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COURT OF APPEALS
DIVISION II

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NO. 37306-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY KEITH WARNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen M. Warning

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

2136 S 260th Street, BB304
Des Moines, Washington 98198
(253) 945-6389

9012108

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give appellant's proposed jury instruction on the lesser included offense of unlawful display of a weapon.

2. The trial court erred in denying appellant's motion to dismiss the charge of assault in the second degree with a deadly weapon as charged in count I of the amended information.

Issues Pertaining to Assignments of Error

1. Did the trial court err in failing to instruct the jury on the lesser included offense of unlawful display of a weapon when each of the elements of the lesser offense is a necessary element of the offense charged and the evidence supported the inference that only the lesser offense was committed?

2. Did the trial court err in denying appellant's motion to dismiss the charge of assault in the second degree with a deadly weapon as charged in count I of the amended information when there was insufficient evidence to prove all the elements of the crime beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural Facts

On May 23, 2007, the state charged appellant, Rodney Keith Warner, with two counts of second degree assault. CP 02-2A. The state

amended the information on September 20, 2007, adding a deadly weapon enhancement to both counts of second degree assault, and charging Warner with a third count of bail jumping. CP 8-10; RCW 9.94A.602, RCW 9A.36.021(1)(c), RCW 9A.76.170(1). Following a trial before the Honorable Stephen M. Warning on December 17-18, 2007, a jury found Warner guilty as charged. CP 33-37. On January 23, 2008, the court imposed an exceptional sentence of 10 months each for the two counts of second degree assault and 4 months for bail jumping, to be served concurrently, and 24 months for the deadly weapon enhancements for a total of 34 months confinement and an additional 18 to 36 months of community custody. CP 102.

2. Substantive Facts

Melvin Stroud testified that he was working in the surveillance room at the Cadillac Casino on May 18, 2007 when a brawl erupted in the pool room when he was watching the monitors. 1RP¹ 23, 26. Over a dozen young people began shoving and punching each other and throwing bottles and pool cues. 1RP 27. Stroud called the police and everyone was kicked out of the casino. 1RP 28-29. The police returned afterwards and asked for a videotape from the camera above the pay phone located near

¹ There are two verbatim report of proceedings: 1RP - 5/21/07, 6/6/07, 6/20/07, 7/11/07, 7/12/07, 9/5/07, 9/20/07, 11/28/07, 12/12/07, 12/17/07; 2RP - 12/18/07, 12/19/07, 1/16/08, 1/23/08.

the rest rooms. 1RP 25, 30. Stroud provided the tape which showed “[t]wo people placing knives at the phone, and one person walking by, looking at them, as they were doing it.” 1RP 31. Casino security retrieved a knife on the floor below the pay phone and another knife stuck behind a phone book. 1RP 31.

Officer Ken Hardy testified that he and other officers were dispatched to the Cadillac Ranch around 10:30 p.m. to investigate a fight. 1RP 40-41. When he arrived at the casino, he saw two females in the street pushing each other so he thought they were part of the fight, “[t]hey were both kind of real excited and upset.” 1RP 41-43. They identified themselves as Chelsea Keefe and Gail Lewis. 1RP 43.

While Hardy and Officer Berndt were talking to Keefe and Lewis, Keefe pointed toward Warner and James Wilcox who were walking down the sidewalk and accused them of assaulting her husband with a knife. 1RP 45. Hardy and Berndt stopped Warner and Wilcox, patted them down for weapons, and questioned them. 1RP 45-47. Thereafter, Hardy went to the Cadillac Ranch and talked to the video technician who provided him with a videotape and he recovered two knives that were found at the casino.² 1RP 47-49.

² The video tape that showed Warner and Wilcox placing knives under the pay phone was played for the jury and admitted into evidence. 1RP 31; Ex. 1.

Officer Michael Berndt testified that he assisted Officer Hardy who had detained Warner and Wilcox outside the Cadillac Ranch. 2RP 135-37. Berndt questioned Warner and he denied having a knife and said that he knew about the fight at the casino but was not involved. 2RP 137-38. After talking to Warner, Berndt attempted to obtain more information from Keefe who was upset and angry. 2RP 140-41. Keefe told him that Warner took a swipe at her husband with a knife and that Wilcox was with him but did not have a knife. 2RP 149-50. Once Warner and Wilcox were taken into custody, Keefe calmed down and eventually provided a written statement. 2RP 143, 154-55. Lewis gave Brendt substantially the same story as Keefe. 2RP 150-51. Brendt also questioned Keefe's husband, Brandon Pinkard, who was initially somewhat cooperative and "then quickly became, I don't want anything to do with you." 2RP 143. Pinkard showed Brendt a slice in his T-shirt and a small cut on his side but refused to let Brendt take any photographs. Pinkard told Brendt that he was not a victim and walked away. 2RP 144-45.

Chelsea Keefe testified she went to the Cadillac Ranch with Pinkard, Lewis, and a group of friends for a birthday celebration. 1RP 100-01. After having some beers, they went over to a pool table. When Keefe asked if anyone was playing on the pool table, "[t]his guy got all freaked out" and threatened to beat her up. 1RP 102. Pinkard came to her

defense and had to be restrained by casino employees. The other man's friends attempted to hold him back but he escaped their grasp and charged Pinkard. 1RP 105-06. Keefe tried to intervene and sustained a cut on her lip when she was hit by Pinkard's elbow. 1RP 106. A fight ensued and they "were all kicked out." 1RP 104-06.

According to Keefe, she left with Pinkard and Lewis and they were walking down the street when she noticed two men behind them. 1RP 106-08. The men were not involved in the fight at the casino. 1RP 108. Then Keefe saw a knife and screamed, "Run, Brandon; he's got a knife." 1RP 108. Keefe started running and saw Pinkard run across the street. Warner chased Keefe with a knife and the other taller man ran after Pinkard with a knife. 1RP 108-10, 112. Keefe started screaming as Warner chased her around a car and then "somebody said the cops are coming, and he was gone." 1RP 110-11. Keefe could not recall what happened to Lewis after they all started running away. 1RP 115.

Keefe acknowledged that she gave a written statement to the police recounting that when they came out of the casino, "two Mexican people" came up to them. According to Keefe's written statement, her "husband yelled, come on, and then another taller Mexican came out and said, come on. The little one tried to stab my husband. And I went up. As the little guy swung, he hit me in the lip and split it and the two ran and the cops

came.” 1RP 117-18. Keefe admitted writing the statement but said it was wrong and that she had been drinking. 118-19. Keefe claimed that she told the police that a man chased her down the street with a knife and another man chased her husband down the other side of the street with a knife, but Officer Brendt testified that Keefe never said anything about being chased by anyone with knives. 1RP 124, 2RP 150.

Brandon Pinkard testified that he and Keefe were with some friends at the Cadillac Ranch having some drinks and playing pool. 1RP 88. An altercation arose “over a pool table” and Keefe was “elbowed in the lip.” 1RP 88-89. They left the casino and were walking down the street when he felt “a poke” in his back and heard his wife scream, “run, he’s got a knife.” 1RP 91. Pinkard took off running and did not see what poked him or who was behind him and did not hear any threats. 1RP 91-92, 97. The poke to Pinkard’s lower back left no mark and “it wasn’t like to inflict injury.” 1RP 93. Pinkard was uncertain where Keefe was after he started running. 1RP 95-96.

Gail Lewis testified that she met Keefe, Pinkard, and another friend at the Cadillac Ranch. They had some drinks and went to a pool table to play pool. Suddenly a man started yelling that “it was his pool table.” 1RP 61-63. When he yelled at Keefe, Pinkard defended her and said, “that’s my wife, don’t yell at her. Next thing I know, everybody’s

fighting.” 1RP 63. Everyone ended up getting kicked out of the casino and the man that started the fight was on his cell phone “saying that he was calling his buddies to come down here and help him.” 1RP 65-66.

According to Lewis, she left the casino with Keefe and Pinkard and was walking ahead of them. As they walked down the street, they passed Warner and another man and she “heard a bunch of people fighting.” 1RP 66-67. Lewis was not paying attention until Keefe grabbed her arm and said a man was chasing her with a knife. Lewis turned around and saw Warner running with a big knife. 1RP 67. They ran across the street together as Warner chased after them. Some men on the street corner heard them yelling and came over to them. Then the police arrived and Warner ran off toward the casino. 1RP 77-78. Lewis did not know what happened to Pinkard and did not see him being chased. 1RP 83-84.

Warner’s nephew, Randy Stout, testified that on May 18, 2007, he received a phone call from his brother who said he was at the Cadillac Ranch and “some people were trying to attack him at the bar and he needed a ride home.” 2RP 162-63. Stout drove to the Cadillac Ranch with Warner and his friend and parked on the street in front of the casino. 2RP 163-64. They got out of the car and a man across the street began yelling at them in a hostile manner, “he was a pretty big guy.” 2RP 165-

66. When the man started crossing the street and yelling at him, Warner protected him by pulling a knife out and showing it to the man, saying "hey, you better back off." 2RP 166. The man, who was with two females who were yelling and screaming, turned around and walked away. 2P 167.

Warner and Stout went into the Cadillac Ranch to look for his brother but never found him. 2RP 167-68. As they were leaving the casino, one of the women who they saw earlier approached them and she shoved him out of the way. Then the woman, who was about five feet and nine inches tall, grabbed Warner and slammed him against a wall. 2RP 170-71. Shortly thereafter the police came and arrested him and Warner. 2RP 171-72.

Warner testified that on May 18, 2007, his family had gathered together on a hillside to scatter the ashes of his sister who had passed away from cancer. 2RP 186. Later in the evening, several of his nieces and nephews went to the Cadillac Ranch. 2RP 186. That night, one of his nephews called from the casino and said they were "in a bind and they needed a ride." 2RP 186-87. Warner did not know what kind of trouble he would encounter at the casino so he put two knives in the car and Stout drove him and his friend Wilcox to the Cadillac Ranch. 2RP 187-88. When they arrived at the casino, there was "[c]haos in the street," with a

lot of people and cars burning rubber so he carried his knives at his side for protection as they got out of the car. 2RP 189-90. Then a man came across the street toward Stout and Warner could tell that he was intoxicated by the way he was walking and slurring his speech. 2RP 190-91. Warner stepped between the man and Stout and showed his knife while still holding it at his side, "I told him go on, you know, go home." 2RP 190-91. During this time, a woman came up to the man and said, "hey, he's got a knife, he's got a knife," and they backed away and left. 2RP 193. Warner identified the man as Pinkard who testified earlier during the trial. 2RP 192.

Warner, Stout, and Wilcox proceeded to the Cadillac Ranch to look for his family. When they could not find anyone, Warner put the knives away by the telephone booth because he no longer needed them. 2RP 194-95. As they were walking back to the car, a woman came up behind Warner and shoved him against a car window. 2RP 195-96. Warner, who was only five feet and six inches tall, did not retaliate and kept walking. 2RP 195-96, 220. Then the woman hit him again from the back, causing him to scrape his elbow against a cement wall. 2RP 195-96. About that time, officers arrived and questioned him. 2RP 216. Warner acknowledged that he initially denied having a knife. 2RP 198. During

his trial testimony, Warner identified the woman as Keefe, who was upset with him "for brandishing a knife" at her husband." 2RP 196, 215.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON BECAUSE EACH OF THE ELEMENTS OF THE LESSER OFFENSE IS AN ELEMENT OF THE OFFENSE CHARGED AND THE EVIDENCE SUPPORTED THE INFERENCE THAT ONLY THE LESSER OFFENSE WAS COMMITTED.

The trial court erred in failing to give appellant's proposed jury instruction on the lesser included offense of unlawful display of a weapon because each of the elements of the lesser offense is a necessary element of assault in the second degree with a deadly weapon and the evidence supported the inference that only the lesser offense was committed. The trial court's error requires reversal.

Under RCW 10.61.006, a defendant can be convicted of an offense that is a lesser included offense of the crime charged, without being separately charged.³ To be entitled to an instruction on a lesser included offense, two conditions must be met: (1) each of the elements of the lesser offense must be a necessary element of the crime charged and (2) the

³ RCW 10.61.006 provides:

"In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he is charged in the indictment or information."

evidence must support an inference that the lesser crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (citing State v. Bowen, 12 Wn. App. 604, 531 P.2d 837 (1975), State v. Snider, 70 Wn.2d 326, 422 P.2d 816 (1967)); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). These conditions are respectively known as the “legal” and “factual” prongs of the lesser included offense test. State v. Walden, 67 Wn. App. 891, 893, 841 P.2d 81 (1992).

Under the legal prong, a defendant is entitled to an instruction on the lesser offense only if the charged crime could not be committed without also committing the lesser offense. Walden, 67 Wn. App. at 891. Under the factual prong, the evidence must support an inference that the lesser offense was committed instead of the greater offense. In other words, the record must support an inference that only the lesser offense was committed. State v. Karp, 60 Wn. App. 369, 376, 848 P.2d 1304, review denied, 122 Wn.2d 1005 (1993).

When determining if the evidence at trial was sufficient to support the giving of an instruction on the lesser included offense, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004).

Here, Warner was charged as an accomplice in count I of the amended information for the alleged assault of Brandon Pinkard with a knife. CP 8. Defense counsel proposed a jury instruction on the lesser included offense of unlawful display of a weapon but the trial court refused to give the instruction. 2RP 222-23; CP 52. Warner was entitled to an instruction on the lesser included offense because the record substantiates that both Workman conditions were met.

Under RCW 9A.36.021(1)(c), a person is guilty of second degree assault if he “[a]ssaults another with a deadly weapon.” The jury instruction provided here defined “assault” as “an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intent to inflict bodily injury.” CP 30. RCW 9.41.270(1) provides that “[i]t shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife . . . in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” The first, or legal, prong has therefore been satisfied because each element of unlawful display of a deadly weapon is a necessary element of second degree assault with a deadly weapon. See also State v. Baggett, 103 Wn. App.

564, 569, 13 P.3d 659 (2000) (all of the elements of the unlawful display statute are elements of second degree assault with a deadly weapon).

To satisfy the second, or factual, prong, the evidence must support an inference that only the crime of unlawful display of a deadly weapon was committed. Warner's testimony that he never chased anyone with a knife and never saw Wilcox chase anyone with a knife does not negate any inference from the evidence that only the lesser included offense was committed. Fernandez-Medina, 141 Wn.2d at 459-61. According to the state's evidence, Keefe saw Wilcox chasing Pinkard with a knife. 1RP 108-112. However, Pinkard testified that he heard Keefe scream, "he's got a knife," so he "took off running." 1RP 91. He felt a poke in his back but did not see what poked him or who poked him. 1RP 91-93. Pinkard demonstrated that he was poked in his lower back but said the poke left no mark and that he did not believe it was meant "to inflict injury." 1RP 93. Pinkard started running because he assumed somebody was behind him but he did not hear anyone make any threats. 1RP 96-97.

Clearly, the record here supports an inference that only the offense of unlawful display of a weapon was committed because there was no evidence of an intent to create in another apprehension and fear of bodily injury, and which in fact created in another a reasonable apprehension and imminent fear of bodily injury. See State v. Prado, 144 Wn. App. 227,

181 P.3d 901 2008, where in contrast, Prado got a knife out of his car's console while the alleged victim was banging on his car window. Prado then stepped out of his car with the knife "to intimidate" the victim. Id. at 243. Prado said that he felt more secure outside of his car with the knife than being inside the car. Prado displayed the knife to the victim and told him to "calm down." Prado testified that when they began to struggle, it was his intention "to touch him with the knife so that he would draw away from me." Id. at 243-44. Division Three of this Court concluded that the evidence did not support the inference that Prado only committed the offense of unlawful display of a weapon because he committed an assault by engaging "in an intentional act to place [the victim] in apprehension of harm. Id. at 244.

Viewing the evidence in the light most favorable to Warner, there was only evidence of an unlawful display of a weapon based on Keefe's claim that she saw Wilcox with a knife. The record establishes that no assault was committed because Pinkard did not see a knife and never said that he was in imminent fear of bodily injury but in fact testified that he did not believe there was any intent to inflict injury. 1RP 91-93. Consequently, reversal is required because the trial court erred in failing to give Warner's proposed jury instruction on the lesser included offense. Fernandez-Medina, 141 Wn.2d at 460-62.

2. THE TRIAL COURT ERRED IN DENYING WARNER'S MOTION TO DISMISS THE CHARGE OF SECOND DEGREE ASSAULT WITH A DEADLY WEAPON AS CHARGED IN COUNT ONE OF THE AMENDED INFORMATION BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT WARNER OR AN ACCOMPLICE ASSAULTED PINKARD.

Reversal and dismissal is required because there was insufficient evidence that Warner or an accomplice assaulted Pinkard with a deadly weapon as charged in count I of the amended information.

In a criminal prosecution, due process requires that the state prove every element necessary to constitute the charged crime beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); U.S. Const. amend. 14; Wash. Const. art. 1, sect. 3. "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).⁴

⁴ The United States Supreme Court noted, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty." In re Winship, 397 U.S. at 364.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

To establish that Warner or an accomplice assaulted Pinkard with a deadly weapon, the state had to prove beyond a reasonable doubt that Warner or an accomplice acted with unlawful force, with the intent to create in Pinkard apprehension and fear of bodily injury, and which in fact created in Pinkard a reasonable and imminent fear of bodily injury. CP 30.

Defense counsel moved to dismiss the charge but the court denied his motion. 2RP 181-82.

The trial court erred in denying the motion to dismiss because Pinkard did not testify that he felt an imminent fear of bodily injury. Pinkard said that he took off running when he heard Keefe scream “run, he’s got a knife” because he assumed that someone was behind him but he never saw anyone. 1RP 91-92, 96. Pinkard felt “a poke” in his back but never saw a knife or heard any threats. 1RP 91-92, 97. Importantly, Pinkard said the poke did not leave a mark and that he did not think it was meant “to inflict injury. 1RP 93. When Pinkard was questioned at the scene by Officer Berndt, he said he was not a victim. Pinkard told Berndt that he wanted to be left alone and walked away. 1RP 143-44.

It is clear from Pinkard’s trial testimony and his statements to Officer Berndt that he never felt an imminent fear of bodily injury. Although Keefe testified that she was scared and she saw Wilcox chasing Pinkard with a knife, fear and apprehension occurring in a third party rather than the victim are insufficient to support a finding that the fear and apprehension element of assault has been met. State v. Nicholson, 119 Wn. App. 855, 863, 84 P.3d 877 (2003), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007).

Reversal and dismissal of count I is required because even when viewing the evidence in the light most favorable to the state, no reasonable trier of fact could find all the elements of assault in the second degree with a deadly weapon beyond a reasonable doubt. DeVries, 149 Wn.2d at 849.

D. CONCLUSION

For the reasons stated, this Court should reverse Warner's conviction for assault in the second degree with a deadly weapon for the alleged assault of Pinkard as charged in count I of the amended information.

DATED this 29th day of September, 2008

Respectfully submitted,


VALERIE MARUSHICE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 29th day of September, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

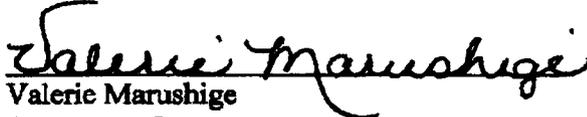
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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626 and Rodney Keith Warner, P.O. Box 671, Goldendale, Washington 98620.

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

DATED this 29th day of September, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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