

64649-4

64649-4

NO. 64649-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY TAYLOR,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED.

1. Permissive inference instructions do not violate due process if the inference is not the sole evidence of the inferred fact and the inferred fact "more likely than not" flows from the proven facts. In this case, the permissive inference of an intent to intimidate was not the sole evidence of Taylor's intent to intimidate, given his threats and assaultive conduct during the charging period, and the inference meets the "more likely than not" standard. Should Taylor's claim that the inference violated due process be rejected?

2. A defendant waives a claim that a trial irregularity requires a new trial by not moving for a mistrial at the time of the irregularity. The victim testified, in violation of the trial court's order, that Taylor previously choked her. Defense counsel did not request a mistrial but only requested that the court instruct the jury to disregard that testimony, and the court did so. Did Taylor waive his claim that the trial irregularity, which was cumulative evidence of Taylor's past assaultive conduct, required a new trial?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Jeffrey Taylor was charged by amended information with felony stalking, assault in the fourth degree, and felony harassment. CP 15-17. The State alleged that the felony stalking and felony harassment crimes were committed within sight or sound of the victim's minor child, an aggravating circumstance. CP 15-17. The jury found the defendant guilty of felony stalking and assault in the fourth degree, but was unable to reach a verdict as to felony harassment. CP 60-62. The jury also found the aggravating circumstance for felony stalking. CP 63. The court imposed a standard range sentence of 13 months of total confinement. CP 70-81.

2. FACTS OF THE CRIME.

Taylor and the victim, Shanika Doage, began dating in 2000, and continued dating "on and off" for six years. RP 57. Doage testified that throughout the relationship, Taylor frequently assaulted her "for stupid reasons," although this was not an everyday occurrence. RP 58. The parties stipulated that Taylor had previously been convicted of assault in the fourth degree for

assaulting Doage in 2002. RP 95. That conviction was based on an incident where he repeatedly struck her and she sought medical treatment at the hospital because her shoulder was almost dislocated. RP 59.

Doage broke up with Taylor in December of 2006. RP 63. She obtained a protection order in January 2007, but was unable to serve it on Taylor because she did not know where he was living. RP 63. She obtained the protection order because Taylor persisted in calling her two to four times a day, and coming to her apartment. RP 64-66. On several occasions she saw him standing in the bushes by her car. RP 64-66. She was frightened by his behavior and changed the locks on her apartment. RP 65-66. She testified that she repeatedly told him to leave her alone. RP 67. Because she was afraid of Taylor, she asked her ex-husband to stay at her home, and had family and friends take her to work and pick her up from work each day. RP 68-69.

On January 3, 2007, Doage's mother, son, and ex-husband picked her up at work. RP 67. They went to the bank, dropped her ex-husband off at her mother's apartment, and then went to a Target store. RP 67. At the Target store, Taylor approached her. RP 70. She tried to turn away from him, but he grabbed her arm

and tried to kiss her. RP 70-71. Taylor told Doage that she could not hide from him, then recounted all the places she had gone after work. RP 70. When she continued to resist, Taylor threatened to beat her up and also threatened to shoot her. RP 72. The altercation was captured on the store's surveillance system, and the tape was played for the jury. RP 51-52, 96.

Two days later, on January 5, 2007, Doage ordered pizza at her apartment and when the delivery man came, Taylor appeared in the hallway of her secured building. RP 100. Doage told Taylor to leave and that she had a no-contact order against him. RP 102. He refused to take the order. RP 102. Taylor told her to "live in fear." RP 105. Michael Fisher, Doage's ex-husband, was present and heard Taylor tell Doage to "live in fear" and that "your protection ain't always going to be here." RP 131, 142.

Taylor testified in his own defense. He testified that he encountered Doage at the Target store by accident and that he had not followed her from her place of work. RP 151. He admitted that she told him to leave her alone at Target. RP 153. He admitted to going to her apartment building on January 5, 2007 and admitted that he told her to "live in fear." RP 154, 164. He testified that he did not mean it as a threat. RP 154.

C. ARGUMENT.

1. THE PERMISSIVE INFERENCE IN THE COURT'S INSTRUCTIONS TO THE JURY DID NOT VIOLATE DUE PROCESS.

Taylor contends that the court's instructions to the jury violated due process because they contained a permissive inference that relieved the State of its burden of proving every element of the crimes. This claim should be rejected. Under the facts of this case, the permissive inference did not relieve the State of the burden of proving intent to intimidate or harass because it was a reasonable inference supported by ample evidence.

It is unconstitutional for the court to give the jury a mandatory presumption instruction. State v. Johnson, 100 Wn.2d 607, 615, 674 P.2d 145 (1983). A mandatory presumption instruction is one that requires the jury to infer some fact from the proof of another fact. Id. at 615. Such instructions have been held to violate due process because they relieve the State of its burden of proving each element of the crime beyond a reasonable doubt. Id. at 616-17.

In contrast, a permissive inference instruction is an instruction that permits, but does not require, the jury to infer a fact from the proof of another fact. Id. at 615. See also County Court of

Ulster v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979). For example, in a burglary case, an instruction that a person who enters a building unlawfully "may be inferred" to have acted with intent to commit a crime therein, contains a permissive inference. Id. at 611, 618. A permissive inference instruction does not require the jury to infer any fact, but only permits the jury to do so. Id. at 615. The jury is free to reject the inference if it wishes. Id. at 618.

For example, in a vehicular homicide case, an instruction that a person who speeds "may be inferred" to have driven in a reckless manner contains a permissive inference. State v. Hanna, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994). When a permissive inference instruction is only part of the State's proof supporting an element of the crime, then due process is not violated so long as the presumed fact can be said to "more likely than not flow" from the underlying fact. Id. at 710; Ulster v. Allen, 442 U.S. at 165. Thus, if the inference is not the sole basis for a finding of guilt, a permissive inference instruction comports with due process as long as the reviewing court can conclude that the presumed fact more likely than not flowed from the underlying fact. Id.

In Hanna, the state supreme court found that the State did not rely on the permissive inference as its sole evidence of recklessness in that vehicular homicide case. Id. at 712. The State presented evidence that the defendant was travelling 80 to 100 M.P.H. before the collision and appeared to be racing another car. Id. The court applied the "more likely than not" standard in light of the evidence presented by the prosecution, holding that the defendant's version of the facts is not relevant to the standard. Id. The court concluded that the presumed fact of recklessness more likely than not flowed from the proved fact of the defendant's excessive speed, and thus the permissive inference did not violate due process. Id. at 713.

In contrast, in State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997), the same permissive inference instruction was held to violate due process. In that vehicular homicide case, evidence was presented that the defendant was travelling only 10 to 20 M.P.H. over the posted speed limit of 50 M.P.H. before the accident. Id. at 77-78. The court concluded that the defendant's speed was not so excessive that one could infer recklessness from it. Id. at 78. Thus, the facts of the case failed to meet the standard that the

presumed fact more likely than not flowed from the underlying fact.

Id. at 78.

In the present case, the court instructed the jury as follows, as provided by Washington Pattern Jury Instruction 36.25:

A person who attempts to contact or follow another person after being given actual notice that the person does not want to be contacted or followed may be inferred to have acted with intent to intimidate or harass the person.

This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.

CP 41. This instruction contained a permissive inference that permitted, but did not require, the jury to infer intent to intimidate or harass. The crime of stalking required the State to prove beyond a reasonable doubt that between December 1, 2006, through January 6, 2007, the defendant intended to frighten, intimidate or harass the victim or that the defendant knew or reasonably should have known that the victim was afraid, intimidated or harassed even if the defendant did not intend to place her in fear or to intimidate or harass her. CP 37; RCW 9A.46.110(1)(c).

In the present case, the permissive inference contained in Instruction 9 was not the sole evidence of Taylor's intent to intimidate or harass the victim. Taylor's threats to beat her up and

to shoot her, and his warning that she should "live in fear," constituted powerful evidence of his intent to intimidate and harass her. Likewise, his assaultive conduct on both January 3rd and January 5th was evidence of his intent to intimidate and harass Doage.

Since the permissive inference was not the sole evidence of Taylor's intent to intimidate and harass, the inference comported with due process as long as the presumed fact more likely than not flowed from the underlying facts based on the evidence presented by the State. The State presented evidence that Doage ended her relationship with Taylor in December of 2006, and he moved out of the home. RP 63-64. After the breakup, Doage testified that Taylor was upset and would call two to four times a day and show up at her apartment uninvited. RP 64-65. She would sometimes find him standing in the bushes behind her car. RP 65. She testified that she told him to leave her alone "a lot" of times prior to the Target incident, but Taylor persisted in trying to contact her. RP 67. During the Target incident, he told her she could not hide from him and that he knew where she had been that day. RP 70. He also threatened her with bodily injury on both January 3rd and January 5th. RP 72, 105. Based on these facts, Taylor's intent to intimidate

and harass the victim flows more likely than not from his repeated attempts to contact her after she told him to leave her alone. In this case, the permissive inference did not violate due process.

Taylor's challenge to the instruction should also be rejected because he failed to object to the court's instruction below. Pursuant to RAP 2.5(a), a claim may not be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." See State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010). RAP 2.5(a) must be construed narrowly. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The appellant must establish that an error is a manifest error affecting a constitutional right. O'Hara, 167 Wn.2d at 98. The appellant must demonstrate that the error is (1) manifest, and (2) truly of constitutional magnitude. Id. An error is manifest only if it "actually affected" the trial. Id. This requires a showing of actual prejudice. Id. at 99. In this case, the error raised by Taylor is not of constitutional magnitude and may not be raised for the first time on appeal.

Moreover, even if Instruction 9 did violate due process and thus constituted a manifest error affecting a constitutional right, the error was harmless. An error in instructing the jury with an improper permissive inference is harmless if there is no reasonable

possibility that the jury relied on the erroneous instruction in reaching its verdict. Johnson, 100 Wn.2d at 621-22. In the present case, given the overwhelming evidence of threats and assaultive conduct, there is no reasonable possibility that the jury relied on the inference instruction in finding that Taylor intended to intimidate and harass Doage. Any error in giving the instruction was harmless.

2. TAYLOR WAIVED HIS CLAIM THAT THE TRIAL IRREGULARITY DURING THE VICTIM'S TESTIMONY REQUIRES A NEW TRIAL BECAUSE NO MOTION FOR MISTRIAL WAS MADE.

Taylor claims for the first time on appeal that a new trial is required because the victim violated the trial court's ruling excluding evidence that Taylor strangled her in 2000, and because the victim testified to prior gun threats. The victim's testimony as to the strangulation was a trial irregularity, but created minimal prejudice considering the court allowed testimony about other acts of past violence. The court instructed the jury to disregard the statement. The jury is presumed to have followed the court's instructions. As to the evidence of gun threats, the only objection raised by defense counsel was sustained. Because Taylor did not move for a mistrial

in either instance he waived his claim that a new trial should be granted.

Prior to trial, the State sought to admit Taylor's prior violence against Doage pursuant to ER 404(b) to prove both motive and the reasonableness of Doage's fear. CP 87-93; RP 9. The court ruled that prior violent acts were admissible to prove reasonable fear and motive, but that one act, a 2002 strangulation incident, would be excluded because it was not documented and was an older incident. RP 15-17. The court ruled that evidence of another 2002 incident in which the victim's shoulder was injured, evidence of a 2003 kick that caused internal bleeding<sup>1</sup>, and evidence of other less specific events were admissible. RP 15-17, 87. Taylor has not assigned error to the court's ruling on appeal.

On direct examination, when asked why she feared that Taylor would carry out his threats, Doage testified, "I mean, throughout our history, I mean, there's been a whole lot of mean things he's done. I mean, he's wrapped vacuum cleaner cords around my neck. He's choked me until I've passed out." RP 99. Defense counsel objected and asked the court to instruct the jury to

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<sup>1</sup> Although evidence of the 2003 kick was ruled admissible, no testimony regarding this incident was elicited.

disregard the answer. RP 99. The court told the jury to disregard the answer. RP 99. Defense counsel did not request a mistrial.

When asked whether she believed Taylor would carry out his threat to shoot her, Doage testified, "I mean, he's said threats with guns before, but he's never acted on them." RP 72. She testified without objection that Taylor did not carry a gun, but "I know he's got access to them, but not never one in his possession." RP 72.

On cross examination, defense counsel asked whether Taylor was welcome at her mother's house. RP 118. Doage answered, "No, he's not." RP 118. On redirect examination, the prosecutor asked, "Why isn't the defendant welcome at your mother's house?" RP 120. Doage answered, "My mother does not like him. And he's come over to my mother's house and threatened the roommate named Ron that answered the door. He threatened him with a gun, said that if I didn't come outside when he came back he was bringing a gun." RP 120. Defense counsel objected and the objection was sustained. RP 120. Defense counsel did not ask the court to strike the testimony or for any other remedy. RP 120.

In closing argument, the prosecutor stated, "Shanika also told you that although the defendant didn't actually carry a gun that

he had access to them and thus she did believe that he could get access to a gun and could shoot her." RP 179. Defense counsel made no objection to this argument. RP 179.

Evidence of Taylor's prior acts of violence against Doage was properly admitted for the purpose of establishing her reasonable fear. The victim's knowledge of the defendant's violence toward the victim in the past is admissible when the crime at issue requires the State to prove that the victim reasonably feared that the defendant's threats would be carried out. State v. Magers, 164 Wn.2d 174, 182, 189 P.3d 126 (2008) (plurality opinion); State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000); State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999). Felony stalking and felony harassment require the State to prove that the victim's fear is reasonable. CP 37, 48; RCW 9A.46.110 and 9A.46.020. Taylor has not challenged the trial court's ruling admitting Taylor's prior acts of violence against Doage.

When a witness testifies to evidence that was excluded by the trial court, the error is analyzed as a trial irregularity. State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). When the trial court denies a defense request for a mistrial based upon a trial irregularity, the inquiry for the reviewing court is whether the

irregularity was so prejudicial that nothing short of a new trial can insure that the defendant will be tried fairly. Id. at 165. The court analyzes the seriousness of the irregularity and whether the evidence at issue was cumulative. Id. The court must presume that the jury followed any trial court instruction to disregard the testimony. Id. If the defendant does not seek a mistrial, then the claim that a new trial should have been granted is waived. State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007). As the state supreme court has explained, "[a] defendant generally cannot decline to ask for a mistrial or jury instruction, gamble on the outcome, and when convicted, reassert the waived objection." Id.

Doage's reference to the strangulation incident was a trial irregularity but was not so prejudicial as to deprive Taylor of a fair trial. The statement was brief and the court immediately instructed the jury to disregard it, as requested by defense counsel. This Court should presume that the jury followed the trial court's instruction. By not requesting a new trial at the time, the defense waived any claim that a new trial was necessary. The jury had properly heard about other acts of violence against Doage, including the facts underlying the 2002 assault conviction. Thus, the statement was cumulative evidence of past violence. See

Weber, 99 Wn.2d at 165-66. Even if the issue had not been waived, the irregularity was not so prejudicial that nothing short of a new trial could cure it.

Doage's reference to Taylor threatening her mother's roommate with a gun did not violate the trial court's ruling. This incident was not discussed prior to trial, but the court had ruled that incidents of violence other than the strangulation incident were admissible. The court sustained defense counsel's objection to the testimony that Taylor threatened Doage's mother's roommate with a gun, but counsel did not request a curative instruction or move for a mistrial. Taylor waived this claim by failing to request a mistrial or an instruction. State v. Lord, 161 Wn.2d at 291.

Moreover, the testimony was not prejudicial because Doage had already testified, without objection, that Taylor had access to guns. For that reason, the prosecutor's statement in closing argument that Doage believed Taylor had access to guns was based on testimony admitted at trial without objection, and was not misconduct.

Taylor cites State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.3d 571 (1984), for the proposition that evidence of legal gun ownership is prejudicial when it has no direct bearing on an issue in

the case. Rupe does not preclude evidence of guns when that evidence is probative of an issue at trial. For example, in State v. Neslund, 50 Wn. App. 531, 565, 749 P.2d 775 (1988), this Court distinguished Rupe in holding that evidence of the defendant's prior hunting experiences was properly admitted as probative of her familiarity with and ability to use guns, which was probative of whether she shot her husband. See also State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986) (firearms not used in crime were probative of defendant's access to weapons). When a defendant threatens to "shoot" the victim, and is charged with harassment and stalking, evidence of past gun threats has direct bearing on whether the victim reasonably feared that the threat would be carried out.

In sum, Taylor did not move for a mistrial when the trial irregularity occurred, and thus waived his claim that a new trial was required to cure the prejudice. Even if not waived, the irregularity was not prejudicial in light of the other evidence of past violence and a new trial was not required.

D. CONCLUSION.

Taylor's convictions for felony stalking and assault in the fourth degree should be affirmed.

DATED this 13th day of July, 2010.

Respectfully submitted,

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