NO. 44258-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARTIN IVIE

Appellant.

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

APPELLANT'S REPLY BRIEF

VICTORIA J. LYONS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The State concedes they failed to prove Mr. Ivie's alleged prior conviction for purposes of calculating his offender score.

The State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 473, 480, 973 P.2d 452 (1999). This burden is not met by simple assertions made by prosecutors during sentencing and some type support evidence must be introduced. *State v. Lopez*, 147 Wn.2d 515, 523, 55 P.3d 609 (2002).

Although the State recited Mr. Ivie's prior convictions during the sentencing hearing there is no record of any other evidence to support the State's assertions. 11/13/12 RP 827-30, 834-36. Thus, the State did not meet its burden of proving the existence of Mr. Ivie's prior convictions. The State concedes this issue in their response brief. State's Response Brief (SRB) 12-13.

2. The trial court improperly admitted Mr. Ivie's statement as impeachment evidence.

a. Mr. Ivie's statement was involuntary under the totality of circumstances analysis.

The State argues that under the totality of the circumstances analysis Mr. Ivie's statement was voluntary and properly admitted at trial as impeachment evidence. SRB 8-9. The totality of the circumstances test includes factors such as defendant's physical condition, age, mental abilities, experiences, police conduct and whether or not the defendant was under the influence of any drugs. *State v. Rupe*, 101 Wn.2d 664, 679, 692, 683 P.2d 571 (1984), *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

The State relied mainly on *State v. Unga*. 165 Wn.2d 95, 196 P.3d 645 (2008). In that case the investigating officer promised Mr. Unga that he would not be charged with a crime if he agreed to answer questions. *Id.* at 647. *State v. Unga* rested on police use of direct psychological coercion. Mr. Ivie's case is far different and is easily distinguishable from *State v. Unga*. Instead Mr. Ivie's situation is almost exactly like that in *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), where the Supreme Court stated that "it is hard to imagine a situation less conducive to the exercise of a 'rational intellect and free will'" than that of someone who has been "seriously wounded just a few hours" prior to being questioned by police.

Mr. Ivie was convicted of one count of theft in the second degree, one count of attempting to elude, one count of assault in the third degree, and two counts of assault in the first degree. CP 38-47. The main issue in the current case is whether or not Mr. Ivie was in a physical and mental state that allowed him to voluntarily speak with officers following surgery for police inflicted gunshot wounds to the head and neck. Mr. Ivie was in poor physical condition less than twenty-four hours after being shot. 7/2/12RP 546. Mr. Ivie was taking opiate painkillers, such as morphine and felt like he was in a dream state, 7/2/12RP 552. The officers asked nursing staff if Mr., Ivie was in any condition to speak with them but at no time was an attending physician asked about Mr. Ivie's status. 6/29/12RP 511; 7/2/12RP 533. At trial no medical evidence was presented and no doctors testified as to the impact surgery and prescription opiate pain medications would have had on Mr. Ivie's ability to exercise his rational intellect and free will. 7/2/12RP 517-20.

Mr. Ivie only vaguely remembered speaking with the detectives, he was unclear as to how man times he had been shot and had no memory of transferring hospitals. 7/2/12RP 543-44. Mr. Ivie was slurring during the interview, was pretty drugged up and cloudy in

addition to having a concussion. 7/2/12RP 546. Mr. Ivie was questioned by officers in a manner that was coercive and involuntary under the totality of the circumstances analysis. The admission of the statement was in error and his convictions should be reversed. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

3. The trial court violated Mr. Ivie's fundamental right to a fair and impartial jury.

a. The foreperson's failure to transmit questions of law to the court did not inhere to the verdict.

The right to a fair trial is fundamental and includes the right to a trial unblemished by jury misconduct or biased jurors. *U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22*; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed.2d 126 (1976). A "a strong affirmative showing of misconduct is necessary" to protect the policy of "stable and certain verdicts." *State v. Balisok*, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994).

Because the jury misconduct in Mr. Ivie's did not inhere to the verdict it is distinguishable from the cases relied upon by the State. SRB 11-12. Following trial a juror, Ms. Steinke came forward and

submitted a declaration that she was confused as to the law in the case and that she was convinced that despite this confusion the jury foreperson would refuse to forward questions to the court for clarification. CP 28-29. Despite believing that Mr. Ivie was not guilty of the two counts of first-degree assault she felt that she had no choice but to change her vote and to say she thought Mr. Ivie was indeed guilty. *Id.*

Ms. Steinke's declaration speaks to a concrete belief that Mr. Ivie was not guilty and the refusal of the jury foreperson to forward questions to the judge. Her declaration does not address the "secret, frank and free discussion of the evidence by the jury" and therefore does not inhere to the verdict as argued by the State. *Balisok*, 123 Wn.2d at 117-18.

4. The evidence at trial was insufficient to sustain Mr. Ivie's convictions for assault in the first-degree.

Mr. Ivie was convicted of two separate counts of assault in the first degree. CP 5. RCW 9A.36.011(1)(a) provides in part:

> A person is guilty of assault in the first degree if he or she, with *intent* to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon

> or by any force or means likely to produce great bodily harm or death.

Assault is a specific intent crime and requires proof of the specific intent to cause assault. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.2d 438 (2009). The State argues simply that because on appellate review the evidence in a sufficiency argument is reviewed in the light most favorable to the prosecution that Mr. Ivie's argument fails. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970). However, it is still the State's burden at trial to present sufficient evidence of all elements of the crime charge. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The State did not present sufficient evidence of intent to assault in Mr. Ivie's case.

Intent may not be inferred from equivocal evidence as it "relieves the State of its burden to prove all the elements." *State v. Vasquez*, __ P.3d __, WL 3864265, ¶ 13 (July 25, 2013). The evidence presented by the State at trial was ambiguous at best. The entire incident took place on a cold, dark night in February, on dirt roads in a remote area of Mason County. 06/27/12RP 73,

86; 07/03/12RP 586. Dark enough that to enable him to see Deputy Reed used night vision goggles. 06/27/12RP 69, 73. Mr. Ivie had not intention of striking either officer or causing them great bodily harm, he simply could not see them. 07/03/12RP 592-93. Mr. Ivie repeatedly testified that he wanted to take his dog home and did not intend to strike or injure either officer. 06/27/12RP 82; 06/29/12RP 485-86; 07/03/12 585. Sergeant Adams fired into the driver's side of Mr. Ivie's truck; clearly demonstrating he was not in danger of being run over. 07/03/12RP 592-93.

Even when looked at in the light most favorable to the prosecution the evidence presented at trial as to intent was equivocal and therefore insufficient to sustain Mr. Ivie's convictions.

5. The trial court's failure to enter written finds following a CrR 3.5 hearing violated Mr. Ivie's due process rights.

CrR 3.5 requires the entry of written findings following a suppression hearing, which must set forth the disputed and undisputed facts, the court's findings as to the latter, and the court's legal conclusions. CrR 3.5. The absence of written findings of fact and

conclusions of law is only excusable if the trial court made detailed oral findings of fact and conclusions of law. *State v. Riley*, 69 Wn. App. 349, 352–53, 848 P.2d 1288 (1993).

a. The trial court's oral findings were not adequate and Mr. Ivie was prejudiced.

The State argues that the court's oral findings are acceptable because they allow for appellate review. However, a trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time..." *State v. Dailey*, 93 Wn.2d 454, 458, 610 P.2d 357 (1980). Written findings are required. CrR 3.5. The importance of the findings of a suppression hearing cannot be underestimated. In Mr. Ivie's case much his freedom hinged on the admission of his involuntary statement. The findings of fact and conclusions of law as to Mr. Ivie's CrR 3.5 hearing were vital and the fact that they were lacking resulted in prejudice.

6. The State's failure to elect an act for the purposes of theft in the second degree violated Mr. Ivie's right to a unanimous jury.

The right to a unanimous jury verdict is fundamental. U.S. Const. amend. VI; Wash. Const. Art., I, §§ 21, 22. A jury

must unanimously agree on the act that underlies a conviction. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); *State v. Workman*, 66 Wash. 292, 294-95, 119 P.2d 751 (1911). When multiple acts are charged that could independently prove one count, the court should explain to the jury that its verdict must be based on a unanimous finding that a certain act was proven beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572.

The State contends that it was clear to the jury that they would have to agree on which specific act constituted the crime of theft in the second-degree. However, the jury was not properly instructed that it must be unanimous regarding the act itself. The evidence presented two possible acts, which could have constituted theft, one being the act earlier in the week and the other being Mr. Ivie's conduct on the date of the incident. 07/03/12RP 578.

The State also argues that they had the discretion to aggregate Mr. Ivie's actions, but the two acts were not contemporaneous enough to allow for this. *State v. Carosa*, 83 Wn.App. 380, 381, 921 P.2d 593 (1996). In this case a rational jury could have had a reasonable doubt as to whether or not Mr. Ivie committed theft on the night of the

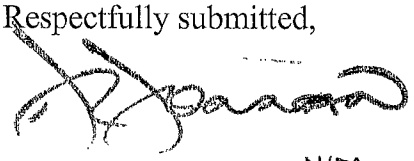
incident. Any impact on the State's burden of proof is indicative of prejudice and Mr. Ivie was deprived of his right to a unanimous jury.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Ivie respectfully asks this Court to reverse his convictions based on a violation of his due process rights. He also requests that his sentence be vacated and the case remanded for the State to meet its burden to prove any prior convictions.

DATED this 6th day of January 2014.

Respectfully submitted,



WSBA 19271 (by fax)

VICTORIA J. LYONS (WSBA 45531)
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. MARTIN IVIE, Appellant.	)	NO. 44258-2-II

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Washington Appellate Project
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1511 Third Avenue
Seattle, WA 98101
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