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COURT OF APPEALS

DIVISION II  
OF THE STATE OF WASHINGTON

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DIVISION II  
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SPokane, WA

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STATE OF WASHINGTON, RESPONDENT

v.

RICKY F. TURNER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF SKAMANIA COUNTY

HONORABLE E. THOMPSON REYNOLDS

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BRIEF OF APPELLANT  
September 19, 2007

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**I. ASSIGNMENTS OF ERROR**

- A. Did the trial judge err in reversing another judge's ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored?
- B. Was the defendant's counsel ineffective when not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel before the time had lapsed and counsel neglected to read the court rules regarding such matters?
- C. Did the trial judge err in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family?
- D. Did the trial court err in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death?
- E. Did the trial court err in permitting questions by the State that impermissibly invite comment regarding the defendant's right to remain silent?

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. The trial judge erred in reversing another judge's ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored.
- B. The defendant's counsel was ineffective by not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel

before the time had lapsed and counsel neglected to read the court rules regarding such matters.

- C. The trial judge erred in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family.
- D. The trial court erred in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death.
- E. The trial court erred in permitting questions by the State that impermissibly invite comment regarding the defendant's right to remain silent.

### **III. Statement of the Case**

Rickey Turner was tried and convicted by jury of one count of assault in the second degree while armed with a deadly weapon and one count of harassment. (RP 289-290).

Prior to trial, defense counsel submitted an Affidavit of Prejudice against Judge Reynolds. (CP 40). Judge Altman signed the Affidavit, after the State waived objection to timeliness on November 2, 2006. (RP 20). Judge Reynolds returned on November 8, 2006 and "determined that the affidavit will not be honored because it was not timely made." (RP 24).

Defense counsel explained Mr. Turner requested such an affidavit from him at his initial appearance, and that it was his “misunderstanding.” (RP 25). Apparently, the misunderstanding was based on the fact defense counsel did not read the court rule that applied. (RP 25). “Ironically,” defense counsel in this case had previously prosecuted Mr. Turner eleven years prior. (RP 302).

Just prior to trial, the State attempted to admit threatening phone messages, apparently from a family member – not the defendant. The court properly excluded that evidence as hearsay. (RP 42-44). After a short hearing, the court likewise rejected the State’s attempt to introduce a set of antlers that were not used in the alleged assault. (RP 54).

During the direct examination of the complaining witness, the State asked a question regarding the defendant’s brothers and the witness was allowed to answer over defense counsel’s objection on relevance grounds. (RP 69). Later, after the State had rested, the examined this same witness regarding threats made involving other members of the defendant’s family. (RP 226). This examination was outside the scope of the Defendant’s prior testimony, and was not otherwise submitted in the State’s case-in-chief. During cross-examination of the defendant, the State was allowed to ask question about the defendant’s family members who were not on trial, over defense counsel’s objection. (RP 200). In closing, the State referred to the “Turner clan” and their displeasure with the complaining witness as evidence of the defendant’s alleged harassment. (RP 266-67).

During the original examination of this same witness, the State attempted to offer a picture of yet another set of antler's not used in the alleged assault. (RP 80-81). While the court properly rejected this attempt, the jury was present for examination and heard testimony regarding the picture. Later, the State attempted to re-introduce and admit the same picture on cross-examination of the defendant. (RP 205-210).

Inexplicably, the State did not offer pictures or elicit testimony regarding this witness' injuries on direct examination. (RP 66-86). Even more baffling is defense counsel's cross examination that put a much finer point on it by asking specific questions about his injuries. (RP 92-93). Presumably this opened the evidentiary door for the State on redirect, who offered four pictures that were admitted without objection. (RP 94-96).

With a law enforcement witness, the State elicited testimony that Mr. Turner did not speak to laws enforcement after being arrested and read his Miranda rights. (RP 127). This witness acknowledged that Mr. Turner had previously advised him that "he didn't want to talk about the situation." (RP 128). During the cross-examination of the defendant, the State asked the Defendant, "[y]ou didn't want to talk to them at all?" (RP 213). This question was posed in the context of the initial contact by law enforcement. Later the State asked, "[n]ow you also told Deputy Hepner that you were going to fill out a statement about your version of events; right?" (RP 214). The defendant answered he did

not, and no such testimony was ever introduced by this law enforcement witness. (RP 130-39). Another example of the State commenting on the Defendant's Miranda rights: (RP 240) – “[Prosecutor] How did he respond to that? [Deputy] He stopped talking.”

The State rested after the examination of a law enforcement witness (RP 139). There was no motion regarding the sufficiency of the evidence, or lack thereof. Based on the evidence to that point, it appears that the harassment count and the deadly weapon enhancements were seriously lacking. (RP 40-139). In an exception to the State's proposed enhancement instructions, defense counsel argued that there was not sufficient evidence to present one of the enhancements to the jury. (RP 256-57). He correctly pointed out that the actual item was never admitted, despite numerous attempts by the State to present a replica. The error may have been harmless, however, since the jury did not convict the defendant regarding Count II or the related enhancement. (RP 290).

Regarding the other “deadly” weapon, the State put on no medical testimony regarding the capabilities of what their own witness called a “stick.” (RP 73). By the witness' own admission, the stick not used to strike anyone. Rather, it was used to intimidate the complaining witness. (RP 76). The complaining witness testified that: (1) was no closer than six feet at any time while armed with the stick (RP 75); (2) only raised it when he got out of his vehicle (RP 75); (3) couldn't recall what Mr. Turner was yelling while armed with

the stick (RP 97); and (4) that the defendant “disarmed” himself (RP 76). Likewise, another eyewitness testified that: (1) the defendant was armed with a stick (RP 103); and (2) the defendant discarded the stick (RP 104). As such, the jury could only have convicted under the “creation of apprehension” theory of assault or that the stick was, in fact, a deadly weapon.

#### **IV. Argument**

##### **A. The trial judge erred in reversing another judge’s ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored.**

Here, the trial judge, without motion by the State, reviewed another judge’s ruling on the defendant’s request for change of judge. Such an action constituted appellate review prior to engaging in the appellate process.

##### **B. The defendant’s counsel was ineffective by not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel before the time had lapsed and counsel neglected to read the court rules regarding such matters.**

The Federal and State Constitutions guarantee a defendant effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. Art. 1, § 22. To prove ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, i.e., that the representation "fell below an objective standard of reasonableness based on consideration of all the circumstances" and (2) that deficient performance prejudiced him, i.e., "there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We determine whether counsel was competent based upon the entire trial record. *McFarland*, 127 Wn.2d at 335. Here, defense counsel admitted a lapse in his duty to Mr. Turner. There was prejudice as critical rulings favored the State, in particular those involving the deadly weapon enhancement.

**C. The trial judge erred in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family.**

Here, the trial judge overruled defense counsel's objections to the State's inquiry about members of the Defendant's family in violation of ER 402. Even if the inquiry would have been relevant, it should still have been subject to ER 403 analysis. The State benefited from this evidence, even referring to the "Turner clan" in its closing argument. This is clear prejudice to the Defendant, as it invites the inference of guilt by association.

**D. The trial court erred in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death.**

Evidence is sufficient to support a conviction if, viewed in the 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).

Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury on another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *State v. Nicholson*, 119 Wn. App. 855, 860, 84 P.3d 877 (2003). When assault is alleged to have been committed by causing another to be in apprehension of harm, the State must prove both that the defendant had the specific intent to place the victim in apprehension of harm and that the victim was in apprehension of harm. *State v. Eastmond*, 129 Wn.2d 497, 500, 503-04, 919 P.2d 577 (1996). A person is guilty of second degree assault if he, under circumstances not amounting to first degree assault, assaults another with a deadly weapon. RCW 9A.36.021(1)(c).

An item may be either a deadly weapon per se, such as a firearm or explosive, or a deadly weapon in fact, due to the manner of its use. *State v. Shilling*, 77 Wn. App. 166 171, 889 P.2d 948 (1995). In order for a weapon to be a deadly weapon in fact, the State has to show that the item had both the inherent capacity to cause substantial bodily injury or death and that it was readily capable of causing such injury or death under the circumstances of its use. *State v. Skenandore*, 99 Wn. App. 494, 499, 994 P.2d 291 (2000). The circumstances of a

weapon's use include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted. *Shilling*, 77 Wn. App. at 171-72. In order to determine whether a thing was a deadly weapon or not, a court must consider all of these circumstances. *State v. Barragan*, 102 Wn. App 754, 9 P.3d 942 (2000).

In *Barragan*, the issue was one of a pencil. *Barragan*, 102 Wn. App 754 at 761. The pencil was swung at the victim's eye. *Id.* The court looked at all of the factors in determining that the pencil was, in fact, a deadly weapon; the pencil had been swung with the intent of putting out a person's eye. *Id.* The victim, while not suffering great bodily harm, was only able to avoid that harm by partially deflecting the blow. *Id.* The victim still received an injury from the pencil being driven into his skin. *Id.*

In this case, taking all inferences in favor of the State, the court need apply both the requirement that the item is inherently deadly and that the circumstance of its use render it a deadly weapon. The State presented no medical testimony about this item, instead relying on the common knowledge and/or experience of the jurors to find it inherently deadly.

Where the State clearly falls short, is the manner in which the stick was used. While it may not eliminate the assault by apprehension component, the substantial evidence presented at trial is that *it wasn't used at all*. The considerations of the *Shilling* court clearly favor the defendant. For example,

regarding the intent and ability of the user, Mr. Turner's intent in the light most favorable to the State was to intimidate the complaining witness and his ability to do so was hampered by the fact that he discarded the stick and clearly wasn't very accomplished in the pugilistic arts. Regarding the degree of force, there was none applied. Regarding the part of the body to which it was applied, there was no contact. Regarding the actual injuries that were inflicted, again – not applicable. Therefore, it could not have been a deadly weapon and the jury should not have been given the option of enhancing the penalty for assault in the second degree.

**E. The trial court erred in permitting questions by the State that impermissibly invite comment regarding the defendant's right to remain silent.**

Under the Fifth Amendment to the United States Constitution, no person shall be compelled to witness against himself in a criminal case. *U.S. Const. Amend. V*. The Appellate Courts similarly interpret our Washington state constitutional provision against self-incrimination, *Wash. Const. Art. I, § 9. State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). In either pre arrest or post arrest situations, every person has the right to remain silent, which silence cannot be used as substantive evidence of guilt. *Easter*, 130 Wn.2d at 238; *State v. Evans*, 129 Wn. App. 211, 225, 118 P.3d 419 (2005). Accordingly, the State cannot elicit comments from a witness that are related to a defendant's silence or make such comments during closing arguments in order to infer guilt. *State v.*

*Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)., *Easter*, 130 Wn.2d at 236. A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. *State v. Slone*, 133 Wn. App. 120 (2006), citing *Lewis*, 130 Wn.2d at 706-07.

The question of whether or not the assertion of *Miranda* rights was commented on is a question of manifest constitutional error. *State v. Nemitz*, 105 Wn. App. 205, 214 19 P.3d 480. Therefore, even though it may not have been addressed below, it is appropriate for consideration at the appellate level. *Nemitz*, 105 Wn. App. at 214, citing *State v. Jones*, 71 Wn. App. 798, 809, 863 P.2d 85 (1993).

In this case, more than a mere mention of the defendant's desire to remain silent at the time was made. While the state's law enforcement witness did inform the jury that Mr. Turner had asserted his *Miranda* rights (RP 128), the true violation came in the cross-examination of the defendant himself. At that time, the state twice elicited from the defendant that he desired to remain silent. (RP 213, 214). Furthermore, the state pointedly ended their cross-examination by questioning the defendant about a written statement to the police. (RP 214). This was not a simple "did you give a written statement," either; the state's question was pointedly phrased to suggest that the defendant *should* have given a written statement if what the defendant was saying was true. The question "You also told

Deputy Hepner that you were going to fill out a statement about your version of the events, right?" is put so that it should naturally follow that a person in the defendant's situation would do this thing; it allows the prosecutor to act surprised when the defendant answers "no," and convey that sense to the jury that they, too, should be surprised by such a response. The prosecution was quite obviously using their cross-examination of the defendant to point out to the jury that, if the defendant's story was true, that the defendant would and should have spoken freely to law enforcement at the time; such an assertion, subtle and crafty though the state may have made it, is still a comment on an accused's silence as it suggests to the jury that the silence was an admission of guilt.

An error infringing on a criminal defendant's constitutional rights is presumed to be prejudicial. And the State has the burden of proving the error was harmless. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); *State v. Caldwell*, 94 Wn.2d 614, 618-19, 618 P.2d 508 (1980). This was an intentional abuse of power by the prosecution, and it was used to affect the mindset of the jurors. No such proof can be provided by the state, and therefore this error is not harmless. Thus, a new trial is required in order to secure Mr. Turner's constitutional rights.

## **V. Conclusion**

Petitioner asks that the court reverse the decision of the trial court to grant a directed verdict on the count of assault in the second degree and the deadly

weapon enhancement, because the evidence was insufficient to show that the stick which the petitioner allegedly used to intimidate the complaining witness was a deadly weapon, and that a new trial be afforded to petitioner on all counts, because the admission of evidence commenting on the Defendant's right to remain constituted reversible error.

Respectfully Submitted this 19<sup>th</sup> day of September, 2007.



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