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NO. 68311-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAYMOND ATCHISON,

Appellant.

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

The Honorable Larry McKeeman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury on fourth degree assault instruction as an inferior degree offense to second degree assault with a deadly weapon. CP 61, 63, 64, 65.

2. The trial court erred by refusing to instruct the jury on unlawful display of a weapon instruction as a lesser included offense of second degree assault with a deadly weapon. CP 66, 67.

Issue Pertaining to Assignments of Error

Did the trial court commit reversible err by failing to grant the defense request for inferior degree and lesser included offense instructions that were supported by the law and the evidence?

B. STATEMENT OF THE CASE

At approximately 7:30 p.m. at a Marysville Jack in the Box, witnesses claim appellant Raymond Atchison, while brandishing a pocket knife, approached Cory Mehler as he sat eating with a group of friends, and grabbed him. 1RP[1] 48-49. Mehler's friend, Tim Lankhaar, immediately stood up and pulled Atchison away. 1RP 48.

[1] There are two volumes of verbatim report of proceedings referenced as follows: 1RP - 1/9/12; and 2RP - 1/10/12.

Atchison stood staring at Lankhaar with the knife at his side until a friend of his convinced him to leave. 1RP 50-53.

At trial, Lankhaar claimed he saw Atchison approach Mehler, lean in and touch him while holding a pocketknife against Mehler's chest. 1RP 48-49. The knife was flat against Mehler, not pointed at him or against his skin. 1RP 60.

Lankhaar claimed that when he shoved Atchison away from Mehler, Atchison turned towards him and stood with his arms tense but down at his sides, with the knife in his hand, but not pointing at Lankhaar. 1RP 50-51, 62. Atchison gave Lankhaar a light push in the chest, which Lankhaar described as a typical "dominance" push between men. 1RP 55, 63-64. Lankhaar asked Atchison, "You're really going to stab me in the middle of the f—ing Jack in the Box?" 1RP 51. Atchison did not respond or say anything to Lankhaar, threatening or otherwise. 1RP 52, 54, 68. Atchison never touched Lankhaar with the knife. 1RP 64. Atchison left without saying anything and without approaching Mehler again. 1RP 66.

Lankhaar said the incident made him feel "threatened" and "a little" fearful he might be stabbed. 1RP 69. Lankhaar thought Atchison seemed to be under the influence. 1RP 65.

Mehler remembered the incident differently. According to Mehler, Atchison walked up behind him, hit him in the side of his head with an open hand, and put the knife to his throat. 1RP 21-22. He said he felt the blade on his skin, but was not cut. 1RP 22, 23. Mehler said after ten to fifteen seconds, Lankhaar pulled Atchison away. 1RP 24, 38. Atchison turned back to Mehler again and put his knife to Mehler's stomach. 1RP 23. According to Mehler, Atchison seemed "confused," and "crazy." 1RP 31. Mehler said the incident made him afraid his throat would be cut. 1RP 24.

Mehler was the only one of the seven eyewitnesses to testify that Atchison hit him. 1RP 60, 84, 94, 105-6; 2RP 11, 25-6. Mehler was also the only witness to claim Atchison made threats, and that Atchison approached him again after Lankhaar intervened. 1RP 23-24, 31-32, 81, 96; 2RP 12, 26.

The five men sitting with Mehler and Lankhaar - Brian Skywalker, Nicholas Fritzberg, Patrick Malone, Jordan Slagle and James Allen - also testified. Each had a somewhat different version of events.

Skywalker claimed Atchison put a knife on Mehler's chest, but never touched his neck. 1RP 79. Skywalker recalled that less than ten seconds later, Lankhaar pulled Atchison away. 1RP 72.

According to Skywalker, Atchison stood looking at Lankhaar with his knife pointed generally in his direction. 1RP 73. Skywalker confirmed that Atchison never touched Lankhaar with the knife. 1RP 80.

Fritzberg testified Atchison had a knife pointed at Mehler's stomach. 1RP 87-88. The knife was not against Mehler's throat. 1RP 95. He told police Atchison did not use the knife in a threatening manner against Mehler. 2RP 73-4. He said that when Lankhaar pulled Atchison away after ten seconds, Atchison stood a foot away from him and had the knife generally pointed in Lankhaar's direction, "but it wasn't really threatening." 1RP 89, 96. Ten seconds later, Atchison left. 1RP 89.

Malone testified he thought Atchison was giving Mehler a hug when he grabbed Mehler by his collar. 1RP 100. He said when Lankhaar pulled him away, Atchison held the knife in his hand pointed down and did not point it at anyone. 1RP 100, 102.

Allen saw Atchison walking toward Mehler. 2RP 17. He testified Atchison opened the pocketknife as he approached, but kept it at his side. 2RP 17. Allen said Atchison brought the knife up near Mehler's neck, but did not touch him with it, and said, "What the f—ck are you looking at?" 2RP 18, 26. Allen

remembered that Lankhaar immediately pulled Atchison away and then pushed Atchison. 2RP 19. Atchison stood apart from Lankhaar with his knife to the side with the blade pointed toward Lankhaar, but not swinging the knife. 2RP 10, 26. When Atchison's friend came in, she yelled, "What are you doing, you don't even know these people." 2RP 21. Atchison looked under the influence and "freaked out." 2RP 27.

The witnesses described the knife as a pocketknife with a serrated blade that was between two and four inches in length. 1RP 22, 28, 29, 49, 62, 79, 89, 101; 2RP 17, 21.

Atchison was arrested shortly after the incident. 2RP 44. A search of the car Atchison was in at the time of his arrested uncovered a folding knife with a wood handle and 3.5 inch blade. 2RP 44, 45, 69. There were also multiple open containers of alcohol. 2RP 54.

Atchison was charged with two counts of second degree assault with a deadly weapon. CP 77-78; RCW 9A.36.021(c). Atchison proposed lesser offense instructions for fourth degree assault and unlawful display of a weapon. 2RP 76-77, CP 61, 63-67. The court refused to give them, concluding the evidence did

not support the inference that only the lesser offenses were committed. 2RP 84.

The jury found Atchison guilty as charged, including that he was armed with a deadly weapon. CP 30-33; 2RP 129. The court imposed standard range sentences, plus 12 months on each conviction for the deadly weapon sentencing enhancements. CP 17; 1RP 113. Atchison appeals. CP 1-13.

C. ARGUMENT

ATCHISON'S SECOND DEGREE ASSAULT CONVICTIONS MUST BE REVERSED BECAUSE THE COURT WRONGLY DECLINED TO INSTRUCT THE JURY ON FOURTH DEGREE ASSAULT AND UNLAWFUL DISPLAY OF A WEAPON.

Defense counsel requested instructions on the inferior degree of fourth degree assault and lesser included offense of unlawful display of a weapon. The trial court denied these requests on the erroneously conclusion that there was no evidence to show only the lesser offenses were committed. Affirmative evidence in the record, when viewed in the light most favorable to Atchison, supported giving the requested instructions. This Court should therefore reverse Atchison's convictions and remand for a new trial.

1. Atchison was entitled to have the jury instructed on fourth degree assault as a lesser degree offense of second degree assault with a deadly weapon.

A defendant is entitled to have the jury instructed not only on the charged offense, but also on all lesser included offenses and offenses that are an inferior degree of the charged offense. RCW 10.61.006; RCW 10.61.003. A defendant is entitled to an instruction on an inferior degree offense when: (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense;" (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). The first two factors are the legal component of the test, while the third factor is the factual component. Fernandez-Medina, 141 Wn.2d at 455.

Atchison was charged with second degree assault with a deadly weapon, which is committed if one "assaults another with a deadly weapon." RCW 9A.36.021; CP 77-78. The defense requested an instruction for the inferior degree offense of fourth degree assault. 2RP 76-77. RCW 9A.36.041 states that: "[a] person is guilty of assault in the fourth degree if, under

circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." Fourth degree assault is clearly an inferior degree to second degree assault and therefore meets the legal prongs of the test.

The trial court refused to give the proposed instruction based on its conclusion the defense failed to satisfy the factual prong of the test. 2RP 84. The factual prong of the test is met when the evidence raises an inference that only the lesser offense was committed. Fernandez-Medina, 141 Wn.2d at 455. In other words, a requested jury instruction on a lesser offense must be given, "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Fernandez-Medina, at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

In applying the factual prong, a court must view the evidence as a whole in the light most favorable to the party requesting the instruction to determine whether the evidence supports the instruction. Fernandez-Medina, 141 Wn.2d at 456. Although the defendant must be able to point to the affirmative evidence supporting the instruction, this evidence need not come from the defendant alone or at all. Fernandez-Medina, 141 Wn.2d at 456.

An instruction requested by the defendant may be warranted even if it contradicts the defendant's theory of the case. Fernandez-Medina, at 456-58.

The factual prong for a fourth degree assault instruction was met here because the evidence supported an inference the knife used was not a deadly weapon, and therefore Atchison was guilty only of fourth degree assault. Specifically, viewed in the light most favorable to Atchison, the evidence supported the inference that the knife was not used in a manner that was "likely to produce or may easily and readily produce death."

The jury was instructed that: "Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 50. In State v. Shilling, this Court held that under RCW 9A.04.110(6), the circumstances of use include "'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" State v. Shilling, 77 Wn. App. 166, 169, 889 P.2d 948 (1995) (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

Under Schilling, the evidence here, viewed in the light most favorable to Atchison, supports an inference the knife was not used as a deadly weapon. The "degree of force" used against Mehler was arguably minimal. Although Mehler testified he was struck, everyone else testified Atchison only grabbed or touched him. Several witnesses describe Atchison as grabbing Mehler with the knife in his hand, but with the knife not touching or being used against Mehler in a threatening manner. 1RP 48-49, 60, 79, 100; 2RP 73-4. One witness testified he thought Atchison was only hugging Mehler. 1RP 100.

With regard to Lankhaar, most witnesses agreed Atchison did not touch him at all and held the knife against his side while he stood facing Lankhaar. 1RP 62, 64, 73, 89, 96, 100, 102; 2RP 10, 26. Thus, Atchison did not use force at all against Lankhaar. The evidence therefore supports an inference the knife was not used as a deadly weapon in either count.

Shilling also looked to "the part of the body to which the knife was applied." The evidence on this factor was disputed with regard to Mehler, with some witnesses claiming the knife was held flat against Mehler's chest, while others claimed the knife was against Mehler's throat. 1RP 48-49, 79, 87-88, 95; 2RP 18, 26. Viewed in

the light most favorable to Atchison, however, the evidence supports an inference the knife was not used as a deadly weapon against Mehler. In the incident involving Lankhaar, most witnesses agree Atchison did not touch him with the knife at all, but only held it against his side as he looked at Lankhaar. 1RP 62, 64, 73, 89, 96, 100, 102; 2RP 10, 26. Whether Atchison ever even pointed the knife at Lankhaar was in dispute. As with Mehler, the evidence supports an inference the knife was not used as a deadly weapon against Lankhaar.

The fourth Shilling factor is the physical injuries inflicted. No injuries were inflicted here, so this factor clearly supports a finding the knife was not used as a deadly weapon against either Mehler or Lankhaar.

The final Shilling factor is "the intent and present ability of the user." There is evidence here to support an inference that Atchison had no intent to use the knife as a deadly weapon. With regard to the Mehler, most witnesses testified Atchison made no threats. 1RP 74, 87, 68, 81, 107; 2RP 14, 27. One witness told police that Atchison did not use the knife in a threatening manner against Mehler. 2RP 73-74. With regard to Lankhaar, several witnesses, including Lankhaar himself, testified Atchison never

made any threats. 1RP 52, 54, 68, 81, 107; 2RP 14, 27. In these circumstances, the jury could have found Atchison had no intent to use the knife as a deadly weapon.

Taking into account all of the evidence, it is sufficient to support an inference the knife was not used in a manner that was likely to produce death or bodily harm and was therefore not a deadly weapon. If it was not a deadly weapon, then Atchison was not guilty of second degree assault as charged and tried.

The State may argue the jury finding that the knife was a deadly weapon for purposes of the enhancement precludes any argument it would have found Atchison was not armed with a deadly weapon for purposes of the charged assaults. See CP 30, 32. This argument should be rejected, however, because what may constitute a "deadly weapon" for sentence enhancement purposes does not necessarily equate to a "deadly weapon" for purposes of second degree assault as charged and tried here.

The jury was instructed according to RCW 9.94A.602 that a knife with a blade exceeding three inches is per se a deadly weapon for purposes of the enhancement. CP 55. Therefore, the jury could have concluded from the testimony that the knife was over three inches in length and therefore was a deadly weapon per

se for purposes of the enhancement. But to find Atchison guilty of second degree assault under the deadly weapon prong as charged, the jury had to find he used it in a manner likely to produce bodily harm. CP 50, State v. Winings, 126 Wn. App. 75, 87-88, 107 P.3d 141 (2005). Because the evidence supported an inference that he did not, given the opportunity and appropriate instructions, the jury might have convicted Atchison of fourth degree assault rather than second degree assault.

When viewed in the light most favorable to Atchison, the evidence supported the defense request to instruct the jury on the inferior degree offense of fourth degree assault on both charged counts. The trial court's refusal to do so constitutes reversible error.

2. Atchison was entitled to have the jury instructed on unlawful display of a weapon as a lesser included offense to second degree assault with a deadly weapon.

Atchison's request for a jury instruction for the lesser included offense of unlawful display of a weapon was also erroneously refused. 2RP 76-77, 84; CP 66, 67. An instruction on a lesser included offense is warranted where: (1) each element of the lesser offense must necessarily be proved to prove the greater

offense as charged (the legal prong); and (2) the evidence in the case supports an inference only the lesser offense was committed (the factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong of the Workman test is applied "to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute." Berlin, 133 Wn.2d at 541.

Unlawful display of a weapon meets the legal prong of the test for a lesser included offense instruction because commission of second degree assault with a deadly weapon necessarily results in the commission of the crime of unlawful displaying of a weapon.[2] In re Crace, 157 Wn. App. 81, 107-8, 236 P.3d 914 (2010). In Crace, this Court found it was error for the trial court to refuse to instruct the jury on unlawful display of a weapon as a lesser included of offense to the charge of second degree assault with a

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[2] RCW 9.41.270(1) states:

> It shall be unlawful for any person to carry, exhibit, display, or draw any . . . knife or other cutting or stabbing instrument . . . in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

deadly weapon. 157 Wn. App. at 108. The Court held that although Crace was armed with a sword, there was a reasonable inference that he did not have the intent to create a reasonable fear or apprehension of bodily injury. Id.

For the count involving Lankhaar, the proposed instruction meets the factual prong. "To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury." State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004) (citing State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Mere display of a weapon is insufficient in and of itself to prove intent to create a reasonable fear of bodily injury. Ward, 125 Wn.App. at 248, 104 P.3d 670 (citing State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996)).

As in Crace, there is evidence here to support an inference Atchison committed only unlawful display of a weapon, rather than second degree assault with a deadly weapon, because the jury could have found Atchison had no intent to create apprehension or fear in Lankhaar. Witnesses testified that after Lankhaar pulled Atchison away from Mehler, Lankhaar stood still and did not touch Atchison. 1RP 73, 100, 102; 2RP 10. There is also evidence that

Atchison merely stood with the knife at his side. 1RP 62, 89, 96, 100, 102. While the knife may have been held generally pointing in Lankhaar's direction, there is also testimony it was not done in a threatening manner. 1RP 89, 96. Most witnesses testified Atchison never said anything threatening. 1RP 68, 74, 81, 87, 107; 2RP 14, 27. Thus, there is evidence from which the jury could have found Atchison did not assault Lankhaar because he never touched Lankhaar in an offensive manner and never acted with intent to create apprehension or fear.

When viewed in the light most favorable to Atchison, the evidence supported a jury finding Atchison only committed the offense of unlawful displayed of a weapon and that he did not assault Lankhaar. Therefore, the trial court erred by refusing the lesser included offense instruction and Atchison conviction for assaulting Lankhaar must be reversed.

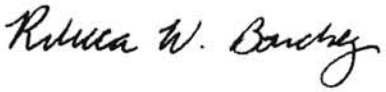
D. CONCLUSION

The trial court erred by failing to give the proposed inferior degree and lesser included offense instructions. This Court should therefore reverse and remanded for a new trial.

DATED: May 23, 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68311-0-I
	)	
RAYMOND ATCHISON,	)	
	)	
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 23RD DAY OF MAY 2012, 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 AND/OR VIA EMAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MAY 2012.

x Patrick Mayovsky