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Court of Appeals
Division III
State of Washington

NO. 35064-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

State of Washington,

Respondent / Plaintiff,

v.

Kye Allery,

Appellant / Defendant.

Appeal From The Superior Court
Of Whitman County
Case No. 16-1-00224-38
The Honorable Gary Libey

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENT OF ERROR

The defendant argues that the trial court's refusal to give one of his proposed jury instructions prevented him from arguing his defense theory to the jury.

The State believes the instruction was properly refused, as it was unsupported by evidence and the refusal did not prevent defendant from arguing his theory of the case.

II. STATEMENT OF THE CASE

Deputy Bill Downey is a Deputy United States Marshall, working as part of a task force to locate fugitives at the relevant time. RP 78-83. He, along with other members of the task force, as well as a local sheriff's deputy, had gone to a house in Whitman County to arrest the defendant on multiple warrants on a chilly night in December 2016. RP 53, 85-86. Deputy Downey was dressed with a ballistic vest over his other clothing, with a US Marshall's seal and the words "United States Marshall" across the front, and "U.S. Marshall" across the back. RP 94. At the front door, Deputy Downey spoke to the defendant's girlfriend. Within sight and sound of the defendant who was sitting inside, Deputy Downey verbally identified himself as a Deputy US Marshall, who was there for the purpose of arresting Mr. Allery on a warrant. RP 88, 92-93.

Deputy Downey arrested the defendant after the defendant walked out of the house to be arrested, and put handcuffs on the defendant. RP 108. Deputy Downey told the defendant at that time that there was a warrant for his arrest. RP 108. Deputy Downey did not have a copy of the warrant and did not show a copy to defendant. RP 108-109. Deputy Downey was not very familiar with Washington's law regarding showing a warrant to an arrestee, but had heard of it. RP 109

Patrick Green, an officer with the Washington State Department of Corrections, and Special Deputy US Marshall, was part of the task force that night. RP 116 -124. His role was primarily as part of the rear security of the house, and he was stationed near the back of the house to watch it, to be sure the defendant did not run out the back. RP 87, 125.

Deputy Green had parked his duty pickup near the house, with its red and blue flashing lights on, which lights were on when the defendant came out of the house and was arrested. RP 126-127. Deputy Green was wearing over the top of his other clothes a ballistic vest with the word "Police" across the front, and the words "US Marshall" across the back.

The defendant was put in the sheriff deputy's car. RP 127. Before the defendant was transported to the county jail, Deputy Downey decided to take a current picture of the defendant, while defendant was seated in back of the patrol car, and asked Deputy Green to hold a light so that

Deputy Downey would have enough light to get the picture. RP 128 – 129. The defendant didn't like having a light shone in his face as he sat in the back of the dark patrol car, and so he spit on Deputy Green. RP 96-98, 130.

The reason that Deputy Downey decided to take a picture of defendant at the scene was that he felt that defendant looked a bit different from the picture the officers had of him. The picture they had seemed a bit out of date to Deputy Downey. He thought defendant appeared a little older, a little heavier, and had different facial hair. Downey wanted a more current picture in case he had to go looking for the defendant again in the near future. The picture was to be kept in Downey's file and used only for an official purpose. RP 95-96.

After Deputy Green was spat on, he told the sheriff's deputy of that assault. The Sheriff's deputy (Sgt. Cooper), then arrested the defendant for Assault in the Third Degree, telling defendant that defendant was now under arrest for that crime, before transporting defendant from the scene to the Whitman County Jail.

While the defendant argued at trial that Deputy Green laughed at the defendant when Green shone the light on defendant (RP 188-190), Green testified he did not laugh at the defendant, or taunt defendant in any way. RP 137-138. Deputy Downey testified that he did not recall Green

laughing, that Green might have, but Downey didn't remember that. RP 114-115. Defendant did not testify or offer any evidence in the defense case.

The defendant sought an instruction (CP 61) reciting part of RCW 10.31.030:

The officer making an arrest must inform the defendant that he or she acts under the authority of a warrant, and must also show the warrant: provided, that if the officer does not have the warrant in his or her possession at the time of arrest he or she shall declare that the warrant does presently exist and will be shown to the defendant as soon as possible on arrival at the place of intended confinement.

The trial court ruled that it would not give the requested instruction, "because it opens the door to confusion of the jury." RP 150.

The trial court did instruct the jury, at the defendant's request, that "An officer is not engaged in performing official duties if the officer is on a frolic of his or her own at the time of the assault." CP 50.

III. ARGUMENT

There was no error here because the jury instructions that were given were correct statements of the law and permitted both sides to argue their theory of the case. The instruction that was refused was not

supported by the evidence and was on a collateral issue that was not required to be instructed on in order to allow the defense to argue their theory.

One element of the charged crime of Assault Third Degree requires the State to prove that the law enforcement officer was performing “official duties” at the time they were assaulted. RCW 9A.36.031(g). If an officer is on a “frolic of his or her own,” then the officer is not performing “official duties.” See State v. Hoffman, 116 Wn.2d 51, 100 (1991); State v. Mierz, 127 Wn.2d 460, 473 (1995). The defense argued that Special Deputy Green was on his own frolic when he held the light as requested by Deputy Downey, so that Downey could take the picture of defendant. That argument was able to be made under the instruction given by the court to the jury regarding the ‘frolic’ language. But the defense wanted a more specific instruction about the requirements of apprising defendants that they are being arrested on a warrant.

“The trial court does not err in refusing to give an instruction when, evaluated in the context of all the instructions, it is collateral to or repetitious of those already given. ... Jury instructions are sufficient if they correctly state applicable law, are not misleading, and permit counsel to argue their theory of the case.” State v. Brown, 132 Wn.2d 529, 618 (1997). In addition, the trial court may refuse a jury instruction if there is

no evidence to support it. See eg State v. Barnes, 153 Wn.2d 378, 382 (2005).

In the case at bar, there was no evidence upon which to conclude that the statute upon which the requested instruction was based was violated by the victim, Special Deputy Green. The evidence was that the defendant was told by Deputy Downey that he was under arrest because of a warrant. Downey did not have the warrant in his possession at the time of arrest. Before the defendant could be taken to the jail to be shown the warrant, the defendant assaulted Green. Immediately after the assault, he was arrested on that charge. Deputy Downey complied with the statute during the relevant time and there was no evidence otherwise.

Even if there was any evidence that the statute in question had somehow been violated by Deputy Downey, the officer who was assaulted during the performance of their official duties, and who was not on a frolic of their own, was Special Deputy Green. The requested instruction did not apply to Green's conduct at all, and so was not applicable to the case.

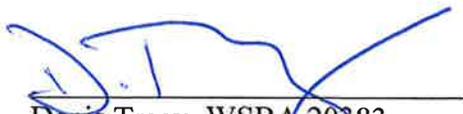
In addition to not being supported by evidence, the requested instruction was, in the words of the Brown case cited above, 'collateral' to the other instructions in the case. This was essentially the ruling of the trial court, in ruling that the proposed instruction would lead to confusion of the issues.

It is often stated that, when instructions, considered as a whole, permit a defendant to argue their theory, then it is not error to decline to give other instructions requested by defense. See State v. Turner, 16 Wn.App 292 (1976). In the case at bar, even though there was no evidence to support the argument that Special Deputy Green taunted the defendant before being assaulted by defendant, the defense nonetheless succeeded in getting the jury instructed on the ‘frolic’ language. Based on that instruction, they made their argument. The instructions therefore allowed them to argue their theory of the case, and the additional refused instruction was not needed.

IV. CONCLUSION

The requested instruction was properly refused, since it was not supported by the evidence and the instructions which were given allowed the defense to argue their theory of the case. The State respectfully requests the court deny the appeal and affirm the conviction.

Respectfully submitted this 29 day of October, 2017.



Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,

Court of Appeals No. 35064-9-III
No. 16-1-00224-38

v.

AFFIDAVIT OF DELIVERY

KYE ALLERY,
Defendant,

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 30TH DAY OF OCTOBER, 2017, I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

- MAILED TO ANDREA BURKHART, TWO ARROWS, PLLC, PO BOX 1241, WALLA WALLA, WA 99362-0023
- EMAILED TO ANDREA BURKHART AT ANDREA@2ARROWS.NET

DATED this 30TH DAY OF OCTOBER, 2017.

Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 30TH DAY OF OCTOBER, 2017.



Kristina A. Cooper
NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2019

WHITMAN COUNTY PROSECUTOR'S OFFICE

October 30, 2017 - 1:20 PM

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Appellate Court Case Number: 35064-9
Appellate Court Case Title: State of Washington v. Kye Caleb Allery
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