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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 70409-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

STACEY IVES,

Appellant.

REC'D
DEC 30 2013
King County Prosecutor
Appellate Unit

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

The Honorable Beth M. Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court improperly commented on the evidence by referring to the alleged victim of third degree assault as a police officer in the "to convict" instruction.

Issue Pertaining to Assignment of Error

Did the trial court improperly remove an element from the jury's consideration and cause prejudice by referring to the alleged victim of third degree assault (of a police officer) as "Officer?"

B. STATEMENT OF THE CASE

Three uniformed Seattle police officers in two marked patrol cars responded to a disturbance report. 2RP 83-84, 107-08; 3RP 23-24.¹ The officers arrived at an apartment building gate and rang the doorbell. 2RP 86-87, 109-10. Appellant Stacey Ives met the officers and asked for their names. 2RP 87-88, 3RP 25. Ives was wearing a black mark stretching from cheek to cheek over her nose. Officer Clark Dickson described it as "tribal paint." 3RP 8.

Ives asked the officers to get an unidentified man out of her house. 2RP 88, 110-11, 3RP 25. She allowed them to enter her apartment, but

¹ Ives refers to the verbatim report of proceedings as follows: 1RP – 4/1/13; 2RP -- 4/2/2013; 3RP -- 4/3/2013; 4RP – 4/19/13.

asked that Dickson stay with her. 2RP 110-11. The other two officers checked every room but found only Ives' three children. 2RP 87-89, 111-12, 3RP 26-28. One of the rooms was locked, but one officer was able to open it. 2RP 89, 3RP 27. When the officers told Ives no one was there, she did not believe them and looked herself. 2RP 112. Ives raised a window shade, opened a window, and told the officers they had let the man go. 2RP 90, 112-13, 3RP 28.

The officers told Ives there was nothing further for them to do and began to leave. 2RP 113. Ives asked them if they were going to file a report describing the incident as a breaking and entering, but Dickson said there was nothing to report. 3RP 12. Ives became angry and told the officers to leave. 2RP 91, 3RP 30. As Ives walked outside with the officers, she called them murderers and referred to John T. Williams. 2RP 91, 3RP 30. She told the officers she was going to get her "beat stick" and ran back into the apartment. 2RP 91-92, 113-14, 3RP 30.

When Ives re-emerged, she ran at the officers holding a mop handle over her head with two hands. 2RP 92-93, 114-15. She struck Dickson's arm with the stick before Dickson and another officer disarmed her. 2RP 93-97, 116-17, 3RP 31. Dickson said the striking "stung pretty

good." 2RP 117. The officers got Ives to the ground, handcuffed her, and arrested her. 2RP 94-95, 117-19.

The State charged Ives with third degree assault under RCW 9A.36.031(1)(g). CP 11. Ives testified someone had been following her for about two weeks leading up to the incident. She became frightened because the door to one of the bedrooms had never locked before. 2RP 133-35. She also explained that two days before the incident, she noticed clothing she had donated months before was accumulating in her closet. 2RP 135. She was hesitant to call the police because she was Native American and feared them. 2RP 134-35. She decided to call the police, but as she stepped onto her balcony to make the call, she saw three police officers at her gate. 2RP 135-37.

Ives said she felt relieved, but was also leery because she did not trust police officers. She contacted them at the gate, asked them for identification, and invited them in. 2RP 136. They went inside her apartment and Dickson frisked her while the other officers searched other rooms and found no one other than her children. 2RP 137-40. Ives recalled accusing the officers of letting whomever had been in the locked room get away. She then told them to leave. 2RP 139-40.

On the way out, she asked Dickson if he was going to report the incident as a breaking and entering. He told her no. 2RP 140. This caused her to recall an earlier incident in which she called the police to report something was on her roof and officers telling her "you're crazy." 2RP 140-41. She did not want Dickson to report that she was "nuts." 2RP 140-41. Her plan was to intimidate them so they would report coming to her apartment. 2RP 144, 155.

Ives decided to make "a gesture towards" the officers so they would have something to report. 2RP 141. She grabbed a mop stick, ran outside and made a gesture with it, but one of the officers called her a stupid bitch and slammed her to the ground. 2RP 142. She had been recording the incident her cell phone in one hand and holding the stick with the other. The officer grabbed the phone and dropped it in a puddle. 2RP 143. Dickson, in turn, said the phone fell out of Ives' pocket and landed in a puddle as they were getting her to the ground. 3RP 13-14. Dickson retrieved the phone and returned it to Ives' daughter. 3RP 18-19.

Ives did not object to the jury instructions. 2RP 165-70, 3RP 35. In the "to convict" instruction, the trial court twice referred to Dickson as "Officer Clark Dickson." CP 19 (instruction 9), attached as appendix.

The jury found Ives guilty as charged. CP 14. The trial court sentenced Ives within the standard range.

C. ARGUMENT

THE "TO CONVICT" INSTRUCTION CONTAINED AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this prohibition is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

A jury instruction that removes a disputed issue of fact from the jury's consideration is an impermissible comment on the evidence. State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997). Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Errors in jury instructions are reviewed de novo. Id. at 721.

The elements of third degree assault as charged are intentionally assaulting a law enforcement officer performing official duties at the time of the assault. RCW 9A.36.031(1)(g); State v. Brown, 140 Wn.2d 456, 467, 470, 998 P.2d 321 (2000). Instruction 9 referred to Clark Dickson as

"Officer," thereby removing the victim's status as an element of the offense. CP 19. This portion of the instruction was an unconstitutional comment on the evidence. See State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (trial court unconstitutionally commented on the evidence by including minor victims' dates of birth in "to convict" instruction because, absent fact victims were minors, defendant's actions were not criminal).

Such a comment in an instruction is presumed prejudicial, and the State has the burden to show the defendant was not prejudiced, "unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 725. The State cannot meet its burden here.

Ives' defense was general denial. The jury was properly instructed that Ives' plea of not guilty put in issue every element of the crime charged. CP 18. But the trial court removed an element in Instruction 9. The status of Dickson as a police officer was "a threshold issue without which there was no crime." Jackman, 156 Wn.2d at 745; see State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (by identifying Youth Employment Education Program as "school" in sentence enhancement special verdict form, trial court left jurors to decide only whether offense occurred within 1,000 feet of YEP, not whether YEP is school).

The State will likely argue it presented sufficient evidence for a rational juror to find Dickson was a police officer. But this is irrelevant to whether the "to convict" instruction was correct. Becker, 132 Wn.2d at 65. Nor does it matter that Ives did not challenge Dickson's status as a police officer. See Jackman, 156 Wn.2d at 745 (although defendant did not challenge fact of victims' minority, "it is still conceivable that the jury could have determined that the boys were not minors at the time of the events, if the court had not specified the birth dates in the jury instructions."); cf. Levy, 156 Wn.2d at 727 ("[N]o rational juror would have concluded that jewelry was not property, the named victims were not someone other than Levy, a revolver was not a deadly weapon, or an apartment located at a specific address was not a building[.]").

Here as well, it is conceivable the jury could have determined Dickson was not a police officer engaged in his professional duties at the time of the assault. The State therefore cannot prove the instruction did not prejudice Ives. This Court should reverse her conviction.

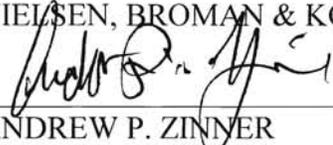
D. CONCLUSION

For the above reasons, this Court should reverse Ives' conviction and remand for a new trial.

DATED this 30 day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

WSBA No. 18631

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APPENDIX

No. 6

A person commits the crime of assault in the third degree when he or she assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

No. 7

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

No. 8

Bodily injury, physical injury or bodily harm means physical pain or injury, illness, or an impairment of physical condition.

No. 9

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 20, 2012, the defendant assaulted Officer Clark Dickson;
- (2) That at the time of the assault Officer Clark Dickson was a law enforcement officers or other employee of a law enforcement agency who was performing his official duties; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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.

No. 10

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to

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STATE OF WASHINGTON)	
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STACEY IVES
410 2ND AVENUE EXT. S.
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER 2013.

X *Patrick Mayovsky*