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Court of Appeals
Division I
State of Washington

NO. 73952-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BIJAN KHORRAMI,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES

1. Whether Khorrami has failed to show that the trial court's to-convict instruction and criminal negligence instruction improperly stated the law.

2. Whether Khorrami has failed to show that the trial court abused its discretion responding to a jury inquiry by directing the jury to consider its previously provided instructions.

3. Whether the State produced sufficient evidence to convict Khorrami of Assault in the Third Degree when viewing the evidence in the light most favorable to the State.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Bijan Khorrami with Assault in the Third Degree for negligently causing bodily harm to a parking enforcement officer. CP 1-4. A jury convicted Khorrami as charged. CP 79. At sentencing, the court granted Khorrami a first-time offender waiver, and imposed 232 hours of community service. CP 115-22, 127. The court also granted Khorrami's request to stay his sentence pending the outcome of his appeal.¹ CP 123-26.

¹ The court later granted Khorrami's request to stay payment of \$43,461.88 in restitution, pending the outcome of his appeal. CP 128-29.

2. SUBSTANTIVE FACTS

On August 27, 2014, around 12:30 p.m., Seattle Police Parking Enforcement Officer Arlene Calderon, and her partner, Nina Nolan, were patrolling Seattle's Belltown neighborhood in their marked parking enforcement van when they received a "hit" on a Honda, and a white Lexus Sport Utility Vehicle (SUV). 1RP 5, 7, 9-10, 83, 86;² Ex. 5-B, 5-O. Using a license plate recognition system, they determined that the vehicles were "boot eligible" because they were associated with four or more parking tickets in collections. 1RP 12, 81. Khorrami owned the Lexus, and his son's girlfriend owned the Honda. 1RP 22, 135. Both vehicles were parked outside Khorrami's floral shop on First Avenue. 1RP 9, 29, 82-83. Calderon "booted" the Honda first, placing a 16-pound, U-shaped, yellow metal boot on the Honda's back passenger, curbside tire. 1RP 10, 34-35, 83; Ex. 5-N, 5-V.

Calderon next turned her attention to the Lexus, which was parked 25 feet south of Khorrami's flower shop and the Honda. 1RP 22, 86-87. Nolan started filling out the notice of violation, while Calderon carried a parking boot over to the passenger side of the

² The partial Verbatim Report of Proceedings are designated as follows: 1RP (7/22-24/15 – Jury Trial), 2RP (7/22-24/15 – Supplemental Transcript of Trial). Khorrami did not transcribe the motions in limine, voir dire, verdict, motion for new trial hearing, or sentencing hearing.

Lexus. 1RP 87. Both Calderon and Nolan were dressed in uniform, wearing parking enforcement badges and a large fluorescent green, reflective traffic vest bearing the words "SEATTLE POLICE" on the back. 1RP 46-47, 80; Ex. 5-R.

Calderon was kneeled down placing a parking boot on the Lexus's front passenger, curbside tire when she heard a man, later identified as Khorrami, run by her yelling "don't boot my car." 1RP 37-38. Khorrami ran over to Nolan, who was standing on the driver's side of the vehicle, and exclaimed, "you cannot boot my car," and "I'm getting in my car and moving my car." 1RP 89-91. Nolan ordered Khorrami not to get into his car, and told him that it had been booted. 1RP 94. Undeterred, Khorrami "kept steamrolling right on in," pushed Nolan out of the way, and climbed into the driver's seat. 1RP 94-95. Nolan then positioned herself in front of the Lexus, held out her hand, and commanded Khorrami "do not move your vehicle." 1RP 95. Khorrami ignored her. 1RP 96.

At the same time, Calderon was trying to attach the parking boot, but its locking mechanism was stuck. 1RP 38. Calderon's left arm was inside the wheel well trying to lock the boot when she heard Khorrami turn on the car engine. 1RP 38, 40. Calderon

thought, "oh shit," and tried to pull her arm out, but it was "too late."
1RP 40. Khorrami shifted the Lexus into reverse, and the boot's
clamp pinned Calderon's arm down. 1RP 40-41. The tire rolled
over Calderon's hand and trapped her arm until Khorrami moved
the car forward and Calderon managed to escape.³ 1RP 43.
Calderon pulled herself up, hit the hood of the Lexus, and yelled,
"you just ran over my hand." 1RP 43. Khorrami got out of his car,
but he did not respond, or check on Calderon.⁴ 1RP 44.

Immediately following the incident, Calderon described the
pain to her hand as a constant "throbbing." 1RP 118. Although
Calderon did not break any bones, she lost 80% of functionality in
her wrist, and underwent a three-hour surgery to repair it. 1RP
51-52. At the time of trial, Calderon was still wearing a cast,
despite having had surgery three months prior. 1RP 52.

Khorrami testified at trial that when he initially approached
Nolan, he did not see Calderon placing the parking boot on his front
passenger side tire. 1RP 139. Although Khorrami admitted that
nothing blocked his view of the passenger side where she was

³ Calderon believed that she "would have died" if Khorrami had kept the car in
reverse, and it had rolled over her chest. 1RP 69.

⁴ Indeed, as they waited for the police to arrive, Khorrami busied himself with
removing the boot that Calderon had tried to affix to the vehicle, and dragged it
over to the sidewalk. 1RP 99.

working, he insisted that he did not see her because he was looking at Nolan, who was filling out the violation. 1RP 153-54; Ex. 5-D. Khorrami asked Nolan if she was “booting” his car, too, and she said yes, “we are going to boot your car.” 1RP 139 (emphasis added). Khorrami claimed that Nolan used the future tense when talking about the parking boot, and that she never used the past, or present tense. 1RP 141.

Khorrami told Nolan that there must have been a mistake because he had just had his car “booted a week ago,” and had paid off his tickets.⁵ 1RP 140. Nolan replied that she did not know anything about Khorrami’s tickets, and that he was “going to get booted.” 1RP 141. Khorrami believed that the fastest way to clear up the mistake was to drive down “to the city,” and proceeded to get into his car. 1RP 141. Khorrami was concerned that his deliveries would be late, and that the flowers in his car would wilt because it was a sunny August day. 1RP 45, 141. Nolan repeatedly told Khorrami that he could not get into or drive his car, and attempted to physically block Khorrami by placing her hands on his shoulder. 1RP 141-42. Khorrami managed to push past Nolan

⁵ Khorrami admitted at trial that he had received “[s]everal” parking tickets over the years while delivering flowers, and that he was very familiar with the boot removal process. 1RP 133. Indeed, Khorrami’s vehicle was booted eight times between October 2013 and October 2014. 1RP 102-03.

and said, “[I]t’s my car, I can get into my car and I’m going to go to the city right now.” 1RP 141-42.

Khorrami started his car and looked in his mirrors before moving it. 1RP 142. He did not see Calderon affixing the parking boot. 1RP 142-43. When Khorrami released his parking brake and shifted into reverse, his car “wiggled,” and Calderon stood up and pounded on his hood. 1RP 143. Khorrami turned off his car and got out, without realizing that Calderon had been injured. 1RP 144.

At trial, the court instructed the jury that to convict Khorrami of third-degree assault, the jury must find:

- (1) That on or about August 27, 2014, the defendant caused bodily harm to Arlene C. Calderon;
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;
- (3) That the defendant acted with criminal negligence; and
- (4) That this act occurred in the State of Washington.

CP 90. The court's instruction mirrored Khorrami's proposed to-convict instruction, and tracked the pattern jury instruction.

CP 30; WPIC 35.22.⁶

⁶ In relevant part, WPIC 35.22 provides that to convict a defendant of third-degree assault, the State must prove beyond a reasonable doubt:

- (1) That on or about (date), the defendant caused bodily harm to (name of person);
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;

The court also adopted Khorrami's proposed instruction defining criminal negligence, which paralleled the pattern jury instruction, providing:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly, or recklessly as to that result or fact.

CP 28, 92; WPIC 10.04.⁷

During deliberations, the jury inquired whether the "substantial risk" referenced in the criminal negligence instruction was "specific to the crime – being injury to Calderon," or the "awareness of substantial risk in general." CP 80 (emphasis in original). The court responded that no additional information would

-
- (3) That the defendant acted with criminal negligence; and
 - (4) That this act occurred in the State of Washington.

⁷ WPIC 10.04 provides:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that [a wrongful act] [(fill in more particular description of act, if applicable)] may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

[When criminal negligence [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [or] [recklessly] [as to that [result] [fact]].]

be provided, and that the jury should rely on the instructions, evidence admitted at trial, and arguments of counsel. CP 81. Khorrami agreed with the court's response. 1RP 191.

The day after Khorrami was convicted, a juror notified the court that following the verdict, he had researched whether the "substantial risk" Khorrami had failed to be aware of was the "risk in a general sense," or the "risk specifically to Officer Calderon." CP 101. Based on his research, the juror concluded that the issue was "whether or not Mr. Khorrami was aware of Officer Calderon on the passenger side of his vehicle." CP 101. The juror suggested that if he had understood that better, then there was "a substantial likelihood" that his verdict would have been different.⁸ CP 101.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Khorrami seeks reversal of his conviction, arguing that the court improperly instructed the jury that to convict him the State need only prove that he failed to be aware of a substantial risk that a *wrongful act* may occur, rather than a substantial risk that *bodily harm* may occur. Having proposed the instructions that he now

⁸ Although Khorrami moved for a new trial based in part on this email, the court denied his motion. CP 96-102, 114. Khorrami does not assign error to this ruling on appeal.

challenges on appeal, Khorrami's claim fails under the invited error doctrine. Even if Khorrami's claim is not waived, the trial court's instructions properly stated the law.

a. Khorrami Invited Any Instructional Error.

Khorrami's instructional error claim is barred by the doctrine of invited error. "A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). The invited error doctrine is well established in Washington, and "strictly enforced" to prevent parties from benefiting from an error that that they caused, regardless of whether the alleged error was committed intentionally or unintentionally. State v. Ortiz-Triana, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 2627117 at *3-*4 (May 9, 2016). The rule applies even to errors of constitutional magnitude.⁹ State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

Here, Khorrami created the alleged error by proposing the instructions that he now challenges.¹⁰ The court adopted

⁹ A limited avenue of relief exists when a defendant claims that his counsel was ineffective for proposing the challenged instruction, or when a defendant also proposed a curative instruction. State v. Studd, 137 Wn.2d 533, 550-52, 973 P.2d 1049 (1999). Neither claim is made here.

¹⁰ Khorrami appears to challenge both the to-convict and the criminal negligence instructions. See Appellant's Br. at 20 (arguing that "inserting the charge-specific language in the to-convict instruction would have clarified the State's burden"),

Khorrami's proposed to-convict and criminal negligence instructions word for word. CP 28, 30, 90, 92. Khorrami did not object, or take any exceptions, to the court's instructions. 2RP 5-6. Having had the court do his bidding, Khorrami should not receive the windfall of a new trial.

b. Alternatively, Khorrami's Instructional Error Claim Fails Under State v. Johnson.¹¹

The State charged Khorrami with assault under RCW 9A.36.031(1)(d), which provides that a person is guilty of third-degree assault if he, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument likely to produce bodily harm. Consistent with that language, the court instructed the jury that to convict Khorrami, the State must prove beyond a reasonable doubt that Khorrami:

- (1) . . . caused *bodily harm* to Arlene C. Calderon;
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;
- (3) That [he] acted with *criminal negligence*; and
- (4) That this act occurred in the State of Washington.

CP 90 (emphasis added).

22 (arguing that the criminal negligence instruction, "Jury Instruction Number 8," allowed the jury to convict him based on the "risk that *some* harm might occur") (emphasis in original). To the extent that he challenges both instructions, the analysis is the same because he proposed both instructions.

¹¹ 180 Wn.2d 295, 325 P.3d 135 (2014).

Criminal negligence is defined by statute as follows:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d). The court's instruction defining criminal negligence tracked the statutory definition, and mirrored the pattern jury instruction, providing:

A person is criminally negligent or acts with criminal negligence when he or she *fails to be aware of a substantial risk that a wrongful act* may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

CP 92 (emphasis added); WPIC 10.04.

Challenges to jury instructions are reviewed de novo in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Taken in their entirety, the court's instructions must inform the jury that the State has the burden of proving every element of the crime beyond a reasonable doubt. Id. "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." Id.

Khorrani argues that the combination of the to-convict instruction and the general instruction defining criminal negligence lowered the State's burden of proof by allowing the jury to convict him of a "generic wrongful act," rather than the specific risk of bodily harm to Calderon. Appellant's Br. at 14. Khorrani is mistaken.

The Washington Supreme Court rejected a similar claim in State v. Johnson, which held that it is not error to instruct the jury on the general definition of reckless when the to-convict instruction contains the essential elements of the crime, including the charge-specific language for recklessness. 180 Wn.3d 295, 307, 325 P.3d 135 (2014). The defendant in Johnson was charged with second-degree assault for recklessly inflicting substantial bodily harm on the victim. Id. at 304-05. The trial court's instructions in Johnson provided the jury with the general definition of recklessness, which contains the same "wrongful act" language found in the definition of criminal negligence. Compare 180 Wn.2d at 305 ("A person is reckless or acts recklessly when he or she knows of and disregards *a substantial risk that a wrongful act may occur . . .*"), with CP 92 ("A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of *a substantial risk that a wrongful act may occur . . .*") (emphasis added).

The defendant in Johnson argued that the general instruction lowered the State's burden of proof because it used the phrase "a wrongful act," rather than the more charge-specific language of "substantial bodily harm." 180 Wn.2d at 305. The court disagreed, holding that the general instruction was sufficient because the to-convict instruction identified the wrongful act as "substantial bodily harm." 180 Wn.2d at 306. The court noted that "providing a generic definition of 'reckless' did not relieve the State of its burden of proof." Id. Further, the court explicitly rejected the lower appellate court's holding, based on other "Court of Appeals precedent," requiring charge-specific language in the definition of reckless. Id. at 305-06.

Here, the rule announced in Johnson applies with equal force, and defeats Khorrami's claim. The trial court's instructions, taken in their entirety, were sufficient because the to-convict instruction properly identified the wrongful act as "bodily harm." CP 90. Separately instructing the jury about the general definition of criminal negligence did not lower the State's burden of proof.

Although Khorrami recognizes the court's holding in Johnson, he attempts to avoid it by focusing on the earlier Court of Appeals precedent in his favor that was overruled by Johnson.

Khorrami devotes pages of his brief to discussing this Court's decision in State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), and Division Two's decision in State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), despite the fact that both decisions were cited in Johnson as the basis for the lower court's erroneous decision. Appellant's Br. at 14-18; see 180 Wn.2d at 305-06 (referring to the decisions as "the 2011 Court of Appeals cases" that formed the basis of the lower court's "incorrect[] conclu[sion]"). Khorrami's claim fails in light of Johnson's clear and binding precedent.¹²

Khorrami's efforts to distinguish Johnson based on the jury's inquiry in this case about "substantial risk," and the juror's post-verdict email, are also unavailing. "The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). A jury's question is not a final determination; rather, "the decision of the jury is contained exclusively in the verdict." Id. (citation omitted). Further, a juror's

¹² Khorrami's attempts to further advance his claim by relying on other allegedly "analogous" areas of criminal law are unavailing given that Johnson is on point and controlling. Appellant's Br. at 18-19.

post-verdict statement regarding matters that inhere in the verdict cannot be used to attack the jury's verdict. Id. at 44.

Here, the jury's question did not suggest that the entire jury was confused, or that any confusion was not remedied before the jury reached its final verdict. CP 80. For the reasons discussed more fully below, the trial court properly responded to the jury's inquiry, and directed the jury to rely on "all" of the instructions provided, including the to-convict instruction that contained all of the essential elements of third-degree assault. CP 81. Jurors are presumed to follow the court's instructions. Diaz v. State, 175 Wn.2d 457, 474, 285 P.3d 873 (2012) ("Washington courts have, for years, firmly presumed that jurors follow the court's instructions.").

The juror's post-verdict statements about "some confusion" that existed in the jury, and the subsequent research that he conducted that led him to doubt his decision, unquestionably qualify as "individual or collective thought processes leading to a verdict." Ng, 110 Wn.2d at 43. As such, the statements cannot be used to impeach the verdict. Id. at 44.

Khorrani's claim fails in light of Johnson's binding precedent. The trial court did not err by using the general definition

of criminal negligence when the to-convict instruction contained all of the essential elements, including the charge-specific language of “bodily harm.”

2. THE TRIAL COURT RESPONDED PROPERLY TO THE JURY’S INQUIRY.

Khorrani argues that the trial court erred by failing to properly respond to the jury’s inquiry during deliberations. He contends that the trial court should have provided a specific response to the jury’s inquiry, rather than generally instructing the jury to rely on its previously provided instructions. Khorrani’s claim fails. Khorrani waived his right to challenge the court’s instruction by failing to propose the language that he now claims was required.¹³ Even if he did not waive his claim on appeal, Khorrani cannot show that the trial court abused its discretion by providing a neutral instruction directing the jury to rely on its previous instructions.

¹³ Although it is not entirely clear from the record, it appears that Khorrani and the prosecutor most likely suggested that the court provide a general instruction referring the jury to the previously provided instructions. See 1RP 191 (prosecutor stating “The parties are aware that the jury has a question . . . the parties are in agreement that the best answer has something to do with (*unintelligible*) instructions.”) (emphasis added). Neither party suggested that the court provide a specific response to the jury’s inquiry. 1RP 191-92.

a. Khorrami Waived His Claim On Appeal.

To claim error on appeal, an appellant challenging a jury instruction must first show that he took exception to that instruction in the trial court. State v. Salas, 127 Wn.2d 173, 181, 89 P.2d 1246 (1995). The objecting party must indicate the instruction objected to and the reasons for the objection. CrR 6.15(c); see also CrR 6.15(f)(1) (requiring that parties have an “opportunity to comment” on the appropriate response to a jury inquiry, and that “any objections” be made a part of the record).

The rule requiring a timely and well-stated exception is “well-settled law” and “not a mere technicality.” State v. Bailey, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). The objection must apprise the court of “the precise points of law involved and when it does not, those points will not be considered on appeal.” Id. The purpose of the rule is to clarify the nature of a party’s objection at the time that the trial court has all of the evidence and legal arguments before it, so that the trial court can correct any error.¹⁴

¹⁴ A narrow exception to the rule exists for a “manifest error affecting a constitutional right.” State v. Salas, 127 Wn.2d 173, 182, 89 P.2d 1246 (1995). Although Khorrami suggests in passing that the trial court’s failure to properly instruct the jury on criminal negligence, and clarify the jury’s inquiry amounted to “a manifest error of constitutional magnitude,” he makes no effort to articulate, let alone apply, the test for “manifest constitutional error.” Appellant’s Br. at 12; see State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007) (requiring the defendant to identify a constitutional error and show “actual prejudice”). As such,

Salas, 127 Wn.2d at 182; City of Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

Here, Khorrami argues that the trial court should have instructed the jury that “the disregard was *of the specific risk of bodily harm* to PEO Calderon, and not merely a general risk.” Appellant’s Br. at 23 (emphasis in original). Khorrami did not propose this language below, or object to the court’s general response, as required to preserve his claim on appeal. 1RP 191-92. By depriving the trial court of the opportunity to correct the alleged error at the time it occurred, Khorrami has waived his right to challenge the court’s instruction on appeal.

b. Alternatively, The Trial Court Did Not Abuse Its Discretion By Referring The Jury To The Instructions Previously Provided.

Even if Khorrami has not waived his right to challenge the court’s response to the jury’s inquiry, his claim fails because the trial court properly instructed the jury to rely on the instructions previously provided. CrR 6.15(f)(1) permits a trial court to provide additional instructions to a jury during deliberations, provided that the court notifies the parties of the jury’s inquiry, and allows each

Khorrami has failed to adequately brief and preserve the issue. See RAP 10.3(a)(6) (requiring an appellant to provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record”).

party an opportunity to comment and object. In general, a trial court's instruction directing the jury to refer to previous instructions is not error. Ng, 110 Wn.2d at 44; State v. Allen, 50 Wn. App. 412, 420, 749 P.2d 702 (1988) (holding that the trial court's failure to consult the parties before answering a jury's inquiry was harmless because the trial court's instruction, referring the jury to the previous instructions, "was neutral and conveyed no affirmative information").

A trial court's decision on whether to provide additional instructions is reviewed for an abuse of discretion. State v. Becklin, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In other words, the reviewing court considers whether "any reasonable judge would rule as the trial judge did." State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Here, the jury inquired whether the "substantial risk" referenced in the criminal negligence instruction was "specific to the crime – being injury to Calderon," or the "awareness of substantial risk in general." CP 80 (emphasis in original). With the parties'

agreement, the trial court responded, "No additional information will be provided. Please rely on all your instructions, the evidence admitted in the case, and argument of counsel." 1RP 191-92; CP 81. The trial court's instruction, referring the jury to its previous instructions, was not error. Khorrami cannot show that no reasonable judge would have instructed the jury to rely on its previously provided instructions.

This Court's decision in State v. Besabe, 166 Wn. App. 872, 271 P.3d 387 (2012), is instructive. In Besabe, the court assumed, based on the incomplete record, that the trial court had erred by not consulting the parties before answering the jury's inquiry. Id. at 882. Similar to the facts presented here, the jury in Besabe inquired about the "potential contradictions" between two instructions, specifically instructions 15 and 30. Id. The trial court responded, "Please follow all of the instructions, including instruction 30." Id. at 882-83. On appeal, this Court held that even if the trial court erred by failing to contact the parties prior to providing a response, the error was harmless because the response "conveyed no affirmative information to the jury." Id. at 883.

Akin to the jury in Besabe, the jury in this case inquired about the interplay between two instructions, the general criminal negligence instruction and the to-convict instruction.¹⁵ CP 80. The trial court's response to the jury's inquiry here conveyed even less affirmative information than the response provided in Besabe. Compare CP 81 ("No additional information will be provided. Please rely on all your instructions . . ."), with Besabe, 166 Wn. App. at 882-83 ("Please follow all of the instructions, *including instruction 30.*") (emphasis added). Rather than identify a particular instruction, the trial court here instructed the jury generally to rely on "all" of the previously provided instructions. Given this Court's decision in Besabe, Khorrami cannot show that the trial court abused its discretion by providing a neutral response that did not convey any affirmative information.

Khorrami's reliance on State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984), is misplaced. In Davenport, the prosecutor committed misconduct by "unilaterally" presenting the theory of accomplice liability during rebuttal argument. Id. at 763. Although the defendant had not been charged as an accomplice, and the jury

¹⁵ Unlike in Besabe, the record is clear that the trial court consulted the parties, and provided them with an opportunity to fashion a response to the jury's inquiry. 1RP 191; CP 81.

had not been instructed on accomplice liability, the prosecutor argued that the defendant was guilty as an accomplice. Id. at 759-60. Subsequently, the jury inquired about accomplice liability, and the trial court directed the jury to “rely on the law given in the Court’s instructions.” Id. at 759. The Davenport court held that the trial court’s instruction did not remedy the prosecutorial misconduct because it failed to inform the jury that the State’s comment was improper, and that accomplice liability should not be considered. Id. at 764.

Here, there is no indication that the prosecutor introduced a new legal theory during closing argument that Khorrami was never charged with, or given an opportunity to respond to. For the reasons previously stated, the trial court’s instructions properly stated the general definition of criminal negligence, and the specific level of injury required to convict Khorrami. See Johnson, 180 Wn.2d at 307 (holding that the trial court’s instructions properly provided the general definition of reckless where the to-convict instruction contained the charge-specific language for recklessness); CP 90, 92. The trial court did not abuse its discretion by directing the jury to rely on properly given instructions.

3. SUFFICIENT EVIDENCE SUPPORTS KHORRAMI'S THIRD-DEGREE ASSAULT CONVICTION.

Khorrani argues that his conviction should be reversed because the State failed to prove that he acted with criminal negligence. Viewing the evidence in the light most favorable to the State, Khorrani's claim fails. There is substantial evidence from which a rational trier of fact could find that Khorrani failed to be aware of a substantial risk that Calderon could suffer bodily harm, and that his failure constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id. Circumstantial and direct evidence

are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

A person commits third-degree assault if he (1) with criminal negligence, (2) causes bodily harm to another person, (3) by means of a weapon, instrument, or thing likely to produce bodily harm. RCW 9A.36.031(1)(d). By statute, a person acts with "criminal negligence" when he "fails to be aware of a substantial risk that a wrongful act may occur," and that failure "constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). "Bodily harm" is defined as physical pain or injury. RCW 9A.04.110(4)(a).

Here, there is substantial evidence from which a rational trier of fact could find that Khorrami failed to be aware of a substantial risk that Calderon would suffer bodily harm, and that his failure

constituted a gross deviation from the standard of care that a reasonable person would exercise in the same situation. As Khorrami approached his Lexus, Calderon was "within inches" of his front passenger side tire, affixing a one-and-a-half foot long, bright yellow parking boot. 1RP 34-35, 93; Ex. 5-N. Calderon was placing the boot curb side – the same side on which Khorrami's car had been booted six times previously in the last year, including 12 days prior. 1RP 103, 140. Calderon was readily identifiable as a parking enforcement officer, and highly visible, given that she was dressed in uniform, and wearing a fluorescent green traffic vest bearing the words, "SEATTLE POLICE." 1RP 46-47, 80; Ex. 5-R.

As Khorrami admitted on cross examination, and the photos of the scene confirm, nothing obstructed his view of the car's passenger side once he was within five feet of the vehicle. 1RP 153-54; Ex. 5-D, 5-L, 5-Q. The fact that the incident occurred on a clear, sunny August day further suggests that Calderon was easily observable. 1RP 45.

Moreover, Khorrami's words and conduct suggest that he knew that his car was in the process of being booted, and that more than one parking enforcement officer was involved. The first words Khorrami yelled as he ran past Calderon were, "don't boot my car."

1RP 38, 89-90. Khorrami testified that Nolan told him, "we are going to boot your car," confirming that she was not alone. 1RP 139 (emphasis added).

Despite being told twice by Nolan that his car had been booted, and twice commanded not to get inside it, Khorrami "kept steamrolling right on in." 1RP 94. Khorrami chose to muscle his way past Nolan, even though he was familiar with the booting process, and knew that a phone call could resolve the situation without further physical confrontation. 1RP 137, 141-42. Nolan positioning herself in front of Khorrami's car, holding out her hand, and ordering him not to move his car, was not enough to deter him. 1RP 95-96.

Based on all of this evidence, a rational trier of fact could find that Khorrami was criminally negligent when he ignored Nolan's repeated commands and insisted on driving away.¹⁶ A reasonable person with Khorrami's prior booting history and unobstructed view, would have seen Calderon affixing the boot, and complied with Nolan's orders, rather than flouted them. Viewing this evidence in the light most favorable to the State, and drawing all reasonable

¹⁶ Even the juror who emailed the court after the verdict with second thoughts admitted that Khorrami's behavior grossly deviated from a reasonable person's standard of care when he turned on the ignition to start his vehicle. CP 101.

inferences therefrom, there is substantial evidence that Khorrami was criminally negligent.

Khorrami's arguments on appeal are largely a reprise of his arguments at trial, and are either unsupported by the evidence, or inconsistent with the standard of review. For example, Khorrami argues that it is "inescapable" that Nolan informed him "only that his car *was going to be* booted, not that the process was underway." Appellant's Br. at 26 (emphasis in original). Nolan's testimony, however, was to the contrary. See 1RP 94 ("I told him (Khorrami) that his vehicle had been booted twice. I told him do not get in your vehicle once, and I told him do not move your vehicle twice."). Further, Khorrami argues that Nolan did not tell him that there was another officer on scene or involved, but he testified at trial that Nolan told him, "we are going to boot your car," suggesting that Nolan had a partner. 1RP 139 (emphasis added).

Khorrami's other factual arguments, that Calderon did not see or contact him prior to the injury, and that Nolan could not see Calderon kneeling down, are unavailing in light of the standard of review, which requires the reviewing court to defer to the trier of fact on the persuasiveness of the evidence. Fiser, 99 Wn. App. at 719. A rational trier of fact could have reasonably concluded that

Khorrami was criminally negligent despite both facts, given that Calderon was wearing a fluorescent green traffic vest while affixing a large, bright yellow parking boot on the same curb side location where Khorrami's car had been booted six times previously. 1RP 34-35, 46-47, 103. These facts, combined with the fact that nothing blocked Khorrami's view of where Calderon was working as he approached, is strong evidence of Khorrami's criminal negligence. 1RP 153-54; Ex. 5-D, 5-L, 5-Q. Nolan's inability to see Calderon from where she was standing on the driver's side of the vehicle is irrelevant because Khorrami approached the car from the opposite, passenger side. 1RP 91, 153. Substantial evidence supports Khorrami's third-degree assault conviction.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Khorrami's conviction.

DATED this 14th day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

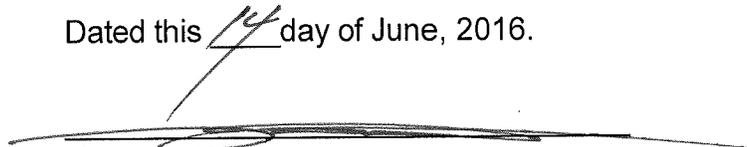
By: Kristin A. Relyea
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to DIANA LUNDIN, the attorney for the appellant, at dlundin@phillipsonlundin.com, containing a copy of the Brief of Respondent, in State v. Bijan Khorrami, Cause No. 73952-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of June, 2016.


Name:
Done in Seattle, Washington