

No. 299287-III

FILED

APR 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KYLE STODDARD

Defendant/Appellant.

RESPONDENT'S BRIEF

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RESPONSE TO ASSIGNMENTS OF ERROR

1. The State proved, beyond a reasonable doubt, each and every element of the offense of first degree assault.

2. The State's attorney did not commit prosecutorial misconduct in closing argument which prejudiced Appellant's constitutional right to a fair trial.

STATEMENT OF THE CASE

The State hereby adopts in its entirety the statement of the case prepared by appellant's counsel with the following correction and addition:

In the Statement of the Case portion of Appellant's Brief, the knife used by Appellant to commit the crime of first degree assault was described inaccurately as having "a blade less than 3 inches in length." App. Brief, Page 3, last two lines.

The Record of Proceedings instead describes a "... plastic handled knife with approximately a three inch blade when it's open." RP 65, lines 8-9.

Also, the manner in which the knife is opened described as "... with the flick of a wrist it opened." RP, lines 17-18.

At closing argument the state argued it had proved the second element of first degree assault by referencing the jury

instruction that was given regarding deadly weapons and then submitting for the jury's consideration that the "... knife in the manner in which it was used is a deadly weapon." RP 265, lines 4-5.

Also at closing argument the state argued it had proved the third element of first degree assault by referencing the jury instruction that was given regarding great bodily harm and then pointing to the Appellant's own words at the time of the incident that he was "... going to cut right through (Officer Potter)" as evidence that Appellant intended to cause great bodily harm. RP 265, line 11.

ARGUMENT

1. The State proved, beyond a reasonable doubt, each and every element of the offense of first degree assault.

The State agrees with the Appellant's assertion that it is the State's duty to prove beyond a reasonable doubt each and every element of the offense of first degree assault.

Of the jury instructions given by the court at this trial, instruction 7, the "to convict" instruction, provides the most clarity to both the trier of fact as well as the appellate court for the specific elements the state needed to prove for this charge. CP 84, Appendix "A".

Four elements are identified in that instruction, which originated from Washington Pattern Jury Instruction 35.02. Appellant only attacks the sufficiency of the evidence for the second and third element, and the State will constrain its response accordingly.

The standard of review for this issue is whether in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find that Appellant assaulted Officer Potter with a deadly weapon and that Appellant intended to cause Officer Potter great bodily harm. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003), citations omitted. By claiming the evidence is insufficient, the defendant admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. Id.

- a. The State proved beyond a reasonable doubt that the assault was committed with a deadly weapon.

At trial, the court instructed the jury with the definition of "deadly weapon." It states:

Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is use(d), attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 88, Appendix "B".

Appellant's argument that the statutory definition of the phrase "deadly weapon" -- found in RCW 9A.04.110(6) and which forms the basis for the above referenced jury instruction -- only contemplates the causation of substantial bodily harm and not death, is both inaccurate and contradicts Appellant's own brief when it quotes the RCW verbatim. App. Brief, Page 10, last line.

From the record of this case there was more than sufficient evidence presented to the jury, both in testimony by Officer Potter and by seeing the actual knife and the manner in which it was used, to support the jury's conclusion that the State had proven beyond a reasonable doubt that the Appellant had used the 3-inch blade knife under circumstances that were readily capable of causing death.

At trial when the jury instruction conference was held there was never a request from Appellant for the court to give a definition of substantial bodily harm. For Appellant to now argue that such a definition should have been provided simply is a non sequitur in this case.

- b. The State proved beyond a reasonable doubt that the Appellant acted with intent to inflict great bodily harm.

At trial, the court instructed the jury with the definition of "intent." It states:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 86, Appendix "C".

The court also instructed the jury with the definition of "great bodily harm." It states:

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

CP 87, Appendix "D".

Appellant concedes that there is sufficient proof that Appellant intended to cut Officer Potter but then proceeds to argue that this proof is insufficient to support the jury's finding that Appellant intended to inflict great bodily harm.

Appellant's arguments are summarized and rebutted as follows:

i. *Because Appellant didn't actually inflict physical injury with the knife there is no proof he intended to inflict great bodily harm.* However, the court's instruction to define intent for the jury tracks the statutory definition. RCW 9A.08.010(1)(a). Proof of intent requires only evidence that the Appellant acted with the objective or

purpose to accomplish a result, not that the result is ultimately accomplished.

ii. *Because the State didn't introduce specific evidence (i.e. testimony) that a 3-inch bladed knife could cause death there is no proof Appellant intended to inflict great bodily harm.* However, the jury saw both the knife and how it was handled, supporting a finding that the Appellant could have killed Officer Potter with that knife.

iii. *Because the transcript quality is lacking, the Appellant's statement "I'm going to cut through you" may be in error.* Certainly there are minor errors in this transcript. However, Appellant fails to point to any other major errors in the transcript and to argue that the key statement by Appellant which verbalizes his intent to inflict great bodily harm was misreported flies in the face of reason.

2. The State's attorney did not commit prosecutorial misconduct in closing argument which prejudiced Appellant's constitutional right to a fair trial.

Appellant next asserts that his conviction was a result of prosecutorial misconduct in closing arguments which prevented him from receiving his constitutionally mandated fair trial.

Prosecutorial misconduct may deprive a defendant of a fair trial and only a fair trial is a constitutional trial. State v. Charlton, 90 Wn.2d 657, 64, 585 P.2d 142 (1978).

The State agrees with the Appellant that “in order to prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.” State v. Bin Thach, 126 Wn.App. 297, 316, 106 P.3d 782 (2005), citing State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

A defendant establishes prejudice only if there is a substantial likelihood the instances of misconduct affected the jury’s verdict, thereby depriving the defendant of his right to a fair trial. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

Courts afford a prosecutor wide latitude in closing argument to argue inferences based on evidence in the record. State v. Millante, 80 Wn.App. 237, 250, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012, 917 P.2d 130 (1996). However, a prosecutor may not appeal to the jury’s prejudice or passions. State v. Clafin, 38 Wn.App. 847, 850-51, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

In reviewing a prosecutor’s comments during closing arguments, the appellate court is to consider “the context of the total argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury.” State v. Brown,

132 Wn.2d 529, 561, 940 P.2d 546 (1997), (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)) cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

Failing to object waives the objection unless the prosecutor's comment was so ill-intentioned or flagrant that it causes a continuing prejudice that could not be cured by instruction. Brown, 132 Wn.2d at 561. It is not necessary to order a new trial if the trial court could have cured the misconduct by giving a curative instruction but the defendant did not request one. Id.

Appellant's basis for his claim that the State's attorney made two flagrant and ill-intentioned comments in closing and rebuttal arguments are without merit. Appellant only points to a single sentence in the closing argument out of more than 16 pages of transcript for the basis of his accusation that the State's attorney impermissibly argued for the jury to presume Appellant's intent.

No objection was made to this part of the State's argument nor was it so ill-intentioned and flagrant that it created an ongoing prejudice against the Appellant. The State never argued that the jury should presume the Appellants intent, only that they could

reasonably infer from his actions that he intended to hurt the officers by taking them to the ground.

The plain reading of the statement, especially when considered in context with the rest of the closing argument, clearly demonstrates that this was permissible argument of inferences based upon evidence in the record. Ultimately the verdict would seem to suggest that the jury did not agree with the State's argument, in that they found Appellant not guilty of the third degree assault charge that was solely based upon Appellant pulling Officer Potter to the ground and causing his injury. While the jury did find Appellant guilty of third degree assault involving Officer Brunk, there was additional assaultive conduct involved (spitting).

The Appellant's next argument of prosecutorial misconduct focuses on three sequential statements in the rebuttal argument which used the word "deserves" as being an impermissible "golden rule" argument and also an effort to inflame the prejudices or passions of the jury. Again, no objection was made at the time and these statements were not so ill-intentioned and flagrant that it created an ongoing prejudice against the Appellant.

To be a "golden rule" argument, the state's attorney would have to be urging the jurors to put themselves in the officers' places

and rule the way they think the officers would want them to rule. State v. Bin Thach, 126 Wn.App. 297, 316, 106 P.3d 782 (2005), citing Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988). No such argument was made in this case by the State's attorney.

Likewise, the argument that repeating the word "deserves" inflames the emotions of the jury ignores the broader context of the argument. The context in which this word was used was to rebut the Appellant's closing argument that by admitting to committing three third degree assaults the jury should believe the defense argument that the first degree assault did not happen. The State's rebuttal to this argument was to urge the jury to not accept Appellant's suggestion but instead remember the court's instruction that jury is to assure that all parties get a fair trial. CP 78; Appendix "E". The use of the word "deserves" speaks directly toward that assurance.

CONCLUSION

The State proved, beyond a reasonable doubt, each and every element of the offense of first degree assault. There was sufficient evidence at trial for a rational trier of fact to find that

Appellant assaulted Officer Potter with a deadly weapon and with the intent to cause Officer Potter great bodily harm.

In addition, the State's attorney did not commit prosecutorial misconduct in closing argument which prejudiced Appellant's constitutional right to a fair trial. The State's attorney argued inferences based on evidence in the record and none of the statements were made in a context that would enflame the passion of the jury such that the Appellant did not receive a fair trial. For these reasons the State requests that Defendant appeal be denied.

Respectfully submitted on April 6, 2012.



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Deputy Prosecuting Attorney
Kittitas County
Attorney for Respondent

APPENDIX "A"

INSTRUCTION NO 7

To convict the defendant of the crime of Assault in the First Degree, as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 29th day of January, 2011, the defendant assaulted Ryan Potter:

- (2) That the assault was committed with a deadly weapon
- (3) That the defendant acted with intent to inflict great bodily harm;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

000084

APPENDIX "B"

INSTRUCTION NO. 11

Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is use, attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.

000088

APPENDIX "C"

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

000085

APPENDIX "D"

INSTRUCTION NO. 10

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

000087

APPENDIX "E"

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

000078

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this.

If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

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DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
Plaintiff/Respondent.) No. 299287-7-III
) AFFIDAVIT OF MAILING
vs)
KYLE J. STODDARD,)
Defendant/Appellant.)
_____)

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 6th day of April, 2012, affiant deposited into the mail of the United States a properly stamped and addressed envelope directed to:

Renee S. Townsley, Clerk
Court of Appeals
Division III
500 N. Cedar St.
Spokane WA 99201-1905

Dennis W. Morgan
120 W Main Street
Ritzville WA 99169

Kyle J Stoddard #311643
Washington State Penitentiary
1313 N 13th Ave, Delta E 114
Walla Walla WA 98362

containing copies of the following documents:

- (1) Respondent's Brief with page numbers
- (2) Affidavit of Mailing



SIGNED AND SWORN to (or affirmed) before me on this 6th day of April, 2012.



NOTARY PUBLIC in and for the
State of Washington.

My Appointment Expires: 8-29-13

