Court of Appeals No. 37168-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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DIVISION II
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STATE OF WASHINGTON
BY
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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

DWAYNE S. SANDERS,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal form the Superior Court of Pierce County,
Cause No. 07-1-01845-1
The Honorable Sergio Armijo, Presiding Judge

Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 759-5940

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Sanders' motion to dismiss where Detective Larson offered testimony which was a legal conclusion as to whether or not Ms. Goebel had been assaulted.

2. The trial court erred in refusing to instruct the jury on assault in the third and fourth degrees.

II. ISSUES PRESENTED

1. Was it error for the trial court to deny a motion to dismiss where Detective Larson's testimony was a legal conclusion that Ms. Goebel had been assaulted? (Assignment of Error No. 1)

2. Did the trial court properly decline to instruct the jury on assault in the third and fourth degrees? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Factual and Procedural background

In March of 2007, Ms. Angelic Goebel was living in an apartment in Lakewood. RP 52. Ms. Goebel was in a dating relationship with Mr. Dwayne Sanders. RP 55. Mr. Sanders was seeing other women and Ms. Goebel knew about the other women. RP 58. Mr. Sanders had a key to Ms. Goebel's apartment and stayed there occasionally, but did not live there. RP 54, 59, 185.

On March 23, 2007, Mr. Sanders came to Ms. Goebel's apartment and stayed there. RP 115. On March 29, 2007, Ms. Goebel and Mr. Sanders got

into an argument. RP 57, 71-75, 256. A woman named Stephanie was staying with Ms. Goebel and Ms. Goebel became angry when Stephanie and Mr. Sanders began flirting. RP 61-63. The argument became physical and Mr. Sanders hit Ms. Goebel once in the face. RP 75-76. Mr. Sanders turned and walked away so Ms. Goebel jumped onto his back but he threw her off. RP 77-78. Ms. Goebel then grabbed a wooden paddle off the wall and struck Mr. Sanders as hard as she could across the arms and ribs with it. RP 134-136.

Ms. Goebel left her apartment and returned a few hours later. RP 80. When she returned, she discovered that her foot was injured. RP 80. Ms. Goebel subsequently went to a gas station and then to the Emerald Queen Casino with Stephanie. RP 80-83. Ms. Goebel then went with strangers to a garage where she stayed until she was taken home at 8:00 a.m. the next morning. RP 84.

When Ms. Goebel returned to her apartment, Mr. Sanders was cleaning her patio. RP 86. Mr. Sanders made Ms. Goebel a meal. They then took a shower and had sex. RP 87, 89. After having sex, Mr. Sanders and Ms. Goebel fell asleep until 9:00 p.m. when Stephanie returned to the apartment. RP 89. Stephanie had drugs but Mr. Sanders didn't want Ms. Goebel to get high. He became angry and left. RP 89-90.

Ms. Goebel called a friend of hers, Brian Hausner to pick her up and

take her to the hospital. RP 91-92, 207-210. Mr. Hausner saw that Ms. Goebel had one full black eye and one partial black eye. RP 210. Mr. Hausner took Ms. Goebel to St. Clare's Hospital in Lakewood. RP 93. After Ms. Goebel was checked into the hospital, Mr. Hausner called the police. RP 94, 212.

Ms. Goebel was contacted at the hospital by Officer Brian Weekes. RP 182-183. Ms. Goebel had bruising and swelling on her face. RP 185. Ms. Goebel told Officer Weekes what had happened and that Mr. Sanders had done it to her. RP 185. Officer Weekes obtained consent from Ms. Goebel to search her apartment for Mr. Sanders as well as a key to Ms. Goebel's apartment. RP 185. Officer Weekes went to Ms. Goebel's apartment and arrested Mr. Sanders without incident. RP 192-194.

Ms. Goebel was examined at the hospital and was found to have swelling around her face and her right eye. RP 253. Ms. Goebel told the doctor that someone had hit her with a fist. RP 252. A CT scan was done on Ms. Goebel's head. RP 253. The CT scan revealed that Ms. Goebel had what appeared to be a fracture on the inside wall of her eye socket. RP 258-259. However, Ms. Goebel did not have a serious injury. RP 272.

Mr. Sanders was charged with one count of second degree domestic violence assault in violation of RCW 9A.36.021. CP 1.

Trial began on October 10, 2007. RP 51.

Mr. Sanders requested that the jury be instructed on assault 3 and assault 4 as lesser included crimes. RP 301, CP 39-70. The State objected and the trial court sustained the objection and did not allow the jury to be instructed on assault 3 and 4 as lesser included crimes. RP 301, 313.

The jury found Mr. Sanders guilty of second degree domestic violence assault. RP 374-376, CP 185-198.

This was Mr. Sanders' third "strike" offense and he received a life sentence. CP 185-198.

Notice of appeal was timely filed on December 26, 2007, and January 8, 2008. CP 291-305, 329-330.

IV. ARGUMENT

1. HE TRIAL COURT ERRED IN DENYING MR. SANDERS' MOTION TO DISMISS WHERE DETECTIVE LARSON GAVE IMPROPER TESTI- WHICH CONSTITUTED A LEGAL CONCLUSION THAT MR. SANDERS HAD COMMITTED ASSAULT.

Whether to grant a motion for mistrial is a matter addressed to the sound discretion of the trial court and is reviewed for an abuse of discretion. *State v. Tigano*, 63 Wn.App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021, 827 P.2d 1392 (1992).

"Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of

abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable

> if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Id., 110 Wn.App. at 99, 38 P.3d 1040.

Here, counsel for Mr. Sanders moved for a mistrial following improper testimony by Detective Larson that invaded the province of the jury. Detective Larson testified that he sought out Mr. Hausner, "[b]ecause [Mr. Hausner] gave Angelic a ride to the hospital after she was assaulted." RP 160. Mr. Sanders' defense was that no assault had occurred and that Ms. Goebel was lying when she said that Mr. Sanders had assaulted her. RP 343-345. Detective Larson's testimony was therefore testimony that Mr. Sanders had violated the law since it presupposed that an assault had occurred. Counsel for Mr. Sanders immediately objected, moved to strike the response as an improper legal conclusion, and moved for a mistrial. RP 160-161. The trial court, apparently believing that counsel for Mr. Sanders was only

concerned with the officer's use of the word "assault" denied the objection and denied the motion for mistrial. RP 163.

Under ER 704, a witness may testify as to matters of law, but may not give legal conclusions. *State v. Olmedo*, 112 Wn.App. 525, 532, 49 P.3d 960 (2002). Improper legal conclusions include testimony that the defendant's conduct violated a particular law. *Olmedo*, 112 Wn.App. at 532, 49 P.3d 960.

> Permitting a witness to testify as to the defendant's guilt raises a constitutional issue because it invades the province of the jury and the defendant's constitutional right to a trial by jury. An error of constitutional magnitude is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt.

Olmedo, 112 Wn.App. at 533, 49 P.3d 960 (internal citations omitted).

Detective Larson's improper testimony was not harmless beyond a reasonable doubt. As Mr. Sanders' trial attorney pointed out to the court, the central issue at trial was whether or not an assault had occurred. RP 161. The only evidence of injury to Ms. Goebel was her black eyes (RP 185, 210) and the x-rays of her head which revealed what might have been a fracture of the wall of Ms. Goebel's eye socket. RP 257-258. Mr. Sanders' defense was that no assault had occurred and that Ms. Goebel was lying when she said that Mr. Sanders had assaulted her. RP 343-345. Ms. Goebel testified that she bruised easily (RP 88) and that she had had chronic sinus infections for years and developed sinus infections frequently. RP 101-102, 109. Ms. Goebel

also testified that she had had reconstructive surgery on her jaw and that when the jaw surgery was performed, "they messed around with all kinds of stuff" in her head. RP 102. Dr. Oliphant, the radiologist who examined Ms. Goebel's head CT scans (RP 275, 279-280), testified that Ms. Goebel was missing a certain bone on each side of her face in her sinuses which indicated that she had had surgery to help with chronic sinusitis. RP 287. Dr. Friedrick, the ER doctor who treated Ms. Goebel at the hospital (RP 243-244, 251), testified that the fracture found in Ms. Goebel's right eye socket could have been caused by sinus surgery. RP 269-270.

Detective Larson's testimony is highly improper in light of the ambiguous evidence introduced at trial. Further, "An officer's live testimony offered during trial, like a prosecutor's statements made during trial, may often carry an aura of special reliability and trustworthiness." *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

Given the facts of this case, it was an abuse of discretion for the trial court to deny Mr. Sanders' motion for mistrial following Detective Larson's improper testimony.

2. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THIRD AND FOURTH DEGREE ASSAULT.

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Walker*,

136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).

In considering whether the trial court erred in rejecting the instruction, the appellate court views the evidence in the light most favorable to the party who requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Here, Mr. Sanders requested that the trial court instruct the jury on third and fourth degree assault. RP 301, CP 39-70. Citing *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), the State argued that the facts of the case did not support instructing the jury on third or fourth degree assault. RP 301-303, 308, 312-313. The trial court agreed with the State and declined to give the instructions. RP 313.

A. *The instruction on third degree assault was warranted as an instruction on an inferior degree offense.*

An instruction on an inferior degree offense is properly administered 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.

Fernandez-Medina, 141 Wn.2d at 454, 6 P.3d 1150.

Second, third, and fourth second degree assault "proscribe but one offense," specifically assaulting another person. Third and fourth degree

assault are an inferior degrees of second degree assault. *See* RCW 9A.36.031(1) ("A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree...") and RCW 9A.36.041(1) ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree...").

The evidence introduced at trial supported several interpretations of how Ms. Goebel received the injury to her head including: (1) that Mr. Sanders struck Ms. Goebel in the face and injured her or (2) that Ms. Goebel sustained her injuries when Mr. Sanders tossed her off of his back.

As trial counsel noted in her argument to the court, had the jury been instructed on third degree assault, it might have found that Mr. Sanders acted recklessly with the intent to cause substantial bodily harm when he threw Ms. Goebel off his back. RP 310-312. As also noted by trial counsel, the jury could have believed that the fracture in Ms. Goebel's right orbit was caused by her surgery and not Mr. Sanders, allowing them to find Mr. Sanders guilty of fourth degree assault. RP 310-311.

The facts of this case supported instructing the jury on third and fourth degree assault as an inferior degree offenses, but the trial court did not so instruct the jury because the trial judge felt that "either he did it or he didn't, assault 2." RP 313. The trial court abused its discretion in failing to

instruct the jury on third and fourth degree assault as an inferior degree offenses of second degree assault.

B. *The instructions on third and fourth degree assault were warranted as instructions on lesser included offenses.*

An instruction on a lesser included offense is warranted when two conditions are met: "[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed." *Workman,* 90 Wn.2d at 447-48, 584 P.2d 382.

Mr. Sanders was charged with committing second degree assault in violation of RCW 9A.36.021(1)(a). RCW 9A.36.021(1)(a) provides,

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm

Under RCW 9A.36.031(1)(d),

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> ***
>
> (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm

Under RCW 9A.36.041, "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."

As discussed above, the facts introduced at trial supported an inference that Mr. Sanders only committed third or fourth degree assault. The jury could have interpreted the evidence and concluded (1) that Mr. Sanders was reckless in throwing Ms. Goebel off of his back; (2) that Mr. Sanders was negligent in throwing Ms. Goebel off his back; or (3) that Mr. Sanders was neither reckless nor negligent in throwing Ms. Goebel off his back and therefore only committed fourth degree assault.

The trial court abused its discretion in failing to instruct the jury on third and fourth degree assault as a lesser included offenses of second degree assault.

C. *The trial court's failure to instruct the jury on third and fourth degree assault was not harmless error.*

Where there is evidence to support giving a lesser included offense instruction, failure to give it has never been held harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

It is reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

As discussed above, the evidence in this case supported the giving of

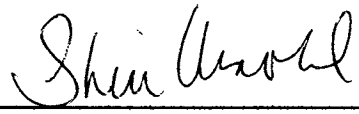
the instructions on the lesser included offenses of third and fourth degree assault. The jury instructions proposed by Mr. Sanders for the lesser included and lesser degree offenses of third and fourth degree assault contained accurate statements of the law regarding those crimes. The trial court abused its discretion in failing to give the third and fourth degree assault instructions.

V. CONCLUSION

For the reasons stated above, this court should vacate Mr. Sanders' convictions and remand for a new trial.

DATED this 14th day of July, 2008.

Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on July 14, 2008, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by U. S. Mail to Dwayne S. Sanders, DOC # 985394, Washington State Penitentiary, 1313 North 13th Street, Walla-Walla, Washington 99362, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 14, 2008.

Norma Kinter

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