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DIVISION II

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STATE OF WASHINGTON

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NO. 47023-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONUALDO CASTILLO,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The defendant was denied due process of law in violation of the Fourteenth Amendment when he submitted sufficient evidence of the defense of necessity but the jury returned a verdict of guilty.
2. The defendant was denied due process of law in violation of the Fourteenth Amendment based on the insufficiency of the evidence when he was convicted of Assault in the Second Degree.
3. The trial court erred when it overruled the defendant's objection to a leading question asked of the assault victim.
4. The defendant was denied the right to have factual issues decided by a jury when the trial court overruled his objection to a leading question, asked of the assault victim, that embraced a core issue for the jury's determination.

Issues Pertaining to Assignments of Error

1. The defendant was charged in count II with the crime of Attempting to Elude a Pursing Police Vehicle. Whether there was sufficient evidence presented by the defendant to prove the defense of necessity by a preponderance of the evidence? (Assignment of Error No. 1.)
2. The defendant was charged in count I with the crime of Assault in the Second Degree. Whether there was sufficient evidence presented by the

state to warrant a verdict of guilty? (Assignment of Error No. 2.)

3. Whether the trial court abused its discretion when it overruled the defendant's objection to a leading question asked of the assault victim?

(Assignment of Error No. 3.)

4. Whether the defendant was denied the right to trial by jury guaranteed under Const. art. 1, sec. 21 and the Sixth Amendment when the trial court overruled his objection to a leading question asked of the assault victim that embraced a core issue for the jury's determination?

(Assignment of Error No. 4.)

B. Statement of the Case

Ronualdo Castillo was charged by information with the crimes of Attempting to Elude a Pursuing Police Vehicle in violation of RCW 46.61.024 and of Assault in the Second Degree in violation of RCW 9A.36.021(1)(c): both counts alleged to have occurred on February 8, 2014. CP 10, 21.

Trial Testimony

Thurston County Deputy County Sheriff Michael Brooks testified that he was on duty on the night of February 8, 2014. RP 38. At this time he had stopped a motorist for traveling the wrong way on Fourth Avenue in Olympia. *id.* The deputy had the motorist stopped at a parking lot of Howard's Towing, which was a former service station with abandoned

pumping stations in front. RP 39, 41-2; Exs. 1 and 2.

Also, at the same time Washington State Trooper Rosser observed the motorist and the deputy's stop and pulled near the curb facing both of the other two vehicles. RP 39, 44.

Deputy Brooks was seated in his vehicle with the trooper standing alongside his driver's window. The deputy observed another vehicle- in his rear-view mirror- turning onto Fourth Street from Plum Street and approaching their location. RP 45. The vehicle was traveling the wrong way on Fourth Street. The deputy was apprehensive that the vehicle would impact the rear of his police car. RP 45-6.

This second vehicle, driven by the defendant, did not impact the rear of the deputy's car. Instead, the defendant drove into the parking area of the entrance to the former service station, did a U-turn and parked his vehicle facing Fourth Street. RP 46,49-50.

Deputy Brooks requested Trooper Rosser contact the defendant's vehicle to see if they could assist him or determine if he was connected to the original stopped motorist, whose identification they were having difficulty discerning. RP 49,52.

As the Trooper approached the defendant's vehicle, he accelerated directly toward the direction from which the trooper was approaching. RP 50. Deputy Brooks heard the sound of what he thought was a flashlight

hitting the defendant's window. RP 50,52.

Deputy Brooks heard the impact at the defendant's vehicle and looked up while he was seated in his vehicle. He observed the defendant speed past him and drive between the stopped mini-van and Trooper Rosser's patrol vehicle. RP 58. The deputy observed the defendant's vehicle proceed down Fourth Street traveling in the wrong direction. RP 55. Brooks pursued the defendant's vehicle west bound with his lights flashing and his siren turned on.¹ *id.*

The defendant's vehicle sped through the Olympia area and traveled along Fourth Street the wrong way until it eventually turned into a two-way street near the Oyster House. RP 58. Brooks testified that he pulled within a quarter mile of the vehicle, which he described as "a Mazda Protégé." RP 57. He was able to eventually pull within 100 yards of the defendant's vehicle. RP 62..

The defendant's vehicle reached 80-90 miles per hour as it drove along Harrison Street. RP 62. The deputy had a device, called an Opticon, which activated the lights at each intersection. RP 63. It cycled through "Green Light" in his direction. *id.* Motorists were not driving through the

¹ The deputy described his vehicle as a black and white Tahoe with a light bar on top. He had red and blue lights and a light in the "front dash of the car." There were also lights on the front push bar, described as red and blue. RP 54-5.

intersections as the other vehicles were speeding past. Traffic on Fourth Avenue was minimal to none. RP 95.

Deputy Brooks testified that the vehicles travelled down Harrison Avenue, toward Mud Bay and across Highway 101. RP 65. After crossing Highway 101 they traveled on Second Avenue and up on “twisted gravel roads.” The driving was described as “aggressive.” RP 66.

The chased vehicle was pursued to a sign that read “End of County Road.” RP 67. The vehicles continued on a gravel road and ended up on a “grassy hillside” near a private residence. RP 70-1.

At the scene of the stop, the deputy had his gun drawn and ordered the defendant out of his vehicle. RP 73. There was some delay as the defendant requested that he be allowed to set his handbrake in order to prevent his vehicle from possibly rolling down a steep embankment which was located to the immediate rear of the defendant’s vehicle. *id.*

Eventually, the defendant got his emergency brake set and emerged from his vehicle. He was confronted by the law enforcement officer. The testimony was to the effect that the defendant understood what was being requested of him in the English language. RP 73-5. Apparently, Mr. Castillo acted “Happy” and “Excited..” RP 76.

An audio tape was played for the jury. Ex. 6, RP 82. It was an audio of the traffic pursuit over the Thurston County channel, referred to

as Tac 1. RP 78-9. The tape began at 14 minutes and 50 seconds into the audio where Deputy Brooks turns on his siren in pursuit of the Defendant. RP 79.

Trooper's Testimony

Guy Rosser testified that he was a trooper with the Washington State Patrol with 22 years in traffic law enforcement. RP 99. He pulled into the parking lot of Howard's Towing facing both the person he had pulled over and Officer Brooks' vehicle. *id.* His vehicle was parked "further away" from their vehicles than as shown on exhibit 1. RP 101. During his contact with Brooks he was standing at the driver's side door. RP 103. Subsequently he walked past where the gas pumps would have been and towards the defendant's vehicle which was facing him. *id.* He approached the defendant's vehicle based on deputy Brooks' request to contact the driver and to see if he was related to the traffic stop. RP 102-03, 125.

The defendant's vehicle accelerated. The trooper testified:

"He came right at me. I took a step back and then moved my body to the right. I was holding onto a small flashlight in my hand. As the car came up alongside me, I took a step back. With that my [right] hand and flashlight hit his driver's window and the vehicle was gone, out the parking lot, towards the west." RP 104.

The trooper was in front of the left headlight of the defendant's

vehicle as it came at him. RP 105. He was 10-15 feet away when the vehicle accelerated. RP 106. Rosser took a “backward step and pushing off of his car.” RP 106. Initially, when the trooper approached the defendant’s vehicle and just before he accelerated they made eye contact. RP 108.

The trooper was then asked the following leading question:

Q. “And do you fear that you could have been severely injured or possibly killed by being struck by a vehicle of that size?”

MR. JEFFERSON: Objection as to the form of the question. Leading.

THE COURT: I’ll overrule that. You may answer.

THE WITNESS: Could you repeat the question again, sir?

BY MR. THOMPSON:

Q. Did you feel that you could have been severely injured or could have been killed by a vehicle of that size traveling at you had it struck you?

A. Yes, I do. I’ve seen several people that have been hit by cars and cars always win against people.” RP 107.

The trooper returned to his patrol vehicle, turned on his emergency lights and started to follow Deputy Brooks the wrong way down Fourth Avenue. RP 108. The trooper’s audio/video had been activated when he turned on his emergency lights. It was played for the jury, except for the last few minutes. RP 109,113-14; Ex. 5.

When he pursued Deputy Brooks’s vehicle he backed off and did not follow at the same speed. RP 112. When he backed down he was

driving, “about 75 to 85.” RP 117. The trooper testified:

“ . . . and at times you can see Deputy Brooks but he was – he was quite a ways ahead of me because I was not doing or matching the speeds he was doing.” RP 113.

Several other police vehicles interceded between Deputy Brooks and the trooper’s vehicle. RP 117. The posted speed limit on the route varied. It was 25 miles per hour at the Fourth Avenue Bridge, at the roundabouts below Harrison and then after Division the speed limit is 30 to Cooper Point Road. RP 120. At Yauger Park, Evergreen Parkway, the overpass at Mud Bay and across Highway 101 the speed limit is 35 m.p.h. RP 120-1.

Eventually the trooper contacted Mr. Castillo. He asked the defendant “Why did you try to run me over? And his response, his verbal response and his physical response was, ”Sorry,” and then he dropped his head and shoulders.” RP 122. On cross-examination he stated that Mr. Castillo had no odor of intoxicants or bloodshot eyes, RP 123.

Defendant’s Testimony

Ronauldo Castillo testified² and contradicted much of the contact testimony by both law enforcement officers. According to Mr. Castillo, he worked as a cargo material handler and lived in Tacoma with his girlfriend, her parents and seven children. RP 138-9. On the night of the

² Mr. Castillo spoke Tagalog. He was assisted by an interpreter throughout the trial. RP 138.

incident he was paid to drive a female to Olympia, He had not been in Olympia before. RP 139. He dropped his passenger off about two blocks from where the police officers were located. RP 160.

Then he was looking for a way to get home. He saw the police vehicles and thought they were parked at a gas station. RP 140. His intention was to fill up with some gas and obtain directions from the police on how to get back to I-5 towards Tacoma. *id.*, RP 152. He drove into the parking lot through an entry that was unblocked. RP 141. He stopped under the overhang, looking in the direction of the police and placed his vehicle in neutral. He stated that he saw one officer in his car and another one outside. RP 142, 152.

He then saw one of the policemen approaching him on his side of the vehicle. *id.*

Mr. Castillo related that he was not paying attention to his speed. Rather he was concerned on getting away from the police "...because I really thought that I was shot at." RP 143. Once Mr. Castillo heard the noise, which he described as "very strong", he drove straight and did not look back. *id.*

He testified that he had never seen the police officer before and he as not angry with him: "I deeply respect the policemen." RP 144.

Once he stopped in the yard next to the embankment, he testified

that he could not immediately emerge from his vehicle because his foot was on the brake. *id.* He was afraid that if he took his foot off the brake that his car “would fall off the embankment.” *id.* He told the officers that he “needed to pull up my handbrake.” *id.*

At that point he emerged from his vehicle. He was no longer afraid of being shot based on the length of time he was chased until he stopped. RP 145. While he was being chased he was still afraid that the police were going to kill him. RP 146. When he came in contact with the police he was relieved and said that he was sorry. *id.* He stated that he apologized “To show them that first I was admitting that I made a mistake and to show my respect for them.” *id.*

The jury found Mr. Castillo guilty of both counts and answered the Special Verdict Form in the affirmative. RP 261. A special verdict was a determination that Mr. Castillo drove in a wilful and wanton manner in disregard of the rights of other people or property. *id.* He was sentenced on December 18, 2014. RP 269. He appealed on the same day. CP 60.

C. Argument

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE DEFENDANT TO PROVE A NECESSITY DEFENSE TO THE CHARGE OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

The trial court instructed the jury on the defense of necessity as

follows:

“Necessity is a defense to a charge of Attempting to Elude a Pursuing Police Vehicle if:

- (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
- (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law; and
- (3) the threatened harm was not brought about by the defendant; and
- (4) no reasonable legal alternative existed.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.”

Instruction No. 17; CP 41.

Standard of Review

According to Karl B. Tegland, 5 *Washington Practice* 219 (5th ed.

2007):

Affirmative defenses. When the defendant asserts an affirmative defense such as insanity but the defense is rejected by the trier of fact, an appellate court will normally ask whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense in accordance with the applicable burden of proof. (for insanity, proof by a preponderance of the evidence).”

(footnotes omitted, citing *State v. Matthews*, 132 Wn. App. 926, 135 P.3d 495 (Div. I 2006)).

Mr. Castillo testified at one point- when asked what mistake he had made by running. He described the threatened harm of imminent bodily injury or death as follows:

“Well, my belief that they were going to kill me, that they shot at me and that they were going to shoot me, and that I was running from them.” RP 147.

He further elaborated:

“A. He was approaching towards me. That’s why I put my car in neutral so that it would stop. I was looking his direction to see whether he was going to stop me. So when I shifted to neutral I heard something slap against my vehicle, boom, like that. I thought I was shot at, so that’s when I accelerated because I was scared.

Q. So you heard a noise?

A. Yes, sir.

Q. And what did you think that noise was?

A. Gunshot. I thought I was shot at. That’s why I accelerated and got out of there.

Q. So you thought the police officer was shooting at you?

A. Yes, sir.

Q. And then after you thought the police officer shot at you, you - - what did you do?

A. I ran. I didn’t know any whatchamacallit. I got scared. So I saw - - I saw the road and there was nothing in there so I ran.” RP 142.

According to *State v. Jeffrey*, 77 Wn.App. 222,225, 889 P.2d 956 (Div. III 1995);

“The defendant must prove by a preponderance of the evidence that: (1) he or she believed the commission of the crime was necessary to avoid or minimize a harm, (2) the crime sought to be avoided was greater than the harm resulting from the violation of the law, and (3) no legal alternative existed.”

See also, *State v. Parker*, 127 Wn. App. 352, 354-55, 110 P.3d 1152 (Div. II 2005); *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (Div. I 1994) (defendant’s belief that he had to flee so officer would follow him to help assist third party was unreasonable.) (“Gallegos failed to show that the possible harm to [third party] was any greater than the danger in which he placed other drivers due to his reckless driving.”) *id.* at 651.

Here, the defendant produced sufficient evidence to support his defense of necessity. Mr. Castillo’s testimony showed he reasonably believed that commission of the crime of attempting to elude a police vehicle was necessary in order to avoid or minimize the harm of being shot by a police officer.

Secondly, the harm sought to be avoided, that is the harm of potentially being killed or critically wounded, was greater than the harm resulting from violation of the law. The defendant’s reckless driving the wrong way on a one way street and at a high rate of speed did not result in any other motorist or pedestrian being injured.

The threatened harm was not brought about by the defendant. Mr.

Castillo was seeking directions out of an unfamiliar town and was seeking a location where he could obtain gasoline for his return trip to Tacoma.

Finally, the evidence showed that no reasonable alternative existed. Mr. Castillo stayed on the traveled portion of the roadway- in his attempt to avoid being shot at by the police-until he ran out of any place to go.

By pursuing the defendant the police enhanced the danger that Mr. Castillo sought to avoid and at the same time increased the risk of harm to motorists by chasing Mr. Castillo. He left the premises where the danger was, as he perceived it. The police decided to pursue his vehicle. Trooper Rosser did not pursue at a high rate of speed. And Deputy Brooks was unfamiliar with the circumstances of any alleged confrontation between Mr. Castillo and Trooper Rosser, except for a noise that sounded like "something hitting a window". RP 57.

Initially, Mr. Castillo did not pursue any other legal alternative but to flee. Eventually he adopted another legal alternative by surrendering to the police who had their weapons drawn at the time. RP 97.

II. THERE WAS NOT SUFFICIENT EVIDENCE THAT THE DEFENDANT'S CONDUCT WARRANTED A VERDICT OF GUILTY OF ASSAULT IN THE SECOND DEGREE.

According to RCW 9A.36.021(1)(c):

"Assault in the second degree.

(1) A person is guilty of assault in the second degree

if he or she, under circumstances not amounting to assault in the first degree:

(c) Assaults another with a deadly weapon , or . . .”

The definition of assault given to the jury stated:

“An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act 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 intend to inflict bodily injury.” CP 38; Instruction 9.

The defendant testified that he was putting his vehicle in neutral as Trooper Rosser approached. RP 142. This is evidence that Mr. Castillo did not intend to run into him or to use his car as a deadly weapon. Additionally, Mr. Castillo had no motive to run the officer over. Instead, he testified that he respected police officers. RP 144.

Nevertheless, the jury convicted him of Assault in the Second Degree by use of a deadly weapon. CP 30.

Standard of Review- Sufficiency of the Evidence

According to *State v. Bingham*, 105 Wn.2d 820,823, 719 P.2d 109

(1986):

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).”

See also, *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*, 443 U.S. at 316, 99 S.Ct. at

2787:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

(citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368

(1970)). According to *State v. Devries*, 149 Wn.2d 842, 849, 72 P.3d 748

(2003) “A claim of insufficiency admits the truth of the State’s evidence

and all inferences that can reasonably be drawn from it.” (citing *State v.*

Green, *supra*, at 222.)

Lack of Evidence

In his movement, the trooper’s flashlight impacted the driver’s

window of the defendant's vehicle and emitted a loud noise. RP 50, 52.

Officer Brooks did not hear a "...thud. Rather, he heard a noise that sounded like "something hitting a window." RP 57. He testified:

"It was a clear indication of speeding up, and then trooper Rosser yelled hey, and there's not really a thud but obviously something hitting a window is what it sounded like." RP 52.

The trooper explained the cause of the noise that Deputy Brooks heard:

"Q. All right. And as you moved out of the way, that flashlight hit the car?

A. I pushed—it wasn't a striking motion. I pushed the car and hit his driver's window with my right hand and the flashlight." RP 126.

There was no evidence that Trooper Rosser was struck by Mr. Castillo's vehicle. Mr. Rosser testified that he was an expert when he was surrounded by motor vehicles. He was adept at not getting brushed or hit by an oncoming vehicle. The trooper testified:

"I was probably right in front of the left headlight of the car that was coming up as it was facing me. I make dozens of traffic stops all the time. I'm in and out of cars, the cars driving by me on the freeway all the time, side roads. So to me having a car by me is almost natural. Most people don't think having a car pass your office is normal, but that's what we do." RP 105.

The only other manner in which an assault may have occurred in this case was by creating an apprehension and imminent fear of bodily

injury in another person. Instruction 9; CP 38. Admission of that evidence is addressed in the next assignment of error.

III. THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S OBJECTION TO A LEADING QUESTION THAT ADDRESSED AN ULTIMATE ISSUE OF LAW.

During the trial Trooper Rosser was asked the following leading question:

Q. "And do you fear that you could have been severely injured or possibly killed by being struck by a vehicle of that size?"

MR. JEFFERSON: Objection as to the form of the question. Leading.

THE COURT: I'll overrule that. You may answer.

THE WITNESS: Could you repeat the question again, sir?

BY MR. THOMPSON:

Q. Did you feel that you could have been severely injured or could have been killed by a vehicle of that size traveling at you had it struck you?

A. Yes, I do. I've seen several people that have been hit by cars and cars always win against people." RP 107.

Standard of Review

On appeal evidentiary rulings are reviewed on an abuse of discretion standard. *Sorenson v. Raymark Industries, Inc.*, 51 Wn. App. 954, 756 P.2d 740 (Div. II 1988). Where the decision of the trial court is a matter of discretion, it will not be disturbed on review except on clear showing of abuse of discretion. That is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex. rel.*

Carrol v. Junker, 79 Wn.12, 26, 482 P.2d 775 (1971).

ER 611(c) states as follows:

“(c) Leading Questions. Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”

According to Karl B. Tegland, 5A *Washington Practice* 547-48 (5th ed. 2007):

“A leading question is a question that suggests the desired answer. Particular forms of questions may or may not be leading. The use of the phrase “whether or not” is not decisive. Questions that can be answered “yes” or “no” may be leading, but are not necessarily leading. Form, emphasis, and all surrounding circumstances must be taken into account.”

(Footnotes omitted.)

Examples of leading questions are found in the following cases:

State v. Swan, 114 Wn.2d 613, 658-59, 790 P.2d 610 (1990)) (counsel’s question suggested the desired answer and was leading) (“Q. Was that her phrase for the bathroom, “My potty?” A. Yes.”); *State v. Scott*, 20 Wn. 2d 696, 699, 149 P.2d 152 (1944) (Whether or not questions.) (“Even though the question may call for a yes or a no answer, it is not leading for that reason, unless it is so worded that, by permitting the witness to answer yes

or no, he would be testifying in a language of the interrogator rather than his own.”; *State v. Allen*, 128 Wash. 217, 225, 222 P. 502 (1924) (“yes or “no” questions may indicate the answer too clearly) (“Questions of this sort are not leading unless they suggest the answer desired or unless they are so specific as to permit the witness to answer “Yes” or “No,” and thus testify in the language of the interrogator rather than in his own.”).

The error that occurred was not harmless. “If an appellate court is unable to say from the record whether the defendant would or would not have been convicted but for the error committed, the error will not be deemed harmless.” Karl B. Tegland, 5 *Washington Practice* 110 (5th ed. 2007.) (citing *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968)).

IV. THE DEFENDANT WAS DENIED HIS RIGHT TO TRIAL BY JURY WHEN THE COURT OVERRULED A TESTIMONIAL OBJECTION THAT EMBRACED A CORE ISSUE FOR THE JURY’S DETERMINATION.

The form of the question asked of Trooper Rosser embraced an ultimate issue to be decided by the jury with regard to the charge of Assault in the Second Degree. The defendant’s objection to the form of the question was overruled.³ RP 107.

³ Q. “And do you fear that you could have been severely injured or possibly killed by being struck by a vehicle of that size?”

MR. JEFFERSON: Objection as to the form of the question. Leading.

ER 701 states as follows:

“Opinion Testimony by Lay Witness”. If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception fo the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge with the scope of rule 702.”

Subsequently, the jury was instructed with regard to this charge when it considered the definition of assault to include:

“An assault is also an act 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 intend to inflict bodily injury.” CP 38, Instruction 9.

However, the leading question asked of Trooper Rosser invaded the province of the jury to determine, after considering all the facts and circumstances of the case, whether the state had proved beyond a

THE COURT: I’ll overrule that. You may answer.

THE WITNESS: Could you repeat the question again, sir?

BY MR. THOMPSON:

Q. Did you feel that you could have been severely injured or could have been killed by a vehicle of that size traveling at you had it struck you?

A. Yes, I do. I’ve seen several people that have been hit by cars and cars always win against people.” RP 107.

reasonable doubt that Mr. Castillo's conduct created in Trooper Rosser a reasonable apprehension and imminent fear of bodily injury. This was a violation of the defendant's right to trial by jury guaranteed by Const. art. 1, sec 21 and by the Sixth Amendment.

Standard of Review

The standard of review is abuse of discretion. That is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex. rel. Carrol v. Junker*, 79 Wn.12, 26, 482 P.2d 775 (1971).

According to authority regarding lay opinions the objection should have been sustained. *State v. Farr -Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (Div. II 1999) was a case involving a prosecution for eluding a police officer in a patrol vehicle. The Court of Appeals held that the pursuing officer should not have been allowed to testify that the defendant's driving "...exhibited to me that the person driving that the vehicle was attempting to get away from me and knew I was back there and refusing to stop." *id.* at 458. The appellate court ruled the officer should have confined his testimony to what he saw and/or heard. He should have avoided speculation about the defendant's state of mind.⁴

⁴ The court elaborated with regard to lay opinions: "The above authorities suggest that when analyzing the admissibility of lay opinion

In the case at bench , the prosecutor stated during closing argument:

“So again, the question that you have to decide is whether Trooper Rosser, using the definition of assault, was placed in reasonable apprehension of harm and whether the apprehension of harm was caused by a weapon which constitutes a deadly weapon in the manner it was used.” RP 225-26.

Based on the leading question asked of the police officer, that question had already been answered with the intended response of “Yes.” RP 107.

Later, the prosecutor again argued to the jury about apprehension:

“And the fact is that under that assault or the assault instruction, if you read it carefully it doesn’t require the person to intend to actually assault or strike the person, it just requires under one of the prongs that the defendant create in the reasonable mind of the victim apprehension that he is about to be assaulted or contacted. So you don’t have to necessarily find that the defendant intended to actually strike Trooper Rosser, maybe he just wanted to make a real close pass just to scare him. Maybe he got a little closer than he expected.

But if you find that the defendant, Mr. Castillo, went ahead and basically put his car in the direction

testimony, we first determine whether the opinion relates to a core element or a peripheral issue. Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion. Court’s also consider whether there is a rational alternative answer to the question addressed by the witnesses’s opinion. In that circumstance, a lay opinion poses a greater potential for prejudice. *Carr*, 52 Wn. App. at 886.” *Farr-Lenzini, supra*, at 463. (citing *Carr v. Deking*, 52 Wn.App. 880, 765 P.2d 40 (1988)).

of Trooper Rosser in a manner that was going to create that apprehension by Trooper Rosser that he was about to be struck and, if fact, as we know did get struck by defendant's vehicle, then I submit to you that you must return a verdict of guilty on the charge of assault in the second degree." RP 233-34.

The question asked of Trooper Rosser was speculative. By comparison according to *State v. Dolan*, 118 Wn.App. 323,329, 73 P.3d 1011 (2003) "Because improper opinion testimony violates the constitutional right to a trial by jury, it may be raised for the first time on appeal. (citing *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)). According to *State v. Qualle*, 177 Wn.App. 603, 199-200, 312 P.3d 726 (Div. III 2013):

"Opinions on guilt are improper whether made directly or by inference. *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)."

In *State v. Montgomery*, a detective and a forensic scientist were determined to have rendered improper opinions on the defendant's guilt regarding intent. The Supreme Court stated that the opinions "went to the core issue and the only disputed element, Montgomery's intent." *id.* at 594. Secondly, as stated in *City of Seattle v. v. Heatley*, 70 Wn. App. 573, 581, 854 P.2d 658 (1993) (opinions are more troubling if they are

stated in conclusory terms parroting the legal standard.)⁵

The detective's opinions in *Montgomery* were also objectionable, not only because police officers' testimony carries an "aura of reliability", but also because they were explicit opinions on intent.⁶

Included in the leading question in the case at bench was the language used twice of "could have". RP 107. Cases involving speculation are not cases of harmless error. For instance, in *State v. Huynh*, 49 Wn.App. 192, 742 P.2d 160 (Div. I 1987) (testimony was that traces of gasoline at the scene of a fire "could have" come from a 2-gallon gas can found in the defendant's car where he was charged with arson, murder and attempted murder. The court held this testimony was reversible error.) Although the error was not of constitutional magnitude the appeal was

⁵ In *Montgomery*, the legal standard was defined in RCW 69.50.440(1) as "[i]t is unlawful for any person to possess ephedrine or ...pseudoephedrine...with intent to manufacture methamphetamine..." The forensic chemist parroted the legal standard in his answer when he testified: "These are all what lead me toward this pseudoephedrine is possessed with intent." *Id.* at 594-95.

⁶ The prosecutor asked the detective, "Why ...would you come to the conclusion that this was possession of that pseudoephedrine with intent to manufacture methamphetamine?" The court sustained the objection because the question went to the ultimate legal issue in the case. *id.* at 588. Later, the detective testified when asked why he did not arrest the defendant earlier: "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location." Then on redirect he testified; "That those items were purchased for manufacturing." *id.*

reversed because the appellate court could not say that it did not materially affect the outcome of the case. *id.*

The error here was of constitutional magnitude. Error such as that is presumed prejudicial. The Court stated in *State v. Stephens*, 93 Wn.2d 186,191, 607 P.2d 304 (1980):

“Moreover, an error of constitutional proportions will not be held harmless unless the appellate court is “able to declare a belief that it is harmless beyond a reasonable doubt.”⁷ *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S. Ct. 824, 24 A.L.R. 3d 1065 (1967, accord, *State v. Johnson*, 71 Wn. 2d 239, 244-45, 427 P.2d 705 (1967).”

(citing *State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976.))

According to Tegland: “The appellate court determines whether the state has overcome the presumption from an examination of the record, from which it must affirmatively appear the error is harmless beyond a reasonable doubt.” 5 *Washington Practice* 111.⁸ The error in the case at bench was not harmless beyond a reasonable doubt because there was not overwhelming other evidence of assault.

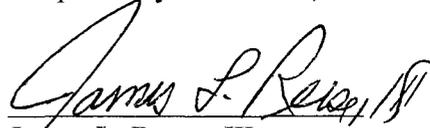
⁸ “...the error is harmless if the untainted evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.” Tegland, at 111 (citing *State v. Trujillo*, 112 Wn. App. 390, 49 P.3d 935 (Div. II 2002)).

D. Conclusion

This court should reverse the defendant's convictions and remand the case to the Thurston County Superior Court for dismissal.

Dated this 18th day of May 2015.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "James L. Reese, III". The signature is written in a cursive style with a large initial "J" and "R".

James L. Reese, III

WSBA #7806

Court Appointed Attorney

For Appellant

WASHINGTON STATE CONSTITUTION

ARTICLE I

SEC. 21 TRIAL BY JURY

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

AMENDMENT (VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

B

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

[2011 c 166 § 1; 2007 c 79 § 2; 2003 c 53 § 64; 2001 2nd sp.s. c 12 § 355; 1997 c 196 § 2. Prior: 1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2; 1986 c 257 § 5.]

Notes:

Finding -- 2007 c 79: "The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter 9A.36 RCW." [2007 c 79 § 1.]

Intent -- Effective date -- 2003 c 53: See notes following RCW 2.48.180.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Effective date -- 1988 c 266: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1988." [1988 c 266 § 3.]

Effective date -- 1988 c 206 §§ 916, 917: "Sections 916 and 917 of this act shall take effect July 1, 1988." [1988 c 206 § 922.]

D

RCW 46.61.024

Attempting to elude police vehicle — Defense — License revocation.

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

(3) The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

[2010 c 8 § 9065; 2003 c 101 § 1; 1983 c 80 § 1; 1982 1st ex.s. c 47 § 25; 1979 ex.s. c 75 § 1.]

Notes:

Severability -- 1982 1st ex.s. c 47: See note following RCW 9.41.190.

E

1 driving at me. We made eye contact once. I
2 continued to walk up and he made eye contact again,
3 and we were looking at each other and then he
4 accelerated at me.

5 Q. And had you not stepped out of the back into the
6 side, you believe he would have struck you?

7 A. I know he would have. If I hadn't moved, he would
8 have hit me.

9 Q. And do you fear that you could have been severely
10 injured or possibly killed by being struck by a
11 vehicle of that size?

12 MR. JEFFERSON: Objection as to the form of
13 the question. Leading.

14 THE COURT: I'll overrule that. You may
15 answer.

16 THE WITNESS: Could you repeat the question
17 again, sir?

18 BY MR. THOMPSON:

19 Q. Did you feel that you could have been severely
20 injured or could have been killed by a vehicle of
21 that size traveling at you had it struck you?

22 A. Yes, I do. I've seen several people that have been
23 hit by cars and cars always win against people.

24 Q. And so you said that you had your light, your
25 flashlight in which hand?

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STATE OF WASHINGTON

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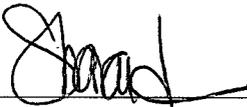
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

Shanna Huie, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 18th day of May, 2015, she deposited in the mails of the United States of America, postage prepaid the original Appellant's Brief in State of Washington v. Ronauldo Castillo, Court of Appeals Cause No. 47023-3-II, to the Court of Appeals at 950 Broadway, Suite 300, Tacoma, WA 98402-4454; mailed a copy of the appellant's brief to counsel for Respondent Carol L. LaVerne, Thurston County Deputy Prosecuting Attorney, at 2000 Lakeridge Dr., SW, Bldg. 2, Olympia, WA 98502-6045 ; and mailed (1) copy of the same to Appellant at his last known address: Ronualdo Castillo, DOC # 379476, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



Signed and Attested to before me this 18th day of May, 2015 by
James L. Reese, III.



Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 06/12/18