

FILED
COURT OF APPEALS
DIVISION II

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NO. 37306-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY KEITH WARNER,

Appellant.

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

The Honorable Stephen M. Warning

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL OF WARNER'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNT ONE IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF UNLAWFUL DISPLAY OF A WEAPON.

The state argues that "the lesser included jury instruction is not warranted because according to the appellant, James Wilcox did not have a weapon and did not unlawfully display a weapon," but the state misstates the record. Brief of Respondent at 15. The record reflects that Warner testified that he gave Wilcox one of the knives after the confrontation with Pinkard. 2RP 190. Contrary to the state's claim, Warner never stated that Wilcox did not display a weapon but said that he did not see Wilcox chasing anybody with a knife. 2RP 197.

Furthermore, the state's argument that Warner was not entitled to an instruction on the lesser included offense because he denied guilt has been rejected by the Washington State Supreme Court. In State v. Fernandez-Medina, 141 Wn.2d 448, 458-61, 6 P.3d 1150 (2000), the Court reasoned that "an inconsistent defense goes to the weight of, but does not entirely negate" the evidence supporting the lesser included instruction, quoting State v. McClam, 69 Wn. App. 885, 850 P.2d 1377, review denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993). Approving the

approach taken by this Court in McClam and a vast majority of other jurisdictions, the Court concluded that when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included offense, the factual component of the test for a lesser included offense instruction is satisfied. Fernandez-Medina, 144 Wn.2d at 461.

Clearly, there is substantial evidence in the record here that supports a rational inference that only the offense of unlawful display of a weapon was committed, particularly when viewing the evidence in the light most favorable to Warner. See Brief of Appellant at 13-14. Consequently, reversal is required because the trial court erred in failing to give Warner's proposed jury instruction on the lesser included offense. Fernandez-Medina, 144 Wn.2d at 460-62, McClam, 69 Wn. App. at 888-90.

2. REVERSAL AND DISMISSAL OF WARNER'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNT ONE IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT WARNER OR AN ACCOMPLICE ASSAULTED PINKARD.

The state argues that there was sufficient evidence for a jury to find that Pinkard had a reasonable apprehension and imminent fear of bodily injury citing State v. Elmi, 138 Wn. App. 306, 156 P.3d 281 (2007), but

Elmi is distinguishable from this case. Elmi's convictions included three counts of assault against three children who were at home with their mother when Elmi fired shots into the house. Id. at 311. The state presented a 911 tape that began with the sound of children screaming and a hysterical mother pleading for help. The mother repeatedly told the operator that shots were fired and windows were broken. There were intermittent sounds of distress from the children throughout the recording and a child was heard saying, "He's going to kill my mommy." Id. at 312. Although the children did not testify, the Court concluded that the evidence was sufficient for a jury to find that the children were put in reasonable apprehension of imminent bodily harm. Id. at 320.

In contrast, it is clear from Pinkard's testimony and his statements to Officer Berndt that he was never put in reasonable apprehension of imminent bodily harm. See Brief of Appellant at 16-18. The record belies the state's argument that Pinkard's reasonable apprehension and imminent fear of bodily injury was evidenced by his immediate flight and abandonment of his wife:

- Q. Okay. Throughout the time, did you see where your wife had gone to?
- A. I -- I just -- no, I -- I ran down the street. And then when I stopped running and looked around, I think

pretty much the commotion was over and everybody was --

Q. Okay.

A. -- and that was it. People had taken off running and all that kind of stuff.

Q. Do you know what you were poked with?

A. What I was poked with?

Q. Yeah.

A. Not for sure, no.

Q. Could you show me where you were poked?

A. Right back here.

Q. Okay. So like, in the lower back.

A. Yeah, lower back, ribs.

Q. Any marks on your (inaudible)?

A. I don't believe so.

Q. Okay.

A. It wasn't -- I don't -- it wasn't like to inflict injury. It think it was just he might have pinched (inaudible).

1RP 93.

Contrary to the state's assertion, nothing in the record reflects that Pinkard abandoned his wife. Importantly, the record substantiates that Pinkard ran only because he heard her scream "run, he's got a knife." 1RP

91-92, 96. It is more than evident from Pinkard's testimony that he had no reasonable and imminent fear of bodily injury. 1RP 91-93, 96-97, 2RP 143-45.

Reversal and dismissal is required because even when viewing the evidence in the light most favorable to the state, no reasonable trier of fact could find all the elements of assault in the second degree with a deadly weapon beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Warner's conviction for assault in the second degree with a deadly weapon as charged in count I.¹

DATED this 8th day of January, 2009.

Respectfully submitted,


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Attorney for Appellant

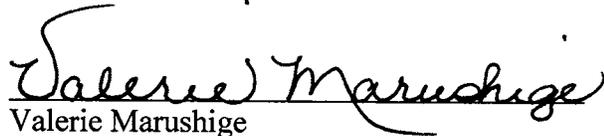
¹ It should be noted that the state improperly cites an unpublished portion of State v. Jackson, 129 Wn. App. 95, 109-111 (2005) which should not be considered by this Court. Brief of Respondent at 11.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Mike Nguyen, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2008 in Kent, Washington.


Valerie Marushige
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