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MAY 12, 2017

Court of Appeals

Division III

State of Washington

No. 34372-3-III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON

V.

BRANDON VANWINKLE

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BRIEF OF APPELLANT

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Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
(360) 792-9345

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## A. Assignment of Errors

### Assignment of Errors

1. The trial court erred by denying Mr. VanWinkle's motion to dismiss based upon insufficient signage at the entrance to the courtroom.
2. The jury instructions improperly defined the elements of the offense.
3. The trial court erred by not declaring a mistrial based upon juror misconduct.

### Issues Pertaining to Assignment of Errors

1. RCW 9A.36.031(1)(k) requires courthouse signage at "any public entrance" that an assault in a courtroom is an aggravated felony. Does a county courthouse comply with this statute by placing a sign at the main public entrance, but not at the public entrance Mr. VanWinkle was required to use?
2. Did the trial court err by instructing the jury that signage is required at "the public entrance to the courtroom," rather than the statutory language "any public entrance?"

3. Did the trial court err by not granting a mistrial after Juror 5 repeatedly spoke to three different jurors about her safety concerns prior to the commencement of deliberations?

#### B. Statement of Facts

Brandon VanWinkle<sup>1</sup> was charged with third degree assault. CP, 1. Mr. VanWinkle filed a pretrial motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). CP, 3. The motion was heard on February 10, 2016 and denied. RP, 12 (Feb. 10, 2016).<sup>2</sup> The case proceeded to a jury trial and the jury convicted. RP, 200.<sup>3</sup> The court imposed a mitigated exception sentence of 26 months. RP, 43 (April 6, 2016). He appeals.

#### Substantive Facts

On December 17, 2015 in the Benton County Courthouse there was an altercation in Courtroom B. RP, 37. Mr. VanWinkle was in custody sitting in the courtroom waiting for his case to be called. RP, 39. He was sitting alone in the jury box in the front row. RP, 39, 47. The case

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<sup>1</sup> Mr. VanWinkle's name is spelled various different ways in the record. He advised the court his name is spelled without a space and a capital "W." RP, 4 (March 28, 2016). That spelling is used in this brief.

<sup>2</sup> All references to the record are to the trial, which occurred on March 28 through 30, 2016, unless otherwise designated.

<sup>3</sup> The trial judge was Court of Appeals Judge George Fearing, sitting as a judge pro tem in Benton County Superior Court. It may be appropriate for this appeal to be transferred to another division of the Court of Appeals.

preceding him involved a man, Kyle Welch<sup>4</sup>, who appeared out-of-custody but was arrested by the court during his hearing. RP, 39, 48, 94. Mr. Welch was being sentenced for child abuse of a three-year-old girl. RP, 42, 87. During the sentencing hearing, the mother of the abused child testified. RP, 86. She described discovering her daughter covered in bruises and apparently strangled. RP, 87. She showed the judge photographs of the injuries. RP, 87. The mother was very upset by the plea bargain, which involved a five day jail sentence. RP, 94. Mr. VanWinkle was paying close attention to Mr. Welch's sentencing hearing, listening very intently. RP, 40.

After Mr. Welch's case was over, Mr. VanWinkle's case was called and he proceeded to the bench to handle his case. RP, 39-40. He had a discussion with his lawyer and the judge handled his case. RP, 47. At the completion of Mr. VanWinkle's case, he proceeded back to the jury box. RP, 41. As he approached Mr. Welch, Mr. VanWinkle stepped to the side, yelled either "Jesus" or "Satan," and struck the man twice. RP, 42, 48, 55. After the first blow, he said, "You don't do that to a little girl." RP, 49. Courtroom officers immediately grabbed Mr. VanWinkle and took him to the ground. RP, 49, 55.

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<sup>4</sup> Mr. Welch did not testify at Mr. VanWinkle's trial. His first name appears in the record at RP, 24.

The main door to Courtroom B has several signs. RP, 68. The signs state there are to be no small children, no cellular devices, and no drinks. RP, 69. There is also a sign advising the reader that an assault in a courtroom is an aggravated assault. RP, 69; CP, 25. In custody defendants do not use that entrance, however. The public entrance used by corrections staff to transport inmates to Courtroom B does not have any signs warning inmates about the consequences of assaulting someone in the courtroom. RP, 50-51, 73.

There was testimony at trial that Mr. VanWinkle had been the victim of beatings by his stepfather growing up. RP, 76. The defense called Dr. Walter Mabee. RP, 98. Dr. Mabee opined that Mr. VanWinkle suffers from a depersonalization/derealization condition that diminished his ability to form the requisite intent of the crime. RP, 103, 107.

At the conclusion of the evidence, the defense asked the court to instruct on the lesser included offense of fourth degree assault. RP, 176. The trial court denied the request and held there was insufficient affirmative evidence of the lesser charge to instruct the jury on the lesser. RP, 179. The court held the sufficiency of the signage was an issue of law, not fact, saying, “[I]here was a legal ruling by both Judge Mitchell and in that the signage only needs to be on the public entrance and that despite that signage only being the public entrance It also applies to

individuals who were in the Jail and walked to the courtroom from a different path.” RP, 179.

During the colloquy about jury instructions, the State argued, “I would like to address with respect to jury instructions. . . . the State anticipates that the defense is going to make an argument during closing argument which would essentially be a jury nullification argument regarding the signage and there is a public entrance.” The defense objected, saying, “I do believe it’s an element for a reason. If there was an actual issue, it wouldn’t be an element.” RP, 181. The court ordered, “I will rule that it is not proper for the defense to argue that the signage needed to be somewhere else or the fact that it was not in the pathway of Mr. VanWinkle as he walked from the jail to the courtroom. Again those arguments cannot be made.” RP, 181. In compliance with the court’s order, neither party argued the signage issue during closing arguments.

Court’s instruction to the jury #11, the “to convict” instruction, defined third degree assault as including the following element: “That, at the time of the assault, signage notifying the public of the possible enhanced penalties for assault in a courtroom was prominently displayed at the public entrance to the courtroom.” Supplemental CP, \_\_\_. Defense proposed instruction #6 read: “A person commits the crime of assault in the third degree when he or she assaults another in a courtroom during a

time when the courtroom is being used for judicial purposes during courtroom proceedings, and there was signage prominently displayed at any public entrance to a courtroom, notifying the public about the possible penalties for the offense.” Supplemental CP, \_\_.

During deliberations, the jury sent the following note to the court, “Can any entrance other than the one public entrance be considered a public entrance?” RP, 197. The State wanted the Court to answer the question, “No.” The defense objected, saying, “I want to point out that I think that was definitively an argument I wanted to make and bring forth and the reason for my request for my lesser includeds because I believe it’s an element, factual decision for the jury.” RP, 197. The Court responded, “You must rely on the jury instructions previously given.” Supplemental CP, \_\_.

#### Juror Misconduct

Early in this case, security was a concern. RP, 8. The State wanted to have extra security in the courtroom with a total of three officers. RP, 9. One uniformed corrections officer would sit “in the vicinity of the defendant,” one uniformed officer would sit next to the prosecutor at counsel table, and one officer would sit in the audience wearing a uniform partially covered up with a sweater or pullover. RP, 9. In support of its position, the State called Corrections Officer Josh Shelton, who testified

that extra security was needed because the defendant has “proven that he lacks the ability to follow court orders,” including making threats to court staff. RP, 15. Officer Shelton opined that the defendant is a “security risk to individuals seated in the courtroom. RP, 15. The trial court approved the proposed plan. RP, 18-19.

On the last day of trial, the bailiff brought to the court’s attention a problem with juror number 10. RP, 120. She was concerned for her safety and had expressed this concern to the bailiff and several other jurors. RP, 120. The bailiff, Lew Reed, testified as to his observations. Juror 10 was concerned for her safety and that her name and address would be part of the public record. RP, 123. Her concerns were such that she was unsure whether she could deliberate on the case. RP, 124. When asked if she would come into the courtroom to address the judge directly, she stated she would refuse to do that. RP, 124-25. Juror 10 also spoke to jurors 5 and 8 about her concerns. RP, 125. When the bailiff approached juror 10 a second time to ask her to come into the courtroom, he observed her talking to jurors 5 and 8. RP, 128. Jurors 5 and 8 were trying to allay her fears. RP, 128. Juror 5 asked why there was so much security in the courtroom. RP, 129. The bailiff did not do anything to allay her fears and she was still afraid when he left her. RP, 130. Jurors 5 and 8 expressed no concerns about continuing. RP, 131.

After Mr. Reed's testimony, the State moved to dismiss juror number 10. RP, 134. Mr. VanWinkle, through counsel, moved for a mistrial. RP, 135. The trial court dismissed juror number 10, but denied the motion for mistrial. RP, 137.

After the verdict, the court brought the twelve jurors into the courtroom and questioned them under oath. RP, 201. Jurors 1,2, 3, 4, 6, 7, 9, 11 and 13 did not have any fear for their safety or participate in any improper discussions about safety concerns. RP, 203-17.

Juror 5 described a conversation with juror 10 where she expressed she felt uncomfortable. RP, 207. Juror 5 told her to ignore her feelings, that you have to get on with your life. RP, 207.

Juror 8 had a conversation with juror 10 and juror 5. RP, 213. Juror 10 said she was concerned about their names being made public, and that if they voted to convict, people would know who she was and look her up and find her. RP, 211. Juror 10 said he has been a juror before, it is a valid concern, but he didn't not think it's ever happened before. RP, 211. He told her they have to approach deliberations as if he is not guilty and it's the prosecutor's job to prove the case. RP, 212.

Juror 12 described a conversation in the parking lot with juror 10 on either Monday or Tuesday, probably Tuesday. RP, 217. She expressed that she might not be safe and her name would be public. RP, 217. Juror

12 responded that he felt safe and whatever was going to happen it would be okay. RP, 218.

The Court found no evidence of juror misconduct. RP, 223.

### C. Argument

1. The trial court erred by denying Mr. VanWinkle's motion to dismiss for insufficient signage at the entrance to the courtroom.

The first, and probably dispositive, issue in this case is whether the Benton County Courthouse complies with the statutory signage requirements for third degree assault. This issue, in turn, requires this Court to interpret the word “any.” Case law is replete with arcane discussions about definitions of commons words, such as when “and” means “or,”<sup>5</sup> “a” means “the,”<sup>6</sup> and the import of “Cf” in an opinion.<sup>7</sup> The definition of “any” is one of those arcane discussions.

Mr. VanWinkle was convicted of third degree assault pursuant to RCW 9A.36.031(1)(k), which reads,

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . Assaults a person located in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This section shall apply only: (i) During the times when a courtroom,

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<sup>5</sup> *State v. Kozey*, 183 Wn App. 692, 334 P.3d 1170 (2014)

<sup>6</sup> *State v. Cronin*, 142 Wn 2d 568, 14 P 3d 752 (2000).

<sup>7</sup> *Western Community Bank v Helmer*, 48 Wn App. 694, 698, 740 P 2d 359 (1987).

jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the assault.

RCW 2.28.200, incorporated by reference into the statute, reads:

- (1) Signage shall be posted notifying the public of the possible enhanced penalties under chapter 256, Laws of 2013.
- (2) The signage shall be prominently displayed at any public entrance to a courtroom.
- (3) The administrative office of the courts shall develop a standard signage form notifying the public of the possible enhanced penalties under chapter 256, Laws of 2013.

In this case, the evidence regarding signage is undisputed. The Benton County Courthouse, Courtroom B, has several signs in front of the main public entrance, including a sign advising that any assault in a courtroom is a felony. But inmates are not brought into the courtroom using the main public entrance. They are brought in through a side door where there is no signage of any kind, including any signage regarding courtroom assaults. The trial court concluded the sign on the main courtroom entrance was sufficient to comply with the statute. Mr. VanWinkle disagrees because, as an in-custody defendant, he would never have had an opportunity to see the sign. This is an issue of first impression.

In order to resolve this issue, this Court must answer two questions. The first question is whether the signage is a statutory element of the offense. Assuming it is, the second question is whether placement

of a sign at an entrance the defendant would not and could not have entered is sufficient to satisfy this element.

Subject to constitutional restraints, the legislature has the power to define offenses and set the appropriate punishment. *State v. Fuentes*, 150 Wn App. 444, 208 P.3d 1196 (2009). There are many examples of crimes that include counterintuitive, or even silly, elements. *State v. Bailey*, 52 Wn App. 42, 757 P.2d 541 (1988), *affirmed on other grounds*, 114 Wn.2d 340 (1990) (in first degree statutory rape prosecution involving a three-year-old victim, the State is required the victim and perpetrator were not married to each other). *State v. Hudson*, 85 Wn.App. 401, 932 P.2d 714 (1997) (former eluding statute required proof the pursuing officer was in uniform)

When a statute requires actual notice of a fact, proof of that notice becomes an element of the offense. *State v. Tapia*, 190 Wn.App.1007 (2015) (unpublished, cited as persuasive authority pursuant to GR 14.1). In *Tapia*, the juvenile was convicted of trespass after going onto school property that was neither fenced nor signed. The trial court concluded that, given the late hour, the day of the week, and the fact no school activities were taking place, no reasonable person would believe he had the right to be on the property, despite the fact the property was open to the public. The Court held that while the trial court's interpretation was

“reasonable,” the statute requires more. When the property is open to the public, the statute requires fencing or signage to notify people that they are prohibited from entering. The Court reversed the conviction.

RCW 9A.36.031(1)(f) states, “This section shall apply only . . . if signage was posted in compliance with RCW 2.28.200 at the time of the assault.” Its language manifests a clear intent by the legislature to require signage. The signage is an essential element of the offense and must be proved beyond a reasonable doubt.

Further evidence that the signage is an element of the offense is that both the State and the trial court considered it an element. The prosecutor included the signage requirement as an essential element in the charging document. CP, 1. The trial court included it in the “to convict” jury instructions. CP, \_\_

The second question is more difficult: whether a sign at the main public entrance is sufficient to comply with the statute when the defendant-inmate is not brought into the courtroom through that entrance. The statute requires the signage to be “prominently displayed at *any* public entrance to a courtroom.” (Emphasis added.) The resolution of this issue turns on the definition of “any.” As has been noted, however, any means both “some” and “all.”

While the Court of Appeals recognized that the debate here centers on the definition of “any,” it found no clear legislative intent as to the unit of prosecution *State v. Sutherby*, 138 Wn.App. 609, 615, 158 P.3d 91 (2008). The court noted that the word “any” has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all. *Id.* at 614 (citing Webster’s Third International Dictionary (1976)). Based on these definitions, the legislature could have intended to ban (1) one photograph or other material; (2) one, some, or all photographs or other material, regardless of quantity; or (3) one or more photographs or other material. *Id.* at 615. Because it concluded the statute is ambiguous, the Court of Appeals held that the rule of lenity applies; therefore Sutherby’s violation of the statute by possessing multiple offending materials at the same time in the same place is subject to only one conviction *Id.*

We agree with the conclusion of the Court of Appeals that the proper unit of prosecution is one. This is consistent not only with the expansive dictionary definitions of “any” and the rule of lenity but also with our prior construction of the term “any” in other contexts.

*State v. Sutherby*, 165 Wn.2d 870, 880, 204 P.3d 916 (2009).

A review of the cases cited in *Sutherby* reveals the word “any” has been most often interpreted to mean “all” or “every.” *Rosenoff v. Cross*, 95 Wn. 525, 164 P. 236 (1917); *State ex rel. Evans v. Brotherhood of Friends*, 41 Wn.2d 133, 247 P.2d 787 (1952); *State v. Smith*, 117 Wn.2d 263, 271 (1991); *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002).

In sum, unless there is a clear contrary legislative intent, the word “any” means “all” or “every.” Further, if the statute is ambiguous, the rule

of lenity requires that the word be resolved in favor of the defendant. Under both of these approaches, RCW 2 28.200 requires that signage be placed at every entrance to the courtroom where the public is going to enter. The fact that a sign was placed at the main public entrance does not assist the State when it required Mr. VanWinkle to use another entrance without signage. The evidence is insufficient to establish an essential element of the crime.

The jury was not instructed on the lesser included offense of fourth degree assault. When the jury is not instructed on a potential lesser included offense and the Court of Appeals concludes the evidence is insufficient to convict of the greater offense, the only available remedy is dismissal with prejudice. *State v Heidari*, 174 Wn 2d 288, 274 P.3d 366 (2012). Mr. VanWinkle's conviction for third degree assault should be dismissed.

2. The jury instructions improperly defined the elements of the offense.

The "to convict" instruction contains a subtle, but important error. Regarding the signage element, the "to convict" instruction reads: "That, at the time of the assault, signage notifying the public of the possible enhanced penalties for assault in a courtroom was prominently displayed

at *the* public entrance to the courtroom ” In other words, the trial court changed the statutory language from “any” to “the.” This was error.

A defendant has the right to have the jury instructed on all the essential elements of the offense. *State v Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). The instruction is in error because the statute requires that signage be at “any” public entrance, not “the” public entrance. Compounding the problem is the trial court restricted the arguments of counsel and ruled they could not discuss the signage issue during closing arguments. Defense counsel made clear that the signage issue was a central issue she intended to argue in her closing argument, but was unable to do so due to the court’s rulings.

Mr. VanWinkle has preserved this instructional error. Defense Proposed Instruction #6 included the proper article “any” rather than the improper article “the.” Ironically, the Court Instruction #7 also, includes the proper article. But Instruction #11 contains the error. It was clear from the colloquy during the jury instructions that Mr. VanWinkle intended to argue that the signage was insufficient. The trial court ruled that Mr. VanWinkle could not argue the sufficiency of the signage.

This issue is similar to the issue considered in *State v Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). In *Cronin*, the jury was instructed that an accomplice aids a person in the commission of “a crime” rather than “the

crime.” The Supreme Court held this was reversible error because it did not properly instruct the jury on the essential elements of the offense.

The error in this case was not harmless. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. *Brown* at 339. In this case, there was disputed evidence about the nature of the signage. Both the State and defense presented witnesses on this issue. This Court may consider questions from the jury in assessing harmfulness. *Seattle v. Gellein*, 112 Wn.2d 58768 P.2d 470 (1991). The jury question clearly indicates the jury was confused by the signage issue. Had the jury been properly instructed, it is possible they would have acquitted. The instructional error was not harmless and requires a new trial.

3. The trial court erred by not declaring a mistrial based upon juror misconduct.

Towards the end of the trial, Juror 10 became a disruptive force on the trial. Apparently, she was concerned for her safety and the possibility that her name could be public. Juror 10 was properly removed from the jury based upon her comments, but not before she expressed her concerns repeatedly to three other jurors.

It is basic rule that jurors are not to discuss the case prior to the commencement of deliberations. In this case, Juror 10 was expressing her concerns to anyone who would listen. To their credit, based upon this record, it does not appear the other jurors were significantly impacted by Juror 10's concerns. But, on the other hand, they did not do anything to shut down the conversation or stop her.

It is misconduct for jurors to discuss a case with anyone prior to the commencement of deliberations. *State v. Murphy*, 44 Wash App. 290, 296, 721 P.2d 30 (1986), *review denied*, 107 Wn 2d 1002 (1987). Once established, it gives rise to a presumption of prejudice which the State has the burden of disproving beyond a reasonable doubt. *Id*

The trial court cited the case of *New Jersey v. Bisaccia*, 319 N J Super 1, 724 A 2d 836 (1999) in denying the motion for mistrial. The trial court's reliance on this case is misplaced given that the court in that case did not engage in a sufficient inquiry into the jurors' concerns and the Court of Appeals remanded for further hearings.

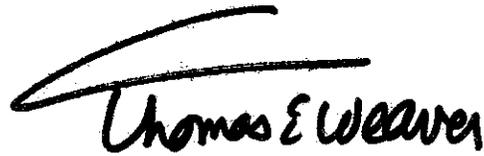
In this case, Juror 10 repeatedly contacted fellow jurors to express her safety concerns. Although Juror 10 did not testify, and in fact refused to enter the courtroom to face inquiry over the matter, one gets the sense from the record here that she was almost pleading with her fellow jurors to agree with her. While the other jurors apparently did not share her

concerns, they continued to engage with her over the matter. This was misconduct and Mr. VanWinkle's motion for a new trial should have been granted.

D. Conclusion

Mr. VanWinkle's case should be dismissed. In the alternative, a new trial should be ordered.

DATED this 12<sup>th</sup> day of May, 2017.

A handwritten signature in black ink that reads "Thomas E. Weaver". The signature is written in a cursive style with a large, sweeping flourish above the name.

Thomas E. Weaver, WSBA #22488  
Attorney for Defendant/Appellant

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

STATE OF WASHINGTON, ) Court of Appeals No : 343723  
 )  
Plaintiff/Respondent, ) DECLARATION OF SERVICE OF  
 ) BRIEF OF APPELLANT  
vs. )  
 )  
BRANDON VANWINKLE, )  
 )  
Defendant/Appellant. )

STATE OF WASHINGTON )  
 )  
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action

On May 12, 2017, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Three; and designated said document to be transmitted electronically, through the Court of Appeals transmittal system, to the Benton County Prosecuting Attorney, [prosecuting@co.benton.wa.us](mailto:prosecuting@co.benton.wa.us).

On May 12, 2017, I deposited into the U S Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Brandon VanWinkle, DOC #787455  
Monroe Correctional Complex  
WA State Reformatory Unit  
PO Box 777  
Monroe, WA 98272

////

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

3 DATED: May 12, 2017, at Bremerton, Washington

4   
5 \_\_\_\_\_  
6 Alisha Freeman

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