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366871-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

EDWIN ESPEJO, Appellant.

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DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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RESPONDENT'S BRIEF

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Respectfully submitted:  
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## I. COUNTERSTATEMENT OF ISSUES

- (1) Is the conviction of Edwin Espejo for assault in the second degree based on sufficient evidence?
- (2) Did the trial court abuse its discretion in excusing Juror 13 and replacing her with an alternate juror?

## II. COUNTERSTATEMENT OF THE CASE

Edwin Espejo (hereinafter defendant) appeals from his judgment and sentence for assault in the second degree entered in Franklin County Superior Court Cause No. 18-1-50360-11. CP 95-108. The conviction resulted from a guilty verdict entered following a jury trial. CP 6.

Defendant brought a motion in limine regarding a surveillance video of the alleged assault, which took place in the Franklin County Jail. RP 78. Defendant acknowledged it would be appropriate for the testifying officers to identify the people seen in the video. RP 79. However, defendant contended, "as to anything else that's going on in a movie, that I think is for the people's eyes to see and make their own judgment about. Because we have really no other evidence in this case except the videos from those

cameras, people should be able to make up their own minds as a result of their watching it.” RP 79. The trial court granted “the defense’s motion in limine in regard to the officers testifying as to what is going on in the video.” RP 89. The trial court confirmed with defense counsel that he did not have any objection “to the officers testifying as to the identification of the individuals.” RP 90.

The victim, Richard Vasquez, was a fellow inmate with defendant at the Franklin County Jail. RP 117. He proved to be a reluctant or hostile witness, denying that defendant assaulted him. RP 116. He acknowledged he was taken to the hospital on June 10, 2018. RP 117. He agreed that he spoke with medical personnel and that testing was done on him. RP 118. He denied telling the medical staff that he was assaulted by multiple people and that he was beaten and kicked. RP 119. He did not recall having said more than three people assaulted him. RP 119-20. He said he was taken to the hospital because he had an injury, but not from having been assaulted. RP 120. He acknowledged that he knew defendant and interacted with him on the day in question. RP 121.

Angela Carpenter was on duty as a registered nurse at Lourdes Hospital on June 10, 2018. RP 124. Two corrections officers brought Richard Vasquez into the emergency department. RP 125. He was checked in for an assault. RP 125. Defendant told her as part of the diagnosis and treatment that he been hit and kicked by three or more men. RP 126. He had obvious injuries including a fractured nose. RP 126-27. He had blood all over his face. RP 127. His right eye was swollen. RP 127. There was blood coming out of his mouth and bruising on his left side. RP 127.

Caleb Engler was on duty as an emergency room nurse on June 10, 2018. RP 129-30. He interacted with Richard Vasquez as a patient. RP 130. He had blood on his face, bruising over much of his torso, a cut to his right eye and his nose was deviated. RP 131. When providing medical diagnosis and treatment Nurse Engler stated, "This looks bad," to which Mr. Vasquez replied, "Yeah, I got beat up." RP 1332.

Dr. Scott Lamb treated Mr. Vasquez as an emergency room physician. RP 138. The first things he noted were that he was

walking with a limp, there was blood coming from the right side of his face, and he had a very swollen right eye. RP 139. There was a large bruise on the right side of his head that would be considered a contusion and a laceration over the right side of his brow. RP 146. His right eye was swollen shut; Dr. Lamb had a nurse assist in opening the eye. RP 140. A possible fracture of the nose was noted. RP 140-41. There was bruising to the right side of the patient's rib cage. RP 141. There was bleeding over the right eyebrow and inside the mouth. RP 141. The majority of the bruising was on the face and to the right rear of the eye, RP 142. Tests ordered by the doctor revealed a nasal fracture in two different spots. RP 143. The patient had suffered a concussion. RP 146-47. Discharge paperwork was provided to the patient. RP 148. The top two diagnoses were a concussion and a fracture to the nose. RP 148. Photos showing injuries to the patient were admitted as exhibits 41, 42, 43 and 44. RP 150.

Sergeant Marc Garcia was the shift supervisor at the time of the incident. RP 154-56. Richard Vasquez denied having been assaulted and claimed he had slipped and fallen. RP 157. After reviewing video tape, it was determined an assault had occurred in

the Q pod, specifically Q-10. RP 158. The injuries noted on Mr. Vasquez's discharge paperwork were consistent with the injuries Sgt. Garcia perceived. RP 160. A DVD video from the jail surveillance system was admitted as exhibit 45. RP 163. The video was played for the jury in open court. RP 164-65.

When Sgt. Garcia first had contact with Mr. Vasquez, he had lacerations on his face and he was bloody and bruised. RP 172. Even though he had attempted to shower and rinse off the blood, there was visible lacerations on the top of his head and across his face, and his neck was swollen and red. RP 172. Based on the culture in the jail, it is not uncommon for assaults to be denied by everyone involved. RP 174. When an inmate has been assaulted, it is common for other inmates to throw his belongings out of the exit as was seen on the video; in effect, the inmate is being told, "You no longer live here." RP 176. This procedure is referred to in jail culture as a "roll up." RP 176. Screen shots of the video were admitted as exhibits 1 through 40. RP 176-78.

Sgt. Garcia identified defendant at various places on the video. RP 180, 181, 182, 188, 189, 190-91, 192, 193, 195, 196,

197,198 . The included where defendant entered with a mop and bucket to clean up after the assault. RP 195. The victim Richard Vasquez was also identified. RP 195-96, 202, 231 Also identified was Daniel Canela. RP 200. Several other inmates were identified as entering and exiting Q-10 during the time period under investigation. RP 237.

Deputy Josh Dennis testified he was on duty with the sheriff's office on June 10, 2018 when he was dispatched to the Franklin County Corrections Center regarding an incident involving Richard Vasquez. RP 240-41. Mr. Vasquez had already returned from the hospital where he was treated for his injuries. RP 241. He declined to speak with the deputy. RP 241. Mr. Vasquez's discharge papers and photographs of his injuries were identified. RP 242. The deputy identified several inmates on the video. RP 244-58. Defendant was also identified. RP 251-52, 257, 258, 259, 260. The State then rested. RP 260.

Defendant made a motion to dismiss at the close of the State's case. RP 261. The trial court reminded defense counsel that prior to the start of the trial, he had strenuously argued the jury

should view the video without any narration from the testifying officers, and the court had granted defendant's motion in limine. RP 271. Accordingly, defendant would not be heard to complain that the jury would decide what events could be seen on the video. RP 272. The motion was denied. RP 272. Defendant then rested. RP 277.

The jury was instructed that a person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. Instruction 12, RP 285. An assault was defined as "an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive." Instruction 7, RP 283-84. Substantial bodily harm was defined as "bodily injury that involves a temporary but substantial disfigurement or that causes a temporary but substantial loss or impairment of any bodily part or organ or that causes a fracture of any bodily part." Instruction 10, RP 284. The jury was given the standard instruction on accomplice liability. Instruction 11, RP 284-85. Instruction 11

stated in part, "The word aide means all assistance whether given by words, acts, encouragement, support or presence. The person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." RP 285.

The prosecutor argued in closing argument that the video at 19:26 showed six individuals (identified by the officers during their testimony) getting together in Q-12, after which the majority of them walked over to Q-10 and proceeded to assault Richard Vasquez. RP 291. The prosecutor argued that defendant was visible on the video throwing punches at Mr. Vasquez. RP 96. It was argued that defendant could be seen throwing six punches with his left hand in rapid succession at 19:28:18, 19:28:20, 19:28:21, 19:28:22, 19:28:23, and 19:28:24. RP 308. The prosecutor additionally argued that even if the jury could not see the punches, defendant could be found guilty under the principles of accomplice liability. RP 296-98. "You have his presence. You see him in the video coming in. Right after the assault's starting place, you see Mr.

Espejo rushing into the middle of it. Directly after that, you see him punching at the victim in the corner here (indicating).” RP 297.

The prosecutor further argued that the video showed defendant grabbing a mop and bucket and cleaning up after the assault. RP 293.

After the jury had begun deliberations, the presiding juror sent the following note to the court: “Juror Number 13 seems incoherent about the case. She says she’s a ward of the State and keeps going on about seeds and germination. She talks about Kool-Aid red, etc. Request an alternate, please.” RP 344-45. The jury was instructed to suspend deliberations until further direction by the bailiff. RP 345.

The presiding juror was interviewed outside the presence of the other jurors. The presiding juror confirmed the comments in the note and said when Juror 13 made them, they did not relate in any way to matters being deliberated. RP 355-59.

The court next interviewed Juror 13. Asked if she had any difficulty seeing or hearing the evidence, she replied, “I could not recognize people’s faces, and like the sergeant and the deputy

seemed to know these people.” RP 360. She stated she was not a ward of the State but had made such a comment. RP 361. She stated: “I had read the word ‘ward’ recently, and it’s the middle name of my brother-in-law and I didn’t know it had that meaning.” RP 363. She continued, “I’m reading two books and, you know, your reading speed can change as you do that, and I haven’t read a book in awhile, but I keep reading what I need to read because I’m a slow reader and it’s interesting and it entertains me, and another thing is that we have - - my parents have a seed business, which I got interested in scientifically and legally, and I suppose machines would be involved but I didn’t get that far. So, the state had sent purity and germination samples in the mail of clover and alfalfa for -- this is, you know, 10 or 15 years ago – 50 years to Yakima, which is the state seed lab. So, being a female, that is the seed. A seed is the fertilized egg.” RP 362. Asked if she had made comments to the other jurors about seeds and germination, she replied, “I started to tell my life story and they said that I was incoherent, and I looked up incoherent and it means loose and rambling.” 362-63. She acknowledged her comments about seeds and germination were not related to the case, but she was “just

trying to connect.” RP 363. She had made comments about Kool Aid red because “the mop was pink.” RP 363-64. She had discussed The Manhattan Project not because it related to the deliberations, but because she had read a book about it. RP 364.

Based on the interview of Juror 13, the court proceeded to interview each of the remaining jurors individually. They all expressed concerns about Juror 13’s mental ability to participate in the deliberations. RP 365-88.

After a thorough consideration of the matter, the trial court ruled:

I certainly appreciate counsel’s comments and their assistance in addressing this issue. Difficult issue, I think, in a lot of ways. All the other jurors expressed concern about her ability to follow the discussions and to appropriately respond to discussions, and that is obviously of great concern to the Court.

In looking at the case law, where it becomes a little more difficult is I do think that some of her answers regarding Kool-Aid red in particular, seemed to make - - could make some, although it may take a few steps, some logical connection to some of the evidence that was presented during the course of this case.

Some of the other statements do not seem to follow at all along with - - could not understand how they - - how she was feeling that they might be related to the

case or how she got to that stage regarding seed germination in particular. Less clear on the Manhattan conspiracy comments.

Regarding the being a ward, she indicated that she had told an individual, another juror, that. That wasn't true, and she looked up the meaning of that, and was reading some books and things of that nature which somewhat explained that but did not seem, to this Court, to show how that meant to be connected to her view of the evidence in this case.

The comments regarding whether she was – had difficulty seeing and/or hearing or understanding the evidence, I think some of those comments were well taken in regard to whether or not she could see faces versus what was told to her.

So, those things have given the Court some pause in regard to this issue, but all those things, looking at the totality of it all and even taking those things into very careful consideration, it seems very clear that she was having some very difficult time tracking and maintaining focus even in my questioning, which is then supported by the comments of essentially each of the other jurors.

So, considering all these things, the Court does find that based on what appears to be a very – her inability to maintain focus and to track what is going on, that the impetus in this case for her dismissal is not the—about her view of the sufficiency of the evidence in any way in this case. In this Court's mind, impetus of this dismissal or request for dismissal is her ability to focus and to track and to appropriately participate in the deliberations.

So, the Court finds that there is not in this case a reasonable possibility that the impetus for her dismissal is her view of the sufficiency of the evidence

but rather her inability to focus, track, and to effectively participate in the deliberations.

So, the Court is going to excuse Juror Number 13.  
RP 391-93.

After an alternate juror was called back to replace Juror 13, the jury was instructed to begin its deliberations anew. RP 397-98.

The jury subsequently returned a verdict of guilty. RP 399.

### III. RESPONSE TO ARGUMENT

(A) *The conviction for Assault in the Second Degree is based on sufficient evidence.*

Defendant first challenges the sufficiency of the evidence to support his conviction for assault in the second degree. In considering such a challenge, an appellate court will review the evidence in a light most favorable to the State. *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficient evidence admits the truth of the State's evidence. *Trout*, 125 Wn. App. at 409; *State v. Pacheco*, 70 Wn. App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be

drawn in favor of the State. *Trout*, 125 Wn. App. at 409; *Salinas*, 119 Wn.2d at 201. The appellate court will defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and generally its view of the persuasiveness of the evidence. *Trout*, 125 Wn. App. at 409. The evidence supporting a criminal conviction may be either direct or circumstantial, and one is not necessarily more or less valuable than the other. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 Wn. App. 3d 157 (2003).

At the outset, the evidence clearly showed that Richard Vasquez with the victim of a second degree assault. His own statements for medical diagnosis and treatment showed he was assaulted by multiple persons. RP 126, 132. Under the unchallenged jury instructions, a person commits assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. RP 285. See RCW 9A.36.021(1)(a). Uncontradicted medical evidence (RP 140, 143) showed the victim had a fractured nose (fracture of any bodily part) and his eye was swollen shut (temporary but substantial impairment of the function of any bodily part or organ); either was

sufficient to show substantial bodily harm. RP 284. See 9A.04.110(4)(b).

The evidence also showed defendant was a participant in the assault. As the trial court noted, since defendant strenuously objected to any narration or interpretation of the video by witnesses, he will not be held to complain of the jury drawing its own conclusions. RP 272. The prosecutor argued that the video showed defendant throwing six punches at 19:28:18, 19:28:20, 19:28:21, 19:28:22, 19:28:23, and 19:28:24. RP 308. It was for the jury to decide whether this interpretation was correct.

Even if the jury could not see defendant throwing punches, it could have found him guilty under the principles of accomplice liability. The prosecutor argued that the video showed defendant rushing into the middle of the assault on the side of the perpetrators, as the victim was pinned into the corner. RP 297. In short, he was aiding by his presence. Once again, it was for the jury to decide if this view was correct. It was unnecessary for the jury to determine his precise role, so long as it was satisfied he was a participant. *State v. Hoffman*, 116 Wn.2d 51, 104-05, 804 P.2d

577 (1991) (“it matters not that some jurors may have believed that petitioner fired the gun, while others may have believed that his only role was in aiding and abetting [the other participant], so long as all twelve agreed that he did participate, . . . The jury in this case need not have decided whether it was Hoffman or McGinnis who actually shot and killed Officer Millard, so long as both participated in the crime.”)

While defendant’s efforts to conceal the crime by cleaning up the blood after the assault do not by themselves make him an accomplice, they show his attempt to make the criminal enterprise succeed and are circumstantial evidence of his participation.

Defendant complains that he was only identified at certain points in the video. However, once knowledgeable witnesses identified him, the jury knew who he was and was able to follow his actions throughout the incident.

(B) *The trial court properly removed Juror 13 and replaced her with an alternate juror.*

Defendant further argues that the trial court erred in excusing Juror 13 and replacing her with an alternate juror.

However, RCW 2.36.110 provides;

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

“We have interpreted this statute, along with CrR 6.5, which specifies the procedure for substituting an alternate for a dismissed juror in criminal cases, to place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014) (internal quotes omitted) (citing *State v. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)).

Where a deliberating juror is accused of refusing to follow the law, the juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation

of the sufficiency of the evidence. *State v. Elmore*, 155 Wn.2d 758, 778, 123 P.3d 72 (2005). However, this standard is applicable only in rare cases where a juror is accused of engaging in nullification, refusing to deliberate or refusing to follow the law. *Id.* Once the proper evidentiary standard is applied, the trial court's evaluation of the facts is reviewed only for abuse of discretion. *Id.* "Emphasis on the trial judge's discretion recognizes that the trial court is uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror's motivations and intentions are at issue." *Id.* (citations and internal quotes omitted).

The instant case was the unfortunate situation where a juror's inability to track the evidence and effectively participate in deliberations was not discovered during jury selection. The juror was not accused of engaging in nullification, refusing to deliberate or refusing to follow the law; rather, her personal challenges prevented her from fulfilling the duties of a juror. There was not the slightest indication that the request to remove the juror was based on her evaluation of the evidence. This is precisely the case where all deference must be given to the trial judge, who had an opportunity to interview not only Juror 13 but also each of her fellow

jurors. The trial court's ruling quoted above shows the care with which it approached the issue. There is no showing of abuse of discretion.

#### IV. CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that the conviction of Edwin Espejo for assault in the second degree be affirmed.

DATED: March 6, 2020.

Respectfully submitted:

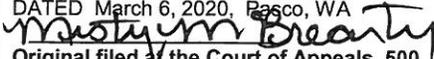
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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 6, 2020, Pasco, WA

  
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**FRANKLIN COUNTY PROSECUTING ATTORNEY'S OFFICE**

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