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NO. 53099-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID THOMAS,
Appellant.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
SPENCER BABBITT, WSBA No. 51076
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Thomas attempted to commit assault in the first degree with a deadly weapon or with the intent to inflict great bodily harm against Detective Schoolcraft.
2. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Thomas committed assault in the second degree by assaulting Officer Suarez with a deadly weapon.
3. The trial court abused its discretion when it allowed the state to impeach Ms. Funk to discredit her testimony regarding Mr. Thomas's untreated symptoms of schizoaffective disorder during the incident based on unrelated and irrelevant jail phone calls between herself and Mr. Thomas.

Issues Presented on Appeal

1. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Thomas attempted to assault Detective Schoolcraft with a

deadly weapon and with intent to inflict great bodily harm when none of the witnesses ever saw the knife in Mr. Thomas's hand during the incident?

2. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Thomas assaulted Officer Suarez with a deadly weapon when no witness saw the knife in Mr. Thomas's hand during the incident?
3. Did the trial court abuse its discretion when it allowed the state to impeach Ms. Funk with jail phone calls that were irrelevant and improperly used for impeachment purposes?

B. STATEMENT OF THE CASE

Substantive Facts

Since adolescence, David Thomas has suffered from severe mental illness. RP 394. Mr. Thomas has diagnosed with schizoaffective disorder and takes a variety of medications to mitigate the psychotic symptoms related to his illness. RP 393-94, 493, 529. Mr. Thomas was in a dating relationship with Syreeta Funk for roughly three years. RP 161-62. Near the end of the

relationship, Mr. Thomas was involved in an incident with Ms. Funk that resulted in Mr. Thomas's arrest and the issuance of no-contact order. RP 162-63. Ms. Funk ended the romantic relationship after Mr. Thomas's arrest. RP 162.

Ms. Funk received a phone call from Mr. Thomas late at night on May 12, 2017. RP 164-65. During this call, Mr. Thomas told Ms. Funk that he was feeling depressed and asked if she could bring him some clothing because he was homeless and cold. RP 166-67. Ms. Funk agreed to meet with Mr. Thomas to bring him some clothing. RP 167-68. Mr. Thomas and Ms. Funk planned to meet near a Chevron gas station in downtown Vancouver, Washington. RP 168.

Ms. Funk drove to the gas station and let Mr. Thomas into her car so they could talk. RP 170. Mr. Thomas told her that he was out of his medication and experiencing psychotic symptoms. RP 170. Ms. Funk provided Mr. Thomas with his clothing and asked him to get out of the car. RP 172. Mr. Thomas refused to exit the car and made comments suggesting he was suicidal. RP 173. Ms. Funk called Mr. Thomas's mother on the phone for assistance. RP 173. When Mr. Thomas still refused to exit the car, Ms. Funk and

Mr. Thomas's mother agreed that Ms. Funk should call the police. RP 173. Ms. Funk exited the car and called 911 to report Mr. Thomas for violating the no-contact order. RP 176.

The first officers to arrive at the gas station were Detective Brandon Schoolcraft, Detective Trent Harris, Officer Sean Suarez, and Officer Kathryn Endresen. RP 308. The officers observed Mr. Thomas exit Ms. Funk's car and walk across the gas station parking lot away from them. RP 102, 274, 308. The officers yelled at Mr. Thomas to stop. RP 275, 308. Mr. Thomas turned to face the officers while continuing to walk backwards. RP 275. He yelled at them to say he did not do anything and asked what they wanted from him. RP 275.

Detective Schoolcraft noticed a black object in Mr. Thomas's right hand that resembled a black sharpie marker. RP 109. Officer Suarez concluded that Mr. Thomas was not going to comply, so he deployed his taser, but it had no effect on Mr. Thomas. RP 110-12. Mr. Thomas, punched Detective Schoolcraft in the face breaking his nose as Schoolcraft tried to grab Mr. Thomas. RP 113, 118-19, 313. The other officers grabbed Mr. Thomas and Detective Harris lifted Mr. Thomas's leg off the ground, thereby causing Mr. Thomas

and the officers to fall into the street. RP 314.

Mr. Thomas continued to struggle and attempt to strike the officers. RP 315. Detective Schoolcraft executed a carotid restraint hold on Mr. Thomas to render him temporarily unconscious while the other officers handcuffed him. RP 115-16, 315-17. Mr. Thomas regained consciousness and was arrested before being transported to the hospital for evaluation. RP 319.

After the officers arrested Mr. Thomas, Officer Suarez noticed a knife with a three-inch blade on the ground a few feet from where the struggle had occurred. RP 119, 146, 284, 300-01. Officer Suarez also noticed that his uniform had been cut and he had a puncture wound on his arm. RP 287. Detective Schoolcraft examined his tactical vest and noticed that the patch had a slice through it. RP 121; Ex. 33.

Procedural Facts

The state charged Mr. Thomas with four crimes: attempted assault in the first degree for allegedly trying to stab Officer Schoolcraft with the knife; assault in the second degree for allegedly cutting Officer Suarez's arm with the knife; assault in the third degree for attempting to punch Officer Endresen during the

struggle; and violation of the no-contact order with Ms. Funk. CP 162-64. All three assault charges included deadly weapon enhancements and the State alleged the law enforcement victim aggravator in the assaults related to Detective Schoolcraft and Officer Suarez. CP 162-64. Mr. Thomas pleaded not guilty by reason of insanity and elected to proceed to a jury trial. CP 54-58.

The state sought to admit recorded jail phone calls between Mr. Thomas and Ms. Funk that occurred a few days before trial began to demonstrate that Ms. Funk was biased in favor of Mr. Thomas. RP 36-38. In the calls, Ms. Funk makes statements of encouragement to Mr. Thomas and indicates that she still feels affection for him. RP 37. Mr. Thomas objected to admission of the calls because they had no relevance to the underlying charges and were not prior inconsistent statements. RP 38. The trial court ruled that the state could only introduce the calls if Ms. Funk denied having made them when asked during trial. RP 45-46. Ms. Funk denied any recent contact with Mr. Thomas during trial. RP 183-84.

The state renewed its request to admit the phone calls in light of Ms. Funk's denial. RP 230. The trial court ruled that the calls were admissible over Mr. Thomas's objection:

[TRIAL COURT]: Okay, I'll go ahead and allow it. I would have -- if she had said, yeah, I talked to him a couple of days ago or I sent him a message a couple of days ago, that would be the end of it as far as I'm concerned. But, since she was directly asked the question and said I haven't spoken to him during that time period, I didn't call him, didn't leave him messages, then the prosecutor can try to bring it out again, first by confronting her and then if she says yes, in fact I did do those things, then that's the end of it. On the other hand, if then she says no, there's no way that happened. I didn't call him; I didn't leave him messages then they can bring in extrinsic evidence about it.

RP 232-33. The state played the phone calls for Ms. Funk outside the presence of the jury where she acknowledged that it was her voice on one of the calls. RP 252. The jury returned to the courtroom and the state questioned Ms. Funk about the calls and her original denial in their presence. RP 253-55.

Dr. Alexander Duncan, a clinical psychologist, performed a criminal responsibility evaluation on Mr. Thomas and testified at trial regarding his findings. RP 390. Dr. Duncan diagnosed Mr. Thomas with schizoaffective disorder and concluded that Mr. Thomas's psychotic symptoms prevented him from perceiving the nature and quality of his actions and that he was legally insane at the time of the alleged offenses. RP 393-94, 405-06, 409-10.

In rebuttal, the state called Dr. Angela Sailey, a psychologist at Western State Hospital, who also performed a criminal

responsibility evaluation on Mr. Thomas before trial. RP 565, 571. Dr. Sailey diagnosed Mr. Thomas with unspecified depressive disorder and substance abuse disorders. RP 572. Dr. Sailey opined that Mr. Thomas could accurately perceive the nature and quality of his actions and was not legally insane at the time of the offenses. RP 588-89, 616-17.

At Mr. Thomas's request, the trial court instructed the jury on two lesser included offenses: assault in the second degree for the attempted first-degree assault charge involving Detective Schoolcraft and assault in the fourth degree for the second-degree assault charge involving Officer Suarez. CP 254, 258. The jury found Mr. Thomas guilty as charged and answered affirmatively on all of the special verdict forms. RP 730; CP 279-89. The trial court sentenced Mr. Thomas to a standard range sentence. RP 770-74. Mr. Thomas filed a timely notice of appeal. CP 326.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. THOMAS ATTEMPTED TO COMMIT ASSAULT IN THE FIRST DEGREE AGAINST DETECTIVE SCHOOLCRAFT BY ASSAULTING HIM WITH A DEADLY WEAPON

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime and any sentencing enhancements beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1).

To convict a defendant of assault in the first degree, the

state must prove beyond a reasonable doubt that the defendant (1) assaulted another person, (2) the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm or death, (3) the defendant acted with the intent to inflict great bodily harm, and (4) that the assault occurred in Washington. RCW 9A.36.011(1)(a). “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

- a. The state presented insufficient evidence that Mr. Thomas assaulted Detective Schoolcraft with a deadly weapon or means likely to produce great bodily harm or death

The state’s case for attempted assault in the first degree depended on proving beyond a reasonable doubt that Mr. Thomas was armed with the knife found in the street during the struggle with Detective Schoolcraft and the other officers. The record contains no direct evidence of Mr. Thomas ever being armed with the knife. Detective Schoolcraft noticed a black object in Mr. Thomas’s hand, but the object resembled a marker and none of the other officers

recalled Mr. Thomas holding anything in his hands. RP 109, 277, 310, 355.

The state also offered the patch from Detective Schoolcraft's police vest to assert that Mr. Thomas attempted to stab the detective through the vest. Ex. 33. The patch had been sliced with a sharp object but what caused this slice is unclear because Detective Schoolcraft did not notice it until after being transported to the hospital. RP 121. Although the state asserted that Mr. Thomas must have sliced the patch while attempting to stab Detective Schoolcraft, this assertion is contradicted in the record.

The evidence establishes that the sliced patch was on the back of Detective Schoolcraft's uniform. RP 121, 324. Detective Schoolcraft testified that he fell on top of Mr. Thomas's back once the struggle broke out and Mr. Thomas was facing away from him. RP 115.

From the evidence in the record, it is impossible to tell when and how Mr. Thomas could have stabbed the patch on the back of Detective Schoolcraft's vest while pinned to the ground and facing away from the detective. This fact, when combined with the fact that no witness ever saw a knife in Mr. Thomas's hands,

demonstrates the deficiencies in the state's attempts to prove beyond a reasonable doubt that Mr. Thomas assaulted Detective Schoolcraft with the knife. No reasonable trier of fact could find beyond a reasonable doubt that Mr. Thomas assaulted Detective Schoolcraft with a deadly weapon or means likely to produce great bodily harm.

- b. The state presented insufficient evidence that Mr. Thomas acted with the intent to inflict great bodily harm

“The mens rea for first degree assault is the specific intent to inflict great bodily harm. Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (citing *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)).

“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). Specific intent cannot be presumed but can be inferred as a logical probability from all of the facts and circumstances present in the case. *State v. Pierre*, 108 Wn. App. 378, 386, 31 P.3d 1207 (2001) (citing *State v.*

Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945)).

The evidence did not establish that Mr. Thomas acted with the intent to inflict great bodily harm. RCW 9A.04.110(4)(c). At best Mr. Thomas may have, for the sake of argument alone, Mr. Thomas attempted to flee from the police and in the process may have made contact with the officers, but this is different and less than an intent cause great bodily harm with the specific intent to inflict injury of such a severity that it would create a probability of death or permanent disfigurement.

It was undisputed at trial that Mr. Thomas punched Detective Schoolcraft in the nose as the officers closed in on him in the parking lot. RP 113. However, the circumstances described in the record establish that Mr. Thomas's intent in punching Detective Schoolcraft was to resist the officers' efforts to arrest him rather than for the specific purpose of inflicting great bodily harm on the detective. Mr. Thomas was trying to avoid contact with the officers when they arrived on scene and a physical confrontation only occurred once they attempted to physically apprehend him. RP 112-13, 279, 313.

Furthermore, a single punch is not comparable to the levels

of force traditionally required to find intent to inflict great bodily harm. Cases examining the sufficiency of evidence offered to prove intent to inflict great bodily harm have required evidence of other actions showing an intent to use a more destructive level of force. See *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 220, 340 P.3d 859 (2014) (defendant threatened victim and then struck him in the face multiple times with a metal gun); *Pierre*, 108 Wn. App. at 385-86 (defendant knocked victim to the ground and stomped on his head multiple times thereby inflicting permanent brain damage). Without additional evidence of Mr. Thomas intending to use the knife or taking other action that indicates an intent to inflict great bodily harm on Detective Schoolcraft, the state failed to prove an essential element of attempted assault in the first degree.

c. Remedy

When an appellate court reverses for insufficient evidence and the jury was instructed on a lesser included offense, the court may enter judgment on the lesser offense and remand for resentencing on that charge if the jury necessarily found each element of that offense in reaching its verdict. *In re Heidari*, 174 Wn.2d 288, 292-94, 274 P.3d 366 (2012) (citing *State v. Green*, 94

Wn.2d 216, 234, 616 P.2d 628 (1980)).

The trial court instructed the jury on the lesser included offense of assault in the second degree by recklessly inflicting substantial bodily harm. CP 254. The elements of this offense are that the defendant (1) intentionally assaulted another person and thereby recklessly inflicted substantial bodily harm, and (2) the assault occurred in Washington. CP 254. The evidence supports the elements of assault in the second degree. This court should reverse Mr. Thomas's conviction for attempted assault in the first degree, vacate the deadly weapon special verdict, and remand for resentencing on the lesser included offense of assault in the second degree.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. THOMAS ASSAULTED OFFICER SUAREZ WITH A DEADLY WEAPON

To convict a defendant of assault in the second degree, the state must prove beyond a reasonable doubt that the defendant (1) assaulted another person with a deadly weapon and (2) the assault occurred in Washington. RCW 9A.36.021(1)(c). A deadly weapon is knife with a blade longer than three inches or "any weapon . . .

which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6); RCW 9.94A.825.

As outlined above, there is no direct evidence in the record that Mr. Thomas possessed the knife found at the scene. The state presented evidence that Officer Suarez’s shirt was torn during the incident and he had a cut on his left arm that he noticed on the way to the hospital with Detective Schoolcraft. RP 287. Officer Suarez did not know how his shirt was torn or how he received the cut on his arm and only noticed it as he was driving to the hospital after arresting Mr. Thomas. RP 287.

The state’s evidence is insufficient to prove beyond a reasonable doubt that Mr. Thomas used the knife while assaulting Officer Suarez. The record describes a physical struggle involving Mr. Thomas and four police officers. RP 314. At one point, Detective Harris knocked Mr. Thomas off his feet, thereby causing Mr. Thomas and the three other police officers to fall into the street while the struggle continued. RP 314-15. The record shows that the fall and ensuing struggle likely caused the injuries to Officer Suarez and tore his shirt. The mere presence of the knife near the scene is

insufficient to prove beyond a reasonable doubt that Mr. Thomas actually used it to cut Officer Suarez's arm.

The trial court instructed the jury on the lesser included offense of assault in the fourth degree. CP 258. The elements of assault in the fourth degree are that (1) the defendant assaulted another person, and (2) the assault occurred in Washington. RCW 9A.36.041(1). The evidence supports both of these elements and the jury necessarily found both in returning a guilty verdict to assault in the second degree. This court should reverse Mr. Thomas's conviction for assault in the second degree, vacate the deadly weapon special verdict, enter judgment on the lesser included offense of assault in the fourth degree, and remand to the trial court for resentencing. *Heidari*, 174 Wn.2d at 292-94.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO USE EXTRINSIC EVIDENCE TO IMPEACH MS. FUNK ON A COLLATERAL MATTER

It is a firmly established rule in Washington that neither party to a criminal trial may impeach a witness on a collateral matter. *State v. Aguirre*, 168 Wn.2d 350, 362, 229 P.3d 669 (2010) (citing *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140

(2006)). An issue is collateral if it is not admissible independent of the impeachment purpose. *Fankhouser*, 133 Wn. App. at 693 (citing *State v. Descoteaux*, 94 Wn.2d 31, 37-38, 614 P.2d 179 (1980)). Extrinsic evidence is inadmissible when it lacks direct relevance to the issues being tried and serves only to contradict a witness. *Fankhouser*, 133 Wn. App. at 693 (citing *Descoteaux*, 94 Wn.2d at 37-38). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Aguirre*, 168 Wn.2d at 361.

The trial court abused its discretion when it allowed the state to impeach Ms. Funk about her recent communications with Mr. Thomas because the communications are irrelevant to the issues being tried and were offered solely to contradict Ms. Funk. The state acknowledged that the jail phone calls it sought to admit for impeachment did not contain any substantive evidence related to the charges against Mr. Thomas. RP 41-42, 45. Instead, the state offered the calls solely to contradict Ms. Funk's testimony. RP 42-43.

Ms. Funk's words of encouragement have no bearing on the issues being litigated during Mr. Thomas's trial. Relevant evidence is "evidence having any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Evidence showing that Ms. Funk maintains a personal relationship with Mr. Thomas and would like to see him succeed does not make any fact of consequence to the action more or less probable. This evidence does not reveal anything about the alleged assaults against the police officers or Mr. Thomas allegedly violating the no-contact order. The state’s only basis for admission was that it showed Mr. Funk had a bias in favor of Mr. Thomas. RP 230.

While evidence of bias or motive can be relevant and admissible under certain circumstances, the witness’s credibility must be crucial to the case. *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996) (citing *State v. Roberts*, 25 Wn. App. 830, 834-35, 611 P.2d 1297 (1980)). Ms. Funk’s credibility and any bias she had towards Mr. Thomas was not crucial to the outcome of his trial. Ms. Funk reported Mr. Thomas’s original violation of the no-contact order and testified against him during the state’s case-in-chief. RP 176. Despite the fact that Ms. Funk was cooperative in the prosecution of Mr. Thomas, the state was allowed to impeach

her with irrelevant extrinsic evidence to discredit her observations about Mr. Thomas's mental health and the symptoms he was experiencing on the day of the incident at issue.

The contents of the jail phone calls are irrelevant and inadmissible independent of the state's asserted impeachment purpose. ER 402. When a trial court allows impeachment on a collateral matter, the decision constitutes reversible error if there is a reasonable probability that decision affected the outcome of the trial. *Aguirre*, 168 Wn.2d at 361 (citing *Fankhouser*, 133 Wn. App. at 695).

The critical issues for the jury in Mr. Thomas's trial were not whether the incident occurred, but rather what degree of assault the state had proved beyond a reasonable doubt and whether Mr. Thomas was legally insane at the time of the offenses. Mr. Funk's testimony provided critical evidence related to Mr. Thomas's sanity.

She was the only person at the scene who was familiar with Mr. Thomas's mental illness and the symptoms associated with it. Ms. Funk testified that she noticed Mr. Thomas was showing symptoms of his schizoaffective disorder and indicated that he had run out of medication on the night at issue. RP 170. While Ms.

Funk's observations were critical to a determination of whether Mr. Thomas was insane at the time of the incident, her testimony was discredited by the state's impeachment on the collateral matter of Ms. Funk's recent communications with Mr. Thomas.

The trial court abused its discretion when it admitted extrinsic evidence to allow the state to impeach Ms. Funk on a collateral matter. There is a reasonable probability that the jury would have found Mr. Thomas not guilty by reason of insanity had the trial court denied the state's request to admit the impeachment evidence. This court should reverse Mr. Thomas's convictions and remand for a new trial.

D. CONCLUSION

The state presented insufficient evidence to prove the essential elements of attempted assault in the first degree and assault in the second degree. The state failed to prove that Mr. Thomas used a deadly weapon during any of the alleged assaults, and the circumstances indicate that he did not intend to inflict great bodily harm on any of the officers. Mr. Thomas respectfully requests that this court vacate his convictions for attempted assault in the first degree and assault in the second degree and enter judgment on the

lesser included offenses presented to the jury at trial. In the alternative, Mr. Thomas respectfully requests that the court vacate his convictions and remand for a new trial based on the improper impeachment of Ms. Funk.

DATED this 4th day of October 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBITT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov and David Thomas/DOC#414636, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on October 4, 2019. Service was made by electronically to the prosecutor and David Thomas by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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