

35872-7-II
COURT OF APPEALS

DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICKY F. TURNER, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF SKAMANIA COUNTY

HONORABLE E. THOMPSON REYNOLDS

REPLY BRIEF OF APPELLANT

February 19, 2008

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 C. Did the trial judge err in allowing inquiry into irrelevant matters, specifically the State’s questioning about the defendant’s family?

 D. Did the trial court err in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death?

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I. ASSIGNMENTS OF ERROR

- A. Did the trial judge err in reversing another judge's ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored?
- B. Was the defendant's counsel ineffective when not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel before the time had lapsed and counsel neglected to read the court rules regarding such matters?
- C. Did the trial judge err in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family?
- D. Did the trial court err in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death?
- E. Did the trial court err in permitting questions by the State that impermissibly invite comment regarding the defendant's right to remain silent?

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. The trial judge erred in reversing another judge's ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored.
- B. The defendant's counsel was ineffective by not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel before the time had lapsed and counsel neglected to read the court rules regarding such matters.
- C. The trial judge erred in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family.
- D. The trial court erred in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death.
- E. The trial court erred in permitting questions by the State that impermissibly invite comment regarding the defendant's right to remain silent.

III. Statement of the Case

Rickey Turner was tried and convicted by jury of one count of assault in the second degree while armed with a deadly weapon and one count of harassment. (RP 289-290).

Prior to trial, defense counsel submitted an Affidavit of Prejudice against Judge Reynolds. (CP 40). Judge Altman signed the Affidavit, after the State waived objection to timeliness on November 2, 2006. (RP 20). Judge Reynolds returned on November 8, 2006 and “determined that the affidavit will not be honored because it was not timely made.” (RP 24).

Defense counsel explained Mr. Turner requested such an affidavit from him at his initial appearance, and that it was his “misunderstanding.” (RP 25). Apparently, the misunderstanding was based on the fact defense counsel did not read the court rule that applied. (RP 25). “Ironically,” defense counsel in this case had previously prosecuted Mr. Turner eleven years prior. (RP 302).

Just prior to trial, the State attempted to admit threatening phone messages, apparently from a family member – not the defendant. The court properly excluded that evidence as hearsay. (RP 42-44). After a short hearing, the court likewise rejected the State’s attempt to introduce a set of antlers that were not used in the alleged assault. (RP 54).

During the direct examination of the complaining witness, the State asked a question regarding the defendant’s brothers and the witness was allowed to

answer over defense counsel's objection on relevance grounds. (RP 69). Later, after the State had rested, they examined this same witness regarding threats made involving other members of the defendant's family. (RP 226). This examination was outside the scope of the Defendant's prior testimony, and was not otherwise submitted in the State's case-in-chief. During cross-examination of the defendant, the State was allowed to ask questions about the defendant's family members who were not on trial, over defense counsel's objection. (RP 200). In closing, the State referred to the "Turner clan" and their displeasure with the complaining witness as evidence of the defendant's alleged harassment. (RP 266-67).

During the original examination of this same witness, the State attempted to offer a picture of yet another set of antler's not used in the alleged assault. (RP 80-81). While the court properly rejected this attempt, the jury was present for examination and heard testimony regarding the picture. Later, the State attempted to re-introduce and admit the same picture on cross-examination of the defendant. (RP 205-210).

Inexplicably, the State did not offer pictures or elicit testimony regarding this witness' injuries on direct examination. (RP 66-86). Even more baffling is defense counsel's cross examination that put a much finer point on it by asking specific questions about his injuries. (RP 92-93). Presumably this opened the evidentiary door for the State on redirect, who offered four pictures that were admitted without objection. (RP 94-96).

With a law enforcement witness, the State elicited testimony that Mr. Turner did not speak to law enforcement after being arrested and read his Miranda rights. (RP 127). This witness acknowledged that Mr. Turner had previously advised him that “he didn’t want to talk about the situation.” (RP 128). During the cross-examination of the defendant, the State asked the Defendant, “[y]ou didn’t want to talk to them at all?” (RP 213). This question was posed in the context of the initial contact by law enforcement. Later the State asked, “[n]ow you also told Deputy Hepner that you were going to fill out a statement about your version of events; right?” (RP 214). The defendant answered he did not, and no such testimony was ever introduced by this law enforcement witness. (RP 130-39). Another example of the State commenting on the Defendant’s Miranda rights: (RP 240) – “[Prosecutor] How did he respond to that? [Deputy] He stopped talking.”

The State rested after the examination of a law enforcement witness (RP 139). There was no motion regarding the sufficiency of the evidence, or lack thereof. Based on the evidence to that point, it appears that the harassment count and the deadly weapon enhancements were seriously lacking. (RP 40-139). In an exception to the State’s proposed enhancement instructions, defense counsel argued that there was not sufficient evidence to present one of the enhancements to the jury. (RP 256-57). He correctly pointed out that the actual item was never admitted, despite numerous attempts by the State to present a replica. The error

may have been harmless, however, since the jury did not convict the defendant regarding Count II or the related enhancement. (RP 290).

Regarding the other “deadly” weapon, the State put on no medical testimony regarding the capabilities of what their own witness called a “stick.” (RP 73). By the witness’ own admission, the stick not used to strike anyone. Rather, it was used to intimidate the complaining witness. (RP 76). The complaining witness testified that: (1) was no closer than six feet at any time while armed with the stick (RP 75); (2) only raised it when he got out of his vehicle (RP 75); (3) couldn’t recall what Mr. Turner was yelling while armed with the stick (RP 97); and (4) that the defendant “disarmed” himself (RP 76). Likewise, another eyewitness testified that: (1) the defendant was armed with a stick (RP 103); and (2) the defendant discarded the stick (RP 104). As such, the jury could only have convicted under the “creation of apprehension” theory of assault or that the stick was, in fact, a deadly weapon.

IV. Argument

A. The trial judge erred in reversing another judge's ruling *sua sponte*, in deciding that an affidavit of prejudice would not be honored.

Under Rules of Appellate Procedure (RAP) 5.1 the only two permissible methods available to a party seeking review of the decision of a trial court is to file 1) a notice of appeal; or 2) notice for discretionary review. *See* R. App. Proc. 5.1(a) *et seq.* As such, because no such appeal was ever filed, there should have been no review of Judge Altman's decision to sign the Affidavit. Judge Reynolds therefore erred in reversing Judge Altman's order. This reversible error requires a new trial on the issue as the entirety of the court proceedings in this matter then took place in front of Judge Reynolds himself.

B. The defendant's counsel was ineffective by not timely filing an affidavit of prejudice, where the defendant made his intention known to counsel before the time had lapsed and counsel neglected to read the court rules regarding such matters.

In this case, the fact that Mr. Lanz filed the Affidavit is evidence enough that it was deficient for him not to. If the Affidavit was unnecessary or would have been ineffective, Mr. Lanz would not have filed it (albeit late). The fact that he did so, it was late, and Mr. Turner was convicted is in itself enough to show that the untimely filing was at least deficient. If this were not bad enough, the record reflects that Mr. Lanz in fact *prosecuted* Mr. Turner approximately eleven

years previous to this incident. (RP 302). Not only should the affidavit been filed, but Mr. Lanz should not have taken Mr. Turner's case either. Rules of Professional Conduct (RPC) 1.8(b) states: "[a] lawyer who is representing a client in the matter [s]hall not use information relating to representation of a client to the disadvantage of the client unless the client *consents in writing after consultation*." RPC 1.8(b) (emphasis added). Here, not only does Mr. Lanz know of his previous prosecution of Mr. Turner, there is no evidence that Mr. Turner remembers having been prosecuted by Mr. Lanz and there is certainly no evidence presented that such consent was in writing and after consultation with Mr. Turner regarding the apparent conflict.

Further, the prejudice in this case is obvious. Mr. Lanz admits that Mr. Turner requested such an affidavit at his initial appearance in this case, and that it was his (Mr. Lanz's) misunderstanding because he did not read the court rule that applied. (RP 25). Mr. Lanz also prosecuted Mr. Turner some eleven years prior which creates an inherent conflict that readily lends itself to prejudice being manifested here.

C. The trial judge erred in allowing inquiry into irrelevant matters, specifically the State's questioning about the defendant's family.

Mr. Turner's family (specifically his brothers) had nothing to do with the matter at bar and were thus irrelevant under ER 402. Further, by allowing the State to refer to Mr. Turner's family as the "Turner Clan" and the like, creates an

implication of guilt by association. This was not only irrelevant but was merely a means of getting otherwise inadmissible testimony in front of the jury. The State, by using this “strength in numbers” implication, was attempting to make the intimidation aspect of the incident seem far worse than it was and the jury convicted Mr. Turner for doing just that.

Even assuming the information was relevant, it should have been excluded under ER 403 because the brothers were not involved in this incident and implying they were and thus advancing this guilt by association type argument. The probative value of this information is substantially outweighed by the danger of unfair prejudice and/or misleading the jury. *See* ER 403.

D. The trial court erred in presenting an instruction to the jury about a deadly weapon enhancement, when the substantial evidence showed that it was not used in any manner likely or readily capable of causing injury or death.

The *Shilling* factors include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted. *State v. Shilling*, 77 Wn. App. 171-72, 889 P.2d 948 (1995), *see also* Appellant’s Brief at 8-9. In the present case there was no degree of force, that force was not applied to any part of any body, and no actual injuries were inflicted. These factors weigh clearly in favor of Mr. Turner in this case and as such the instruction given should not have been for Assault in the Second Degree

because the “weapon” involved does not fit the definition of “deadly weapon.” The ability of the user was substantially impaired by the fact that he was intoxicated at the time. Further, the degree of force applied was exactly zero because the alleged victim admits that Mr. Turner disarmed himself before coming within six feet of him. (RP 75). Similarly, the force was not applied to any part of the victim’s body because Mr. Turner never came within six feet of the alleged victim. (RP 75). Finally, there were no injuries because the stick was never used. The substantial evidence presented at trial is that the stick *wasn’t used at all*. Therefore, it could not have been a deadly weapon as it applies to this case and the jury should not have been given the option of enhancing the penalty for assault in the second degree.

E. The trial court erred in permitting questions by the State that impermissibly invite comment regarding the defendant’s right to remain silent.

The State readily admits case law in this area that is unfavorable to their position: “[M]erely mentioning a suspects pre-arrest silence, although not advisable, generally does not violate due process.” *See* Respondent’s Brief at 10, *citing State v. Lewis*, 130 Wn. 2d 700 (1996). While that case law is alive and well, it is inapplicable here because the State did not “merely mention” Mr. Turner’s silence, but rather commented extensively on Mr. Turner’s Constitutional right. Further, in that case, the State used the defendant’s pre-

arrest, pre-Miranda silence against him. Here, this was a post-arrest, post-Miranda silence. See *State v. Curtis*, 110 Wn App. 6, 11, 37 P.3d 1274 (2002) (holding the distinction between pre- and post-Miranda statements is crucial). The State asked Mr. Turner on two separate occasions about his right to remain silent. The State actually concluded with the following question and answer by Mr. Turner:

Q: Now you also told Deputy Hepner you were going to fill out a statement about your version of the events, right?

A: No I did not.

Mr. Fitzjarrald: I have no further questions.

See RFP 214-215; see also Respondent's Brief at 9. The implication is that Mr. Turner did in fact tell Deputy Hepner that he would give a statement and that he had a guilty conscience by changing his mind and deciding not to give the statement. Not only was there no evidence that Mr. Turner ever stated he would give such a statement, the fact that the State commented on his invoking his right to remain silent is reversible error as it suggests Mr. Turner's silence was an admission of guilt. In *State v. Messinger*, the Court held the prosecutor committed misconduct by commenting on the defendant's failure to contradict or deny that certain conversations occurred. *State v. Messinger*, 8 Wn. App. 829, 840, 509 P.2d 382 (1973). Once a suspect is arrested and *Miranda* rights are read, the State violates his/her Fifth and Fourteenth Amendment rights by introducing

evidence of his exercise of those rights as substantive evidence of guilt. In that case a prosecutor asked a question and received an answer that had no discernable purpose except to inform the jury that the defendant refused to talk to police without a lawyer. *Curtis*, 110 Wn. App. at 13.

In this case, the exchange noted earlier between the prosecutor and Mr. Turner is exactly the same type of situation. By asking a question that implicated Mr. Turner's right to remain silent for that purpose alone, the State committed manifest and constitutional error. *Id.* at 11. As such, Mr. Turner respectfully requests this Court follow the *Curtis* court and reverse and remand for a new trial.

V. Conclusion

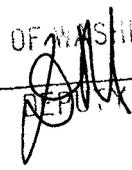
Petitioner asks that the court reverse the decision of the trial court to grant a directed verdict on the count of assault in the second degree and the deadly weapon enhancement, because the evidence was insufficient to show that the stick which the petitioner allegedly used to intimidate the complaining witness was a deadly weapon, and that a new trial be afforded to petitioner on all counts, because the admission of evidence commenting on the Defendant's right to remain constituted reversible error.

Respectfully submitted this 19 day of February, 2008.


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STATE OF WASHINGTON)
Respondent)
v.) No. 35872-7-II
RICKEY F. TURNER) Co. No. 06-1-00080-1
Appellant.) CERTIFICATE OF SERVICE
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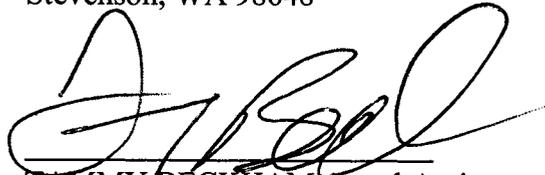
Tammy Beckham, sworn under penalty of perjury under the laws of the State of Washington, declares and says the following is true and correct:

1. I am a legal assistant at Phelps and Associates, attorney for Appellant RICKEY F. TURNER in the action identified above.
2. On the 19TH day of February, 2008 the Reply Brief of Appellant was delivered, hand delivery or first class mail:

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Dated this 19 day of February, 2008.


TAMMY BECKHAM, Legal Assistant