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Court of Appeals
Division III
State of Washington

No. 32553-9-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SUSAN J. LASTER

Appellant.

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

The Honorable Judge Allen C. Nielson

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Susan Laster accepts this opportunity to reply to the State's brief and to clarify certain arguments on appeal. Ms. Laster requests that the Court refer to her opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

The jury was not instructed on how to determine whether Ms. Laster's underlying arrest was lawful, and no other evidence was introduced that her arrest was "lawful;" the jury was blindly required to make the probable cause analysis to determine this legal element without proper instruction on how to do so, which requires reversal.

Appellant's argument on sufficiency of the evidence in Issue 1(b) of her opening brief is intended to be read in conjunction with the argument on inadequate instructions in Issue 2. That is, the Appellant argues that the jury was unable to properly weigh the testimony and therefrom decide whether there was probable cause for Ms. Laster's arrest, because the jury was never instructed on how to make this legal determination that there was probable cause to arrest Ms. Laster for assault, obstruction or any other crime.¹ And, while Ms. Laster maintains that the lawfulness of the arrest should be determined by the jury rather

¹ The State points out that the jury was not required to find that Ms. Laster's arrest was lawful specifically for assault, but that her arrest could be lawful for any crime committed, whether or not charged or proven. (Response Brief pgs. 16-18) But this argument does not address the issue in this case, that the jury must have been instructed on how to make the determination that Ms. Laster's arrest, regardless of for which crime, was lawful.

than a judge, it is at least noteworthy that there was no specific evidence from which the jury could conclude the arrest was “lawful” without doing its own analysis on probable cause (i.e., there was no stipulation or other evidence specifying that the arrest had previously been deemed “lawful” so that the jury could make this finding without its own probable cause analysis.) Ultimately, the jury was blindly expected to determine whether Ms. Laster committed certain acts to support a lawful arrest, without proper instruction on how to make this determination.

Instruction on lawfulness of arrest required

To convict Ms. Laster of resisting arrest, the State was required to prove that Ms. Laster’s underlying arrest was lawful. RCW 9A.76.040(1); WPIC 120.06. Where the lawfulness of the arrest is an element of the charged crime, like with resisting arrest, the lawfulness of the arrest “becomes a jury question.”² *State v. Hoffman*, 116 Wn.2d 51, 97-98, 804 P.2d 577 (1991). In other words, where the defendant elects to proceed with a jury as fact-finder, the jury, not judge, must find the existence of all elements of the crime beyond a reasonable doubt. *See State v. Humphries*, 181 Wn.2d 708, 714, 336 P.3d 1121 (2014); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is

² *C.f. Hoffman*, 116 Wn.2d at 97-98 (When the validity of an arrest is challenged – but where lawfulness of the arrest is not necessarily an element of the crime – the court sits as fact-finder and decides whether sufficient facts existed to find probable cause for a warrantless arrest).

well settled that neither the trial court nor reviewing court may substitute its judgment of the weight of the evidence for that of the jury. *See e.g., Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 585-86, 187 P.3d 291 (2008).

Jury instructions must, “when read as a whole[,] properly inform the jury of the applicable law.” *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). Instructions must make the relevant legal standard manifestly apparent to the average juror and must not be misleading or confusing. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996).

In the case of resisting arrest, particularly where questions arise about the lawfulness of the underlying arrest, a jury should be instructed on how to apply the evidence and how to determine that the underlying arrest was lawful. WPIC 120.06 (Comment) (citing *State v. Simmons*, 35 Wn. App. 421, 667 P.2d 133 (1983); *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986)). *See also City of Tacoma v. Nekeferoff*, 10 Wn. App. 101, 105, 516 P.2d 1048 (1973) (citing *State v. Goebel*, 40 Wn.2d 18, 240 P.2d 251 (1952)) (approving instructions that help jury resolve the question of the legality of the defendant’s arrest when at issue in a case, such as in proving an element in the State’s case).

Contrary to the State’s suggestion, the “lawfulness” of an arrest is not a matter that would be of ordinary understanding or self-explanatory to a jury, such as the phrases “in the course of,” “in furtherance of” or “in immediate flight.” *See* State’s Response Brief, pgs. 27-28. Unlike these other terms, the jury cannot be expected to know that a warrantless arrest happens to be lawful “when facts and circumstances within the arresting officer’s knowledge are sufficient [under a probable cause standard] to cause a person of reasonable caution to believe that a crime has been committed.” *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). The lawfulness of an arrest is not an “ordinary term” so that the court could exercise discretion in not defining this term. The lawfulness of the arrest was an element that the jury was required to find, and it was ill-equipped to make the required finding without an elemental explanatory instruction in this case.

Standard of review is de novo

Contrary to the State’s argument at Response Brief pgs. 21-22, the standard of review for jury instruction issues depends on whether the trial court’s refusal or failure to give an instruction is based upon a matter of law or fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Where the trial court does not give an instruction due to how it resolves a factual dispute, the court’s decision is reviewable only for abuse

of discretion. *Id.* (internal cites omitted). But failure to give an instruction that is needed as a matter of law is reviewed de novo. *Id.* Here, the standard of review is de novo, because it is alleged that omitting an explanatory instruction on how to determine “lawfulness” of an arrest constituted a legal error, as opposed to the instruction not being given because of the trial court’s disputed view of the facts.

City of Seattle v. Cadigan does not address the instructional issue above

Next, the State’s reliance on *City of Seattle v. Cadigan* is misplaced. State’s Response Brief pgs. 16-17 (citing *City of Seattle v. Cadigan*, 55 Wn. App. 30, 36, 776 P.2d 727 (1989)). There, the Court did not decide whether a jury should be instructed on how to make its determination that an arrest is lawful. *Id.* Instead, the Court held that a self-defense instruction was not appropriate when a defendant used force to resist arrest. *Id.* at 37-38. And, the Court determined that there was sufficient evidence from which the jury could have determined that the underlying arrest was lawful in that particular case. *Id.* at 34-36.

But here, contrary to the State’s suggestion (Response Brief pgs. 14, 18-21), Ms. Laster does not allege that it was necessary to or that she was permitted to use force to resist arrest. (See Appellant’s Opening Brief pgs. 13-16, 21-23) “Force” is not at issue here; the jury did not find Ms. Laster had used force and assaulted the officer, and Ms. Laster does not

argue force was permitted. The self-defense instructional issue that was addressed in *Cadigan, supra*, is simply not at issue here.

Furthermore, even if the Court in *Cadigan* happened to review that case for sufficiency of the evidence on the lawfulness of the arrest, that Court did not address the critical issue in this case— failure to instruct on how to determine if an arrest is lawful. The Court in *Cadigan* was never asked to decide, and did not reach the issue, of whether a jury should be instructed on how to determine the lawfulness of an arrest prior to finding this element. And, contrary to the State’s suggestion, this Court cannot weigh the disputed facts and determine itself that Ms. Laster’s underlying arrest was lawful. The jury was charged with making this decision, but it could not effectively do so without instruction on the lawfulness of an arrest.

Constitutional magnitude or ineffective assistance of counsel shown

If jury instructions permit a conviction absent proof of an essential element of the offense, the instructional error violates due process, is of constitutional magnitude and is reviewable for the first time on appeal where the error had “practical and identifiable consequences in the trial.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 Led.2d 368 (1970); U.S. Const. Amend. XIV, art. I, §3. Alternatively, where defense

counsel neglects to request a necessary jury instruction for non-tactical reasons and, but for counsel's performance, the result would have been different, a conviction may be reversed based on ineffective assistance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Here, the failure to instruct on the lawfulness of an arrest was akin to failing to instruct on the very element of the crime. *See generally State v. Gordon*, 172 Wn.2d 672, 677-78, 260 P.3d 884 (2011) (where the lacking explanation is akin to an element, verses merely defining ordinary terms within the element, the error may be of constitutional magnitude). In this case, the jury needed to be instructed on the explanation for when an arrest is lawful, a key element of the crime for resisting arrest. Without this instruction, the obvious risk is that the jury guessed at this legal term and convicted Ms. Laster without actually finding an essential element of the offense. The failure to so instruct had practical and identifiable consequences in this trial, particularly since the jury was not unanimously convinced that Ms. Laster ever committed those acts that would have warranted her arrest. Accordingly, review is proper under RAP 2.5(a)(3).

If remand is ordered, the jury could very well find that the evidence reached the necessary probable cause threshold for Ms. Laster's lawful arrest, even if it did not unanimously believe this same evidence

established beyond a reasonable doubt that she assaulted the officer. Then again, the jury could remain hung on whether Ms. Laster ever assaulted the officer, or performed any other acts that warranted her arrest at the time. Ultimately, this is a determination that a jury need make, else Ms. Laster's due process rights remain violated by an infirm conviction.

Alternatively, this Court should reverse, because counsel was ineffective for failing to request an instruction defining lawful arrest and specifically challenge the lawfulness of the arrest before the jury began deliberating. Counsel did request that the court instruct the jury on the definition of arrest after certain questions were received from the jury (RP 219), and counsel challenged the lawfulness of the arrest in a post-judgment motion. (CP 124) But there does not appear to have been any tactical basis for counsel not pursuing these arguments before deliberation. Counsel should have held the State to its burden on this particular legal element and demanded that the jury be educated on how to decide when an arrest is lawful. Ms. Laster's conviction should not be affirmed where it resulted from counsel's failure to more specifically and effectively address this issue at trial.

Given the jury's lack of verdict on the very factual issue that led to Ms. Laster's arrest, it is likely that the result would have been different with clearer argument and instruction on the lawfulness of an arrest prior

to the jury's deliberations. Ms. Laster was deprived of her constitutional right to effective assistance when counsel waited to address the lawfulness of the arrest until after the jury asked its questions and until post-trial when counsel brought his motion to arrest judgment. It is likely that the results of these proceedings would have been different if the jury was properly instructed, especially since it did not find beyond a reasonable doubt that Ms. Laster hit or kicked the officer(s).³

C. CONCLUSION

Even if this Court could sit in the place of the jury, weigh the facts, and find there was probable cause for an arrest, the conviction must be reversed where the jury did not perform this same function with proper knowledge of the applicable law. In this case, the guilty verdict was entered without adequate instructions to determine when an arrest is lawful. The jury necessarily guessed at how to determine whether Ms. Laster's arrest was lawful, since it was never instructed on the same. The conviction should be reversed and remanded for a trial with proper and complete instructions.

³ The State presumes too much and improperly shifts the burden to the defendant to prove her innocence by implying that the hung jury would have found Ms. Laster had hit the officer under the lesser probable cause standard. (State's Response pg. 33)

Respectfully submitted this 30th day of April, 2015.

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