out the sunroof **one** time, and yelled for the officer to retreat or to shoot him. (10/31/13 RP 135). Both officers specifically testified that the unknown object in Mr. Rodriguez's hand caused them to be "intimidated" and "warranted alarm" for their safety. (10/31/13 RP 136-37; 206).

Moreover, there was substantial evidence that Mr. Rodriguez was impaired by the drugs in his system. The forensic toxicologist testified that the type of drugs found in Mr. Rodriguez's system could have caused the obviously abnormal behaviors. Dr. Grant,

from ESH concluded that drugs impaired Mr. Rodriguez at the time of the alleged crimes. 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.

This case is similar to *Baggett.* There, 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). Baggett was discovered by police officers as he leaned out of his car window with a rifle apparently trying to shoot a cat.

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.

Like *Baggett,* taken in the light most favorable to Mr. Rodriguez, the officers' testimony along with that of the psychologists provided sufficient evidence to support an inference that he committed only the offense of unlawful display of a firearm.

As this Court held in *Henderson,* when warranted by the evidence, giving a jury the option to convict on a lesser-included offense is crucial to the integrity of the criminal justice system. *Henderson,* 182 Wn.2d at 736. To minimize the risk of a jury resolving its doubts in favor of a conviction, if a jury could rationally find a defendant guilty of a lesser offense and not the greater, the jury must be instructed on the lesser offense. *Id.*

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).

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

The Court of Appeals opinion found that its review of this issue was hampered by a lack of record, and declined to address the substantive claim of error since "there was no harm to the defense from the court's answer." *Slip Op.* 7-8. It opined that if the court had consulted with the parties, it would foreclose the issue on appeal because of the invited error doctrine. *Slip Op.* 7. However, in *Becker,* this Court held "...a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose him from raising this issue on appeal." *State v. Becker,* 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Lampshire,* 74 Wn.2d 888, 893, 447 P.2d 727 (1986). Such is the case here and the substantive claim should be reviewed.

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 724 (1982). Here, the court instructed the jury to find Mr. Rodriguez guilty of unlawful possession of a firearm, it was required to decide whether the State had proved beyond a reasonable doubt that he had previously been adjudicated as a juvenile of a felony crime. CP 46.

The note sent to the court by the jury asked if Mr. Rodriguez had been convicted of a felony as a juvenile. Rather than referring the jury back to the court's instructions and the evidence, the court instead answered in the affirmative. CP 24.

Because Mr. Rodriguez pleaded not guilty, every element of each crime needed to be proved beyond a reasonable doubt. 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 at 64-65. 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. State v. Bogner,* 62 Wn.2d 252, 382 P.2d 254 (1963).

Mr. Rodriguez contends the court's response influenced the jury. Citing to the notion that there was a juvenile adjudication exhibit and a probation officer testified Mr. Rodriguez committed malicious mischief that amounted to a felony, the Court of Appeals held "the uncontested evidence established the element." *Slip Op.* 9. However, the question is not whether there was uncontested evidence, the question is whether the jury was influenced by the court's comment. The jury had the exhibit and heard the testimony,

but still questioned whether the element had been met. The court's undisguised directive as to the element of previous adjudication of a felony amounted to a judicial comment; the State was inferentially relieved of the burden of proving that element. The instruction clearly conveyed the idea that the court had accepted the fact as true. *State v. Levy,* 156 Wn.2d 709. 725, 132 P.3d 1076 (2006).

It cannot be said that it affirmatively appears that the jury was not influenced by the trial court's answer. The violation of Article IV, §16 of the Washington Constitution constitutes reversible error in this case.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rodriguez respectfully asks this Court to accept his case for review and reverse his convictions for second-degree assault with a deadly weapon, and unlawful possession of a firearm, remanding for a new trial.

Respectfully submitted this 20th day of August, 2015.

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Certificate of Service

I, Marie Trombley, do hereby certify that on August 20, 2015, 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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APPENDIX A

FILED
JULY 21, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ROGELIO DELGADO RODRIGUEZ, Appellant.	)	No. 32091-0-III UNPUBLISHED OPINION

KORSMO, J. — Rogelio Rodriguez appeals his six convictions arising from a driving incident, arguing that the trial court erred in denying his request for a lesser included offense instruction and by answering a question from the jury. We affirm.

FACTS

Mr. Rodriguez was called to the attention of Franklin County law enforcement authorities after he used his car to batter through a gate and drive onto the property of Jesus Arteaga. The vehicle became high centered on the property. Mr. Arteaga found Mr. Rodriguez in the driver's seat, shouting and playing music loudly with the sunroof open.

When the first responding officer, Deputy Sheriff George Rapp, approached the car, Mr. Rodriguez stood up through the sunroof and pointed a silver object at the deputy. Rapp believed it to be a gun and warned Mr. Arteaga to stay back. Rodriguez yelled obscenities towards the officer and told him to "shoot me." A second officer, Sergeant Pfeiffer, arrived shortly thereafter and the two men approached the car. Mr. Rodriguez locked it up, ignored their commands to show his hands, and refused to exit the car. When Deputy Rapp began to kick out the car window, Mr. Rodriguez opened the door and fled.

The deputies pursued him nearly one half mile before tackling him. He was cussing, kicking, singing, and sweating profusely. Rapp believed he was under the influence of a drug. Mr. Rodriguez's blood tested positive for amphetamines and cannabinoids.

Mr. Rodriguez was charged with second degree assault while armed with a firearm, second degree unlawful possession of a firearm, second degree possession of stolen property, second degree taking a motor vehicle without permission, unlawful possession of a short-barreled shotgun or rifle, and driving under the influence. Mr. Rodriguez had a prior adult Oregon conviction for robbery and a local juvenile adjudication for second degree malicious mischief.

The defense presented evidence from psychologist Stephen Rubin that Rodriguez had an antisocial personality disorder as well as a polysubstance dependence and abuse

disorder defense. While the trial court gave a jury instruction on diminished capacity, it declined a defense request to give an instruction on the lesser included offense (to second degree assault) of unlawful display of a weapon. The court reasoned that the evidence did not affirmatively show that only the crime of unlawful display had been committed.

The court's instructions on unlawful possession of a firearm in the second degree required the jury to find that Mr. Rodriguez had previously been adjudicated guilty of a felony as a juvenile. Clerk's Papers (CP) at 44, 46. During deliberations, the jury sent out the following inquiry:

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

CP at 24. The court responded, "Yes." There is no other record concerning the jury communication.

The jury rejected the diminished capacity claim and found Mr. Rodriguez guilty as charged on all six counts. He timely appealed to this court.

ANALYSIS

Mr. Rodriguez argues that the court erred in failing to give the unlawful display instruction and by answering the jury inquiry. We address each argument in turn.

Lesser Included Offense

Mr. Rodriguez argues that there was conflicting evidence concerning his intent, so the court should have instructed the jury on unlawful display of a weapon as an included

offense of second degree assault. The trial court correctly determined that the evidentiary requisites for a lesser included offense were not satisfied.

By statute, either party in a criminal case is entitled to an instruction on a lesser included offense in appropriate circumstances. RCW 10.61.006.[1] In order to instruct on an included offense, the crime actually must be an included offense and there must be a factual basis for believing that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). These are known as the "legal" and "factual" prongs. *State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997).

The factual prong is satisfied when there is affirmative evidence showing that only the lesser crime actually was committed. *State v. Speece*, 115 Wn.2d 360, 362-63, 798 P.2d 294 (1990); *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). The factual prong is not established merely by the fact that the jury might disregard some of the evidence in the case. "Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *Fowler*, 114 Wn.2d at 67.

The parties do not dispute that unlawful display of a weapon legally is an included offense of second degree assault with a deadly weapon; *Fowler* has answered that

[1] Statutes also provide that parties are entitled to instructions on inferior degree offenses and attempted crimes. RCW 10.61.003; RCW 10.61.010.

question. *Id.* The question remaining is whether there was a factual basis for believing that only display of a weapon was committed.

In part, RCW 9.41.270(1) makes it "unlawful for any person to carry, exhibit, display or draw any firearm, . . . in a manner, . . . that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." Thus, to obtain an instruction on this offense, Mr. Rodriguez needed to show evidence in the record that he did not assault Deputy Rapp, but only either intended to intimidate him or acted in a manner that warranted alarm for the safety of others.

He did not make that showing. Mr. Rodriguez did not testify, so there was no evidence of his purpose in drawing the zip gun on Deputy Rapp.[2] Dr. Rubin testified that Mr. Rodriguez did have the ability to intend his actions, but simply had a distorted view of reality. Thus, there was no evidence to suggest that he did not intend to create fear and apprehension in Deputy Rapp (and thus not assault him), but did intend to intimidate him. Absent evidence that he was not intending to assault the deputy, there simply was no factual basis for concluding that only unlawful display of a weapon was committed.

The trial court correctly concluded that there was no factual basis on which to instruct the jury on the offense of unlawful display of a weapon.

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[2] A homemade shotgun, consisting of a metal tube containing a shotgun shell and an improvised firing mechanism was found, disassembled, in the car.

Jury Inquiry

Mr. Rodriguez also contends that the court commented on the evidence by answering the juror inquiry. Our review of this claim is hampered by the lack of a record regarding the answer, but we conclude that if there was any error, it was harmless.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. This provision "prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of this provision "is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (citing *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981)). "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Thus, a jury instruction which removes a factual matter from the jury constitutes a comment on the evidence in violation of this section. *Becker*, 132 Wn.2d at 64-65. In determining whether a statement by the court amounts to a comment on the evidence, a reviewing court looks to the facts and circumstances of the case. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Mr. Rodriguez argues that the court's response did take a factual issue away from the jury in violation of the constitutional protection. He interprets the jury's inquiry as addressing the element of having "been adjudicated guilty as a juvenile of a felony"[3] and the court's answer "as indicating that the State had already proven that element." Br. of Appellant at 9. The prosecution, looking at the entirety of the inquiry, reads it as the jury asking if the proven malicious mischief adjudication constituted a felony, a legal question that the judge could properly answer.[4]

Both of these views are reasonable. This is an instance where knowledge of what took place in the trial court would have been useful in resolving this appeal. Typically, the court must consult with the parties before answering a jury question. CrR 6.15(f)(1); *State v. Jasper*, 174 Wn.2d 96, 121, 271 P.3d 876 (2012). If that consultation took place here, the defense and prosecution may well have agreed with the State's interpretation of the inquiry and/or the court's answer, leading to the invited error doctrine foreclosing this issue on appeal. *E.g.*, *State v. Studd*, 137 Wn.2d 533, 546-51, 973 P.2d 1049 (1999). At a minimum, this court would have been informed of the view of the question held by the

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[3] CP 46.

[4] A neutral response such as "Second degree malicious mischief is a felony" would have answered the inquiry without commenting on the evidence.

trial judge and parties. In the future, we urge trial courts to make a record at a convenient time concerning how a jury inquiry was handled.[5]

Because of the absence of a record of the proceedings below, we decline to address the substantive claim of error since there was no harm to the defense from the court's answer. An improper judicial comment is presumed to be prejudicial. *State v. Levy*, 156 Wn.2d 709, 723-25, 132 P.3d 1076 (2006); *State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). However, such an error is harmless where the record contains overwhelming untainted evidence to support the conviction. *Lane*, 125 Wn.2d at 839-40; *Sivins*, 138 Wn. App. at 60-61. Under this standard, the appellate court looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Any error was harmless because the evidence supported the element and the defense did not contest it. Defense counsel told the jury there was "uncontrovertable evidence" that his client possessed a gun. Counsel did not address the prior conviction element or otherwise talk further about the unlawful possession count. In addition to putting the juvenile adjudication into the record as an exhibit, the State also presented

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[5] If the defense was not consulted, then it had an incentive to make a record of that fact in order to preserve the issue for appeal. *E.g.*, *Jasper*, 174 Wn.2d at 124. The court's handling of these issues might also implicate the public trial right found in our constitution, thus presenting an additional reason for creating a record. *State v. Koss*, 181 Wn.2d 493, 501 n.4, 334 P.3d 1042 (2014).

testimony from the defendant's juvenile probation officer that Mr. Rodriguez was the man who committed the malicious mischief and that it constituted a felony. The uncontested evidence established the element.

If the court erred in answering the jury inquiry as it did, the error was harmless beyond a reasonable doubt. The prior conviction element was not at issue in this case.

The convictions are affirmed.

A majority of the panel has determined 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.

Korsmo, J.

WE CONCUR:

Brown, A.C.J.

Lawrence-Berrey, J.