

COURT OF APPEALS
DIVISION II

NO. 40572-5-II

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

STATE OF WASHINGTON
DEPT. OF JUSTICE

STATE OF WASHINGTON, Respondent

v.

SIDNEY PURAN DELANEY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01552-0

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplemented in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that there was insufficient evidence to support the conviction for Felony Eluding of a Police Officer as charged in Count 5 of the Information and specifically under RCW 46.61.024 (CP 33 – Amended Information).

Evidence is sufficient to ‘support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), cert. denied, 127 S. Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Luther, 157 Wn.2d at 77-78 (*citing State v. Alvarez*, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)).

In considering the sufficiency of evidence, the Appellate Court gives equal weight to circumstantial and direct evidence. State v. Varga,

151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing* State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). It does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (*citing* State v. Farmer, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)), review denied, 149 Wn.2d 1013 (2003). “In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998); World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 387, 816 P.2d 18 (1991).

The State called Officer Steven Donahue from the Vancouver Police Department as the chief witness involving the attempt to elude. (RP 186). Officer Donahue testified that he was responding to a potential

robbery at the Walmart located in Clark County, State of Washington. As part of the preliminary information the officer received was a report of a red Ford pickup that was seen in the area. (RP 189). As the officer responded to the Walmart he saw the red Ford F150 pickup with Nevada license plates on it traveling from the area of the Walmart. The officer indicated that he was traveling eastbound and that the pickup was traveling westbound out of the Walmart parking lot. (RP 189). The officer told the jury that the vehicle matched the description that was given so he turned around and started traveling in the same direction as the pickup. He said preliminarily there were two or three other cars between him and the pickup but ultimately the pickup turned eastbound and the officer was able to get around the other traffic and caught up with the pickup as it was just starting to go onto the onramp on Interstate 205. (RP 190).

At the top of the ramp he attempted to stop the vehicle. He activated his overhead flashing lights and as soon as he activated those lights the defendant's vehicle accelerated to a high rate of speed and went down the onramp and into the freeway traffic. He described the high rate of speed as approximately 90 miles per hour. (RP 191). The officer told the jury that he was in full uniform and that he was in a fully marked police car with flashing lights and siren. He indicated that these were operational and he had them turned on.

QUESTION (Deputy Prosecutor): And then what happened?

ANSWER (Officer Donahue): And then as soon as I activated the lights, the vehicle accelerated to a higher rate of speed, and then went down the off-ramp – or the on-ramp and entered into the freeway traffic.

QUESTION: Now, when you say a high rate of speed, did you make a note as to the – an observation in line with your – the speed you were traveling?

ANSWER: Once we got onto the freeway, the vehicle got up to a speed of approximately 90 miles an hour.

I was comparing it to my speedometer.

QUESTION: Now, how about the travel, lane travel, did it – did the vehicle stay in the same lane?

ANSWER: The vehicle at first had got into the left fast lane, and then at other times it had crossed all lanes of traffic to get – there was quite of bit of traffic, and it would cross all lanes to the slow lane than then back into the fast lane.

QUESTION: Now, at the point in time when it's driving in the way that you just described, can you describe for the jurors, were you dressed as you are today?

ANSWER: Yes.

QUESTION: Wearing your uniform.

ANSWER: I was wearing a full uniform, yes.

QUESTION: What about your car, how is it equipped?

ANSWER: It is a standard VPD patrol car. It's black and white. It has Vancouver Police markings on the side and

the rear of the car. It also has push bumpers on the front of the car and overhead lights.

QUESTION: Does it have a siren?

ANSWER: Yes, it does.

QUESTION: Was the – were the lights engaged – let me rephrase.

The observations you just made about the driving, the speed?

ANSWER: Yes.

QUESTION: Were your lights engaged at the time that you made these observations?

ANSWER: Yes.

QUESTION: Were your – was your siren engaged at the time you made these observations?

ANSWER: Yes.

QUESTION: And can you – at all times were you behind the – the car, or did you ever pass the car?

ANSWER: I – when it first started, when it first got on the freeway, I was behind the car, and then there was so much traffic that with – there were cars ending up between us several times during that.

But I was still behind the car with the lights and siren on.

QUESTION: And as you're traveling, this is – at any point you get onto the I-205 bridge?

ANSWER: Yes.

QUESTION: And that is, again, southbound travel?

ANSWER: Correct, yes.

QUESTION: Okay. So do you ever actually catch up to the vehicle?

ANSWER: The vehicle kept pulling away from me at the speeds it was traveling. So I never did get any closer to it.

QUESTION: Did you go into the State of Oregon, then?

ANSWER: Yes, I did.

QUESTION: Did you continue your pursuit of the vehicle into the State of Oregon?

ANSWER: No, I did not.

QUESTION: Why not?

ANSWER: My supervisor got on the radio and advised me to terminate the pursuit at that time as I was crossing into Oregon.

QUESTION: Did – were you informed – or were – do you know why that you had to terminate?

ANSWER: No, it's a – it's the supervisor's discretion to do that. It's our policy.

-(RP 191, L2 – 193, L24)

The officer indicated that he alerted authorities in Oregon of the vehicle coming into their State. He further indicated that he was close enough behind the car at times to note that there was a driver only in the vehicle.

The defendant's claim is that he didn't know that the police car was behind him. The State submits that his actions behind the wheel would certainly lead to a different conclusion. The individual was leaving an area where the allegations were that he had committed a serious crime, he weaved in and out of traffic, and ultimately sped off when the officer was immediately behind him at speed almost double the normal speed limit. The State submits that there is sufficient evidence here to allow a jury to determine whether or not this amount of speed and other driving activities would constitute a heedless indifference to life and limb.

RCW 46.61.024. Attempting to elude police vehicle

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The State is not required to prove that defendant's conduct endangered anyone else, or even that a high probability of harm actually existed. State v. Whitcomb, 51 Wn. App. 322, 327, 753 P.2d 565 (1988). Rather, the State need only show that the defendant engaged in certain conduct, from which a particular disposition or mental state--that of driving in a reckless manner which leads to disregard for the lives or

property of others' – may be inferred. Whitcomb, 51 Wn. App. at 327; State v Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007). In State v. Bowman, 57 Wn.2d 266, 270, 271, 356 P.2d 999 (1960), the Court indicated that driving “in a reckless manner” means “driving in a rash or heedless manner, indifferent to the consequences.”

The State submits that there is sufficient evidence produced to allow this issue to go to the jury.

III. RESPONSE TO SECOND ASSIGNMENT OF ERROR

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel in not requesting of the court a supplemental instruction following a jury inquiry during deliberations.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

As the Supreme Court explained in Strickland v. Washington, 466

U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-(Strickland, 466 U.S. at 689).

A trial court need not give a limiting instruction absent a party's request. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v Russell, 154 Wn. App. 775, 225 P.3d 478 (2010). The failure of a court to give a

cautionary instruction is not error if no instruction was requested. State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). The defendant never requested a limiting instruction. And, absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 255, 744 P.2d 605 (1987).

As explained in State v Yarbrough, 151 Wn. App. 66, 91, 210 P.3d 1029 (2009):

But prior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. See State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (“[w]e can presume that counsel did not request a limiting instruction” for ER 404(b) evidence to avoid reemphasizing damaging evidence), review denied, 155 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993). Yarbrough does not attempt to distinguish these cases. We presume, therefore, that Yarbrough's trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence. And a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim. State v McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The State submits that the request on appeal makes no sense. First of all the defendant provides to this court no alternative instruction which would be a “correct” statement of the law. He makes mention of a belief that the jury was improperly instructed yet provides no basis for that nor any approach to take to remedy or rectify the supposed mistake.

The governing principle is that jury instructions will satisfy the demands of a fair trial if, when read as a whole, they correctly tell the jury of the applicable law, are not misleading, and permit the defendant to present his theory of the case. *Id.* The court views the instructions in their entirety and will not parse out a single instruction to examine it in isolation. In re Pers. Restraint of Benn, 134 Wn.2d 868, 922, 952 P.2d 116 (1998).

Once a jury begins its deliberations, the trial court may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence. State v. Johnson, 7 Wn. App. 527, 539, 500 P.2d 788 (1972), *aff'd*, 82 Wn.2d 156, 508 P.2d 1028 (1973); CrR 6.15 (f). Whether words used in an instruction require definition is necessarily a matter of judgment for the trial court. State v. Castro, 32 Wn. App. 559, 565, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982); Seattle v. Richard Bockman Land Corp., 8 Wn. App. 214, 217, 505 P.2d 168, review denied,

82 Wn.2d 1003 (1973). Words which have ordinary and accepted meanings are not subject to clarification. State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985) (common scheme or plan), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986); State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) (knowledge); State v. Humphries, 21 Wn. App. 405, 411, 586 P.2d 130 (1978) (obstructing). However, the court is required to define technical rules or expressions. State v. Hill, 10 Wn. App. 851, 854, 520 P.2d 946 (1974). Where, as in this case, a trial court's response to a jury question conveys no additional information but directs the jury to refer to previous instructions, no prejudice results. State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988).

The other approach to take in this is basically that the defendant really has no standing to raise this since these were his jury instructions that he had requested. The State submits that he cannot make claim of proper jury instructions, have the court give those instructions to the jury, and now claim that they should have been supplemented and because they weren't supplemented constituted ineffective assistance of counsel. This is nothing but blatant invited error by the defendant.

Attached as appendices are the Court's Instructions to the Jury (CP 48) and also the Defendant's Proposed Jury Instruction (CP 46). These attachments clearly demonstrate that the self defense questions were

proposed by the defense and given by the court as the defense wanted them given.

The instruction given is one which the defendant himself proposed. A party may not request an instruction and later complain on appeal that the requested instruction was given. Ball v. Smith, 87 Wn.2d 717, 556 P.2d 936 (1976); Vangemert v. McCalmon, 68 Wn.2d 618, 414 P.2d 617 (1966). The defendant's challenge to the instruction must therefore fail. The defendant did not take exception to the instructions and had requested that the trial court give identical instructions, defendant's proposed Instructions (CP 46). The failure to object precludes appellate review of jury instructions. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). "A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (*quoting* State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). The defendant invited any error in the trial court's jury instructions which, on the facts of this case, did not relieve the State of its burden of proof or prejudice his defense in any event.

The State submits, therefore, that not only did the defense not adequately address this with the appellate court and explain the problem with the instruction or propose an alternative instruction which would be

appropriate under the circumstances, but also the defense proposed these instructions originally, convinced the court to give them, and now wants to claim that this was error; or, if not error, then needed to be supplemented to clarify the instruction so that it would be “a correct statement of the law”. The State submits that this is totally inappropriate and should not be considered by the appellate court.

IV. CONCLUSION

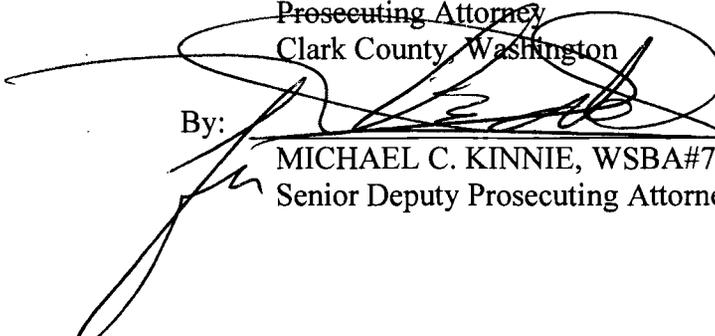
The trial court should be affirmed in all respects.

DATED this 5th day of JAN, 2011.

Respectfully submitted:

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Sherry W. Parker, Clerk, Clark Co.
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,
v.

No. 09-1-01552-0

**COURT'S INSTRUCTIONS
TO THE JURY**

SIDNEY PURAN DELANEY
Defendant.

DATED this 3 day of February, 2010.



SUPERIOR COURT JUDGE

48 (Kb)

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's

testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

**A separate crime is charged in each count. You must decide each count separately.
Your verdict on one count should not control your verdict on any other count.**

INSTRUCTION NO. 5

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A person commits the crime of robbery in the second degree when he unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

INSTRUCTION NO. 7

To convict the defendant of the crime of robbery in the second degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 11th day of September, 2009, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 9

Wrongfully obtains means to take wrongfully the property or services of another.

To exert unauthorized control means, having any property or services in one's possession, custody, or control, secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

INSTRUCTION NO. 10

Property means anything of value.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 12

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

INSTRUCTION NO. 13

A person acts willfully when he acts knowingly.

INSTRUCTION NO. 14

A person commits the crime of assault in the third degree when he assaults another with intent to prevent or resist the lawful apprehension or detention of himself, or another person.

INSTRUCTION NO. 15

To convict the defendant of the crime of assault in the third degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th of September 2009, the defendant assaulted Michael Beaudoin;

(2) That the assault was committed with intent to prevent or resist lawful apprehension or detention of the defendant or another person; and

(3) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant of the crime of assault in the third degree as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 11th of September 2009, the defendant assaulted Victor Murguia;

(2) That the assault was committed with intent to prevent or resist lawful apprehension or detention of the defendant or another person; and

(3) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict the defendant of the crime of assault in the third degree as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 11th of September 2009, the defendant assaulted Greg Huyck;

(2) That the assault was committed with intent to prevent or resist lawful apprehension or detention of the defendant or another person; and

(3) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

An assault is an intentional touching or striking of another person, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the act did not actually intend to inflict bodily injury.

INSTRUCTION NO. 19

The defendant is charged 2, 3 and 4 with Assault in the third degree. If, after full and careful deliberation on these charges, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the fourth degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 20

A person commits the crime of assault in the fourth degree when he or she commits an assault.

WPIC 35.25

INSTRUCTION NO. 21

To convict the defendant of the crime of assault in the fourth degree as to Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th of September 2009, the defendant assaulted Michael Beaudoin;

(2) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 22

To convict the defendant of the crime of assault in the fourth degree as to Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 11th of September 2009, the defendant assaulted Victor Murguia;

(2) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of assault in the fourth degree as to Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 11th of September 2009, the defendant assaulted Greg Huyck;

(2) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 24

It is a defense to a charge of Assault in the third degree and Assault in the fourth degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

INSTRUCTION NO. 25

A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 26

A person commits the crime of attempting to elude a pursuing police vehicle when he willfully fails or refuses to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the officer's vehicle must be equipped with lights and siren.

INSTRUCTION NO. 27

To convict the defendant of attempting to elude a pursuing police vehicle as charge in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 11th day of September, 2009, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner;
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 28

To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

INSTRUCTION NO. 29

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

INSTRUCTION NO. 30

You may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose.

INSTRUCTION NO. 31

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory. You will need to rely on your notes and memory as the testimony presented in the case will not be repeated for you during your deliberations.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for each count. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the verdict form.

As to Counts 2, 3, and 4 only, which charge the crime of Assault in the Third Degree, you have been instructed as to the lesser included crime of Assault in the Fourth Degree. First consider the crime of Assault in the Third Degree as to each count. If you find the defendant guilty on the verdict form for the crime charged, do not use the verdict

form for the lesser included crime. As to Counts 2, 3, and 4, if you find the defendant not guilty of the crime charged, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser included crime of Assault in the Fourth Degree. If you unanimously agree on a verdict, you must fill in the blank provided in the lesser included verdict form the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in the lesser included verdict form.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

7.

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1:15 PM.
Sherry W. Parker, Clerk, Clark Co.

State of Washington v. Sidney Delaney
09-1-01552-0

Defendant's proposed jury instructions
Annotated

Darquise Cloutier, WSBA#21865
Attorney for Defendant

February 2, 2010

46 (KB)

It is a defense to a charge of Assault in the third degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured] in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 17.02

It is a defense to a charge of Assault in the third degree that force used was lawful as defined in this instruction.

A person may use force to aid another in resisting an arrest only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 17.02.01

A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04

It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.

The State has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

WPIC 19.08

A person commits the crime of assault in the fourth degree when he or she commits an assault.

WPIC 35.25

To convict the defendant of the crime of assault in the fourth degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 11, 2009 the defendant assaulted Victor Murguia, Greg Huyck, and Michael Beaudoin, and

(2) That this act occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

WPIC 35.26

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DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

SIDNEY PURAN DELANEY,
Appellant.

No. 40572-5-II

Clark Co. No. 09-1-01552-0

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Jan 6, 2011, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

John A. Hays
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Longview WA 98632

SIDNEY PURAN DELANEY
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Washington State Penitentiary
1313 N 13th Avenue
Walla Walla, WA 99362-1065

DOCUMENTS: Brief of Respondent

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


Date: Jan 6, 2011.
Place: Vancouver, Washington.