No. 46657-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lawrence Roussel,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00670-2

The Honorable Judge Marilyn Haan

Appellant's AMENDED Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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I. WHEN TAKEN IN A LIGHT FAVORABLE TO MR. ROUSSEL, THERE WAS AT LEAST SLIGHT EVIDENCE THAT HE COMMITTED ONLY SIMPLE ASSAULT.

When interpreted in favor of the defense, some evidence showed that Mr. Roussel attempted to strangle Mr. Fadden, but did not actually compress his neck. RP 67-68, 161. This qualifies as simple assault. *State v. Reed*, 168 Wn. App. 553, 575, 278 P.3d 203 (2012).

In addition, at least "slight[ ] evidence"[1] showed that he assaulted Mr. Fadden without a deadly weapon, either by attacking him and knocking him to the ground or by resisting force after having lost the right to use self-defense.[2] RP 110, 211, 273. This, too, qualifies as simple assault.

The trial court should have instructed on simple assault as a lesser offense. Instead, the trial judge refused the requested lesser on the grounds that it was inconsistent with Mr. Roussel's self-defense/defense-of-others theory. RP 334-335. This was an error of law, requiring *de novo* review. *See King Cnty., Dep't of Dev. & Envtl. Servs. v. King Cnty.*, 177 Wn.2d

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[1] *See State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984).

[2] By pushing Ms. Fadden, Mr. Roussel qualified as the first aggressor with respect to Mr. Fadden. *See* CP 36 (aggressor instruction).

636, 643, 305 P.3d 240 (2013). Respondent incorrectly asks the court to apply an abuse-of-discretion standard. Brief of Respondent, p. 16, 20.

A criminal defendant is entitled to a lesser-included instruction even when inconsistent with the primary defense theory. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456-462, 6 P.3d 1150 (2000). The trial court made an error of law by refusing the requested instruction on that basis. Respondent's unsupported attempt to apply an abuse of discretion standard lacks merit.

Furthermore, at trial, both parties are entitled to all of the evidence, regardless of which party introduced it. Respondent erroneously separates the evidence into that introduced by the state and that introduced by the defense. Brief of Respondent, p. 17. According to Respondent, Mr. Roussel was not entitled to instructions on fourth-degree assault because he did not admit to an assault, but rather, claimed self-defense. Brief of Respondent, pp. 17-18. But "[a] trial court is not to take such a limited view of the evidence… [It] must consider *all of the evidence* that is presented at trial." *Fernandez-Medina*, 141 Wn.2d at 456 (emphasis added).

Taking the evidence in a light most favorable to the defendant means examining it in favor of the verdict sought. *Id.* Here, at least *slight* evidence that shows Mr. Roussel committed only simple assault. The

relevant evidence may include excerpts from the testimony of Gary and Laura Fadden, even though they were called by the prosecution.

At least slight evidence shows that Mr. Roussel pushed Laura Fadden to the ground, thereby losing the right to defend himself against Mr. Fadden's subsequent attack, and transforming his actions into fourth-degree assault. RP 63-66, 79, 110, 123. This evidence derives from the Faddens' testimony (that Mr. Roussel pushed Laura Fadden to the ground), from his own testimony that he ran toward Fadden, wrestled his walking stick from him, and threw it in the yard, and from Gary Fadden's testimony that Mr. Roussel knocked him to the ground. RP 110, 150, 208, 211, 269-274, 290-294.

Alternatively, at least some evidence shows that Mr. Roussel tried but failed to compress Fadden's neck. RP 67-68, 161. This qualifies as simple assault, even if he acted with intent to strangle.[3] *Reed*, 168 Wn. App. at 575.

The trial court, the prosecuting attorney, and Respondent seem reluctant to pick and choose facts that support a verdict of simple assault. But such picking and choosing is required when evidence is taken in a light most favorable to one party. *Fernandez-Medina*, 141 Wn.2d at 456.

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[3] Under this scenario, the jury was entitled to decide that the walking stick did not qualify as a deadly weapon, since it was not a deadly weapon *per se*. *See* CP 30 (deadly weapon definition).

A coherent story supporting the lesser offense may emerge from selected testimony drawn from both prosecution and defense witnesses. In this case, at least slight evidence suggests that Mr. Roussel committed only fourth-degree assault.

The trial court should have instructed on this lesser charge.[4] *Id.* The court's refusal to do so requires reversal. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984).

II. THE COURT PREVENTED JURORS FROM HEARING THE DEFENSE THEORY OF THE CASE AND FROM EVALUATING THE FADDENS' BIAS.

The trial court refused to allow Mr. Roussel to explain the defense theory to the jury, and restricted cross-examination into the Faddens' bias. Both Mr. and Ms. Roussel asserted that Fadden attacked his own daughter with a walking stick because she'd accused him of molesting her, and had threatened to go public. The court wouldn't let Mr. Roussel introduce evidence explaining why Fadden attacked his daughter.[5] This left the jury with the impression that Fadden beat his daughter for no reason.

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[4] This is so even though Mr. Roussel also argued that he was defending his wife. *Fernandez-Medina*, 141 Wn.2d 448; RP 324-334.

[5] The state alleges that the assault by Fadden was not related to his daughter's accusation that he molested her. But when the issue was raised before evidence was heard, the defense attorney disagreed with the state's claim that the threat to go public was made after the assault. RP 23. Counsel told the court that the issue was not one that was just raised after the incident, but one that had been of importance to the parties for 15 years. RP 23. He told the court that Mr. Fadden had contemplated suicide due to his guilt a month before the incident, and that he instead decided to buy Mr. Roussel and his daughter a trailer. RP 24.

The prosecutor took unfair advantage of this in closing. He argued repeatedly that the defense theory made no sense, because a father wouldn't attack his own daughter without provocation. RP 361, 412-413, 421. The state was only able to make these arguments because the court excluded evidence of the provocation—that Fadden had molested his daughter and did not want the accusation made public. RP 23-25.

The court prohibited the defense from explaining the conflict. This violated Mr. Roussel's right to present a defense. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). It also violated his confrontation right to impeach prosecution witnesses with bias evidence. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

Evidence that Rebecca Roussel had been convicted of extortion did not explain the situation to the jury. As Respondent points out, the trial court allowed the prosecutor to impeach Ms. Roussel's testimony with evidence of her extortion conviction. Brief of Respondent, p. 23; RP 30.[6]

Her accusations of child molestation provided an understandable reason for her father's rage. By contrast, her conviction for extortion on

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The defense wished to present the molestation as Mr. Fadden's motive to assault his daughter. RP 24-25.

[6] The state agreed that it would not identify the Faddens as the victims of that crime. RP 30-31.

some undisclosed subject would not explain her father's reason for attacking her.

Respondent does not claim that any error was harmless beyond a reasonable doubt.[7] *See State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004); *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009). Nor could the error be considered harmless. This is especially true given the prosecutor's reliance on the error in closing. RP 361, 412-413, 421. The evidence was critical to the defense theory and would have undermined the Faddens' testimony.

Given the court's ruling, the jury could not comprehend why Mr. Fadden hit his daughter with his walking stick. Without the evidence, the defense seemed like nonsense and the Faddens' account seemed credible.

The exclusion of this critical evidence prejudiced Mr. Roussel. *Elliott*, 121 Wn. App. at 410. His conviction must be reversed and the case remanded with instructions to allow jurors the chance to hear the whole story, they can assess the defense theory and the Faddens' bias. *Id.*

III. MR. ROUSSEL'S CONVICTIONS MUST BE REVERSED BECAUSE THE EVIDENCE USED TO CONVICT HIM INCLUDED TESTIMONY ABOUT AN ILLEGALLY INTERCEPTED TELEPHONE CONVERSATION.

Mr. Roussel relies on the argument set forth in the Opening Brief.

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[7] This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

IV. THE PROSECUTOR'S FLAGRANT AND ILL-INTENTIONED MISCONDUCT REQUIRES REVERSAL.

A. The prosecutor improperly relied on pre-arrest silence as substantive evidence of Mr. Roussel's guilt.

Pre-arrest silence may not be used as evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008); *Combs v. Coyle*, 205 F.3d 269, 285 (6th Cir. 2000). This includes partial silence. *Burke*, 163 Wn.2d at 217; *Combs*, 205 F.3d at 285.

The prosecutor in this case introduced evidence that Mr. Roussel didn't give Sgt. Huffine his medical records. The prosecutor also argued that it was "suspicious" that Mr. Roussel didn't talk to the police until his arrest. RP 154-155, 374, 376. In fact, Mr. Roussel had spoken with Sgt. Huffine prior to his arrest. RP 154-155.

The state cannot show beyond a reasonable doubt that this misconduct was harmless. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). Accordingly, Mr. Roussel's convictions must be reversed and the case remanded for a new trial. *Burke*, 163 Wn.2d at 217.

B. The prosecutor improperly shifted the burden of proof.

The prosecutor made an improper missing witness argument that did not follow the requirements of the missing witness rule. RP 374; *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009); *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). The improper

arguments suggested that Mr. Roussel had an obligation to present the testimony of his doctor. RP 374; *State v. McCreven*, 170 Wn. App. 444, 470-71, 284 P.3d 793 (2012); *Montgomery*, 163 Wn.2d at 598.

Mr. Roussel was prejudiced by the prosecutor's improper missing witness argument. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). There is a substantial likelihood that the improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704. Mr. Roussel's conviction must be reversed. *Montgomery*, 163 Wn.2d at 598-99.

C. The prosecutor misstated the state's burden.

In closing, the prosecutor argued that the jury's task was to decide which version of events to believe. RP 361-364, 411-412, 422. This is incorrect. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). The jury's sole task is to determine whether or not the state has proved its case beyond a reasonable doubt. *Glasmann*, 175 Wn.2d at 713.

The misconduct was flagrant and ill-intentioned. It infringed Mr. Roussel's right to due process and prejudiced the outcome of trial. *Glasmann*, 175 Wn.2d 696, 704. His convictions must be reversed and the case remanded for a new trial. *Id.*

D. The prosecutor told jurors they could not acquit unless they believed the Fadden's were lying or mistaken.

A prosecutor may not argue that acquittal requires the jury to believe the state's witness were lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Here, the prosecutor told jurors that the aggressor issue depended on whether they did or did not believe the Faddens. RP 422. He also told jurors to ask themselves if prosecution witnesses were "lying," "making that up," or "hiding something." RP 387, 388, 419.

This flagrant and ill-intentioned misconduct requires reversal. *Id.* Mr. Roussel's convictions must be reversed. *Id.*

V. MR. ROUSSEL WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Roussel rests on arguments set forth in the Opening Brief.

VI. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REVIEW MR. ROUSSEL'S CHALLENGE TO HIS LEGAL FINANCIAL OBLIGATIONS.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record

must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement regarding employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the offense of conviction and the length of incarceration will affect that ability.

Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Leonard,* ---Wn.2d---, ---P.3d ---, No. 90897-4 (Oct. 8, 2015); *see also State v. Rivas*, 355 P.3d 1117 (Wash. 2015).[8]

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina.*

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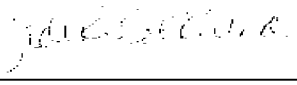
[8] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

CONCLUSION

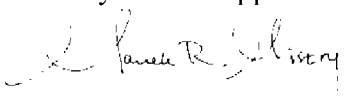
For the foregoing reasons, the Court of Appeals should reverse Mr. Roussel's convictions and remand the case for a new trial. In the alternative, the case must be remanded for inquiry in to Mr. Roussel's ability to pay discretionary legal financial obligations.

Respectfully submitted on January 28, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Reply Brief, postage prepaid, to:

Lawrence Roussel, DOC #967756
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

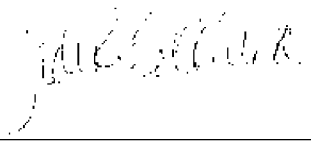
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Amended Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 28, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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