

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY KSC
DEPUTY

No. 38499-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

WADE HILL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

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T A B L E

Table of Contents

COUNTER STATEMENT OF FACTS 1

ARGUMENT 2

 A. The Court properly instructed the jury as to the
 definition of a deadly weapon. 2

 B. No unanimity instruction was required in this case. 3

CONCLUSION 4

TABLE OF AUTHORITIES

Table of Cases

State v. Coleman, 159 Wn2d 509 (2007) 3

State v. Winings, 126 Wash.App. 75, 107
P.3d 141 (2005) 3

COUNTER STATEMENT OF FACTS

On August 12, 2008, Sean Brown confronted Wade Hill, the appellant, at Mr. Brown's grandparents home. (RP 7). Mr. Brown asked the appellant where the legal resident of the property was, and the appellant got up to confront Mr. Brown. (RP 10). At that time, a bag of marijuana fell on the ground. Mr. Brown picked it up with the intent of holding it for the police. Mr. Brown informed the appellant that he was going to call the police, and the appellant pulled a knife from his waistband. (RP 11). The appellant demanded that Mr. Brown return the marijuana. (RP 11).

Mr. Brown picked up a board to defend himself, and the appellant continued to threaten Mr. Brown with a knife. (RP 12).

When police arrived, the appellant was throwing rocks at Mr. Brown. (RP 15). The defendant fled the scene, and was later apprehended by police. (RP 26). A knife was found on the defendant at that time. This knife was entered into evidence. (RP 27).

During closing arguments the State was clear that the defendant was charged with Assault in the Second Degree because he attacked Mr. Brown with a knife. It was stated: "[b]ut then it turned violent and that is

what the defendant is charged with. He pulled out a knife. He pulled out a kitchen knife from his belt and attacked Sean Brown.” RP. 53. Though there was one comment about an assault with the rocks, the State never referred to the rocks as the deadly weapon.

ARGUMENT

A. The Court properly instructed the jury as to the definition of a deadly weapon.

The Court instructed the jury as to two definitions of a deadly weapon. The appellant claims that this confused the jury and alleviated the State of its burden to prove an element of the offense of Assault in the Second Degree.

This claim is based on the theory that the deadly weapon’s instruction for the special verdict is a lessor standard than that of the general definition of a deadly weapon which is applicable to the to convict instruction.

The appellant’s argument fails because the instructions clearly states that the definition of a deadly weapon, with the “per se” instruction as to a three-inch blade, applies to the special verdict. This leaves only the general definition of a deadly weapon to apply to the to convict instruction.

There is no way to make this clearer than it was presented to the jury. These are standard instructions that have been approved by the Supreme Court Committee on Jury Instructions. No error should be found

by this court. This argument was made in *State v. Winings*, 126 Wash.App. 75, 107 P.3d 141 (2005). The Court of Appeals upheld the use of these two instructions in combination.

B. No unanimity instruction was required in this case.

The defendant has a constitutional right to a unanimous verdict. If evidence of more than one act is presented at trial the State must elect a single act that it claims as the basis of the criminal charge or the court must instruct the jury that they must be unanimous as to which act justifies the criminal conviction. *State v. Coleman*, 159 Wn2d 509 (2007).

The defendant was charged by Information with Assault in the Second Degree. In the charging language it is stated specifically that the allegation was that the defendant assaulted Sean Brown with a knife. This information was read to the jury prior to jury selection.

Moreover, all of the evidence presented to the jury was focused on the knife, and little was said about the rocks that he was throwing. The State's argument reiterated numerous times that the defendant was charged with threatening Sean Brown with a knife. At no point did the State refer to the rocks the appellant threw as deadly weapons.

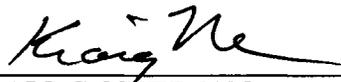
The state elected which act was the basis of the charge of Assault in the Second Degree. The State specifically stated in unambiguous terms what had been alleged as the crime. There could be no confusion by the jury what was being litigated.

Because the State was so clear in its intent, no unanimity instruction was needed.

CONCLUSION

For these reasons, the State asks the Court to deny the appellant's claims of error and uphold the appellant's conviction of Assault in the Second Degree.

Respectfully Submitted,

By: 
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STATE DEPARTMENT
BY [Signature]
DEPUTY

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DECLARATION OF MAILING

WADE HILL,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 17th day of July, 2009, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501, and Wade Hill 741131; Clallam Bay Corrections Center; 1830 Eagle Crest Way; Clallam Bay, WA 98326, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17th day of July, 2009, at Montesano, Washington.

Barbara Chapman