

No. 41486-4-II

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

v.

THOMAS J. STEWART

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BRIEF OF APPELLANT

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ORIGINAL

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## A. Assignments of Error

### Assignments of Error

The trial court impermissibly commented on the evidence by telling the jury that a vehicle is a deadly weapon.

### Issues Pertaining to Assignments of Error

Did jury instructions impermissibly comment on the evidence by defining a deadly weapon as including a vehicle despite the fact that a vehicle is not a per se deadly weapon?

## B. Statement of Facts

Thomas Stewart was charged by amended information with second degree assault, fourth degree assault, and third degree malicious mischief. CP, 12. All three charges were alleged to have been committed on July 10, 2010 against Anna Pribbenow and as acts of domestic violence. CP, 12. A jury convicted him of all three charges and he appeals. CP, 52.

Mr. Stewart and Ms. Pribbenow began dating in the summer of 2009. RP, 43. On the date of the incident, according to the testimony of Ms. Pribbenow, Mr. Stewart was trying to get Ms. Pribbenow into the shower for unknown reasons. RP, 44. Mr. Stewart testified that Ms. Pribbenow voluntarily took a shower with him where they had consensual sexual intercourse. RP, 61. After the shower, the two of them got into an

argument about a cell phone. RP, 51, 62. According to Ms. Pribbenow, when she resisted getting into the shower with him, Mr. Stewart pushed her, causing her to lie in the bathtub with her feet hanging out. RP, 45. According to Mr. Stewart, Ms. Pribbenow fell into the bathtub during the argument. RP, 65-66. Mr. Stewart left a few minutes later, leaving in Ms. Pribbenow's car. RP, 46. Mr. Stewart testified he left in the hope that if they were separated for a few hours, both would calm down. RP, 69.

A couple hours later, Mr. Stewart returned. Ms. Pribbenow was sitting in her living room talking on the phone with a friend. RP, 46. Ms. Pribbenow looked out the window and saw Mr. Stewart changing the battery in the car. RP, 46. Mr. Stewart then entered the house through the back door while Ms. Pribbenow exited the house through the front door and stood in the yard about five feet from front her porch, where she called 911. RP, 47. Mr. Stewart walked through the house and out the front door. RP, 47. Mr. Stewart testified that as he exited the front door, he overheard Ms. Pribbenow talking to the police and it "kind of pissed [him] off." RP, 70. Ms. Pribbenow heard glass breaking, which, according to Mr. Stewart's testimony, was a group of vases containing plants that were in the kitchen. RP, 47, 71. Mr. Stewart went outside and broke the car window of Ms. Pribbenow's vehicle using a pair of pliers. RP, 49, 71.

Mr. Stewart then jumped in his car, started it, backed out and drove onto the yard. RP, 47. As Mr. Stewart drove into the yard, he partially destroyed a bush. RP, 56. According to the testimony of both witnesses, Mr. Stewart was primarily responsible for maintaining the bush. RP, 52, 76. Mr. Stewart testified his motivation for driving across the yard was to kill the bush. RP, 76. As Mr. Stewart drove across the yard, Ms. Pribbenow jumped onto the porch. RP, 48. According to Ms. Pribbenow, she felt like she needed to get out of the way or she would be hit by the vehicle. RP, 48. A neighbor who observed the incident, Ronald Gingrey, testified if Ms. Pribbenow had not jumped onto the porch, the vehicle would have hit her. RP, 35. But Ms. Pribbenow conceded that she did not know what Mr. Stewart was going to do. RP, 48. Mr. Stewart testified he did not intend to run Ms. Pribbenow over with the vehicle. RP, 78.

The Court instructed the jury on the definition of a deadly weapon in Instruction #10. “Deadly weapon means any other weapon, device, instrument, substance, or article, including a vehicle, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” CP, 34. No exception was taken to this or any other instruction. RP, 83.

C. Argument

**The trial court impermissibly commented on the evidence by telling the jury that a vehicle is a deadly weapon.**

The trial court instructed the jury that, for purposes of the second degree assault charge, a deadly weapon includes a vehicle. This instruction constituted an impermissible comment on the evidence because it was for the jury, not the court, to conclude whether the vehicle in the circumstances in which it is used was readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6) defines a deadly weapon as follows: “Deadly weapon means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a ‘vehicle’ as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” Instruction #10 closely mirrors this statute.

Instruction #10’s inclusion of the words “including a vehicle” constitute an improper comment on the evidence. An improper comment on the evidence during the jury instruction phase of the trial may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006).

There are two deadly weapon definitions found in Washington's criminal code. The first definition, RCW 9A.04.110(6), applies to the second degree assault statute. The second definition, RCW 9.94A.825 (former RCW 9.94A.602), applies to deadly weapon enhancements. The latter definition does not include the word "vehicle."

In discussing RCW 9A.04.110(6), the Court of Appeals has held that there are two types of deadly weapons described in the statute: per se deadly weapons and case specific deadly weapons, which are "any other weapon that is readily capable of causing death or substantial bodily harm under the circumstances in which it is used." State v. Winings, 126 Wn. App. 75, 87, 107 P.3d 141 (2005), citing State v. Taylor, 97 Wn. App. 123, 982 P.2d 687 (1999). Per se deadly weapons under this statute are explosives and firearms. All other instruments are case specific deadly weapons and it is for the trier of fact to review the circumstances under which it is used before deciding whether the instrument constitutes a deadly weapon. In Taylor, the Court of Appeals reviewed a challenge to the sufficiency of the evidence. The Court first concluded that a BB gun is not a per se deadly weapon. Then the Court reviewed the facts of the case and concluded that, in the circumstances in which it was used in that particular case, the evidence was sufficient for the juvenile court to conclude that the BB gun was a deadly weapon.

In Winings, the defendant was charged both with second degree assault under the deadly weapon prong and with the deadly weapon enhancement. The jury instructions correctly stated that a sword of more than 3 inches is a per se deadly weapon under former RCW 9.94A.602 but is not a per se deadly weapon pursuant to RCW 9A.04.110(6). Implicit in the Court's analysis in Winings is the conclusion that, had the jury been instructed that a sword is a per se deadly weapon pursuant to RCW 9A.04.110(6), it would have been reversible error.

In State v. Levy, the Washington Supreme Court held that it is error for a trial court to instruct a jury that an article (other than an explosive or firearm) is a per se deadly weapon.

The reference to the crowbar is also problematic. A crowbar only qualifies as a deadly weapon if it "has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." Thus, the State must prove that the crowbar was used in a way that met the criteria of a deadly weapon. We conclude that the Court of Appeals correctly found that the reference to the crowbar as a deadly weapon was likely a judicial comment because the jury need not consider whether the State proved that its use caused it to be qualified as a deadly weapon.

Levy at 721-22. Conversely, instructing the jury that a revolver is a deadly weapon is not error because a revolver is a firearm and, therefore, a per se deadly weapon.

In Levy, the Court spent considerable time on the issue of whether the various comments on the evidence were prejudicial or harmless. But the Court did not find it necessary to determine whether the improper comment that a crowbar is a deadly weapon is prejudicial because the jury in a special verdict determined that the defendant did not possess the crowbar.

A vehicle is not a per se deadly weapon. Therefore, the jury must review the circumstances under which it was used. Whether it is an impermissible comment on the evidence to instruct a jury that a vehicle is a deadly weapon appears to be an issue of first impression in Washington. The danger is that the jury will determine that a vehicle is a per se deadly weapon, rather than a case specific deadly weapon. Just as the court erred by instructing the jury that a crowbar is a deadly weapon in Levy, it was also error to instruct the jury that a vehicle is a deadly weapon.

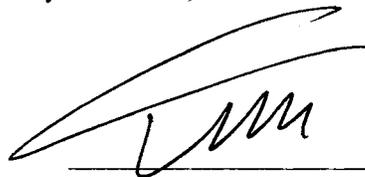
The next issue is whether the error was harmless. The fundamental issue in this case was Mr. Stewart's intent. The State's theory was that Mr. Stewart was angry with his girlfriend and, seeing her standing in the front yard, drove his vehicle onto the yard with the intent of either hitting her with the vehicle or creating apprehension and fear of bodily injury with the vehicle. On the other hand, Mr. Stewart's theory was that his intent was to damage property, first the vases, then Ms. Pribbenow's car

window, and finally the bush in the front yard. If believed, the jury could conclude that the manner in which the vehicle was used was not readily capable of causing death or substantial bodily harm. The error in instructing the jury that the vehicle was a deadly weapon was not harmless beyond a reasonable doubt and reversal is required. State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006). See also State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), reversed in part, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), modified, 163 Wn.2d 428, 439, 180 P.3d 1276 (2008).

#### D. Conclusion

This Court should reverse and remand for a new trial the conviction for second degree assault.

DATED this 22<sup>nd</sup> day of March, 2011.



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Thomas E. Weaver, WSBA #22488  
Attorney for Defendant

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

STATE OF WASHINGTON, ) Case No.: 10-1-00557-7  
Respondent, ) Court of Appeals No.: 41486-4-II  
vs. ) AFFIDAVIT OF SERVICE  
THOMAS J. STEWART, )  
Defendant. )

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,  
and competent to be a witness.

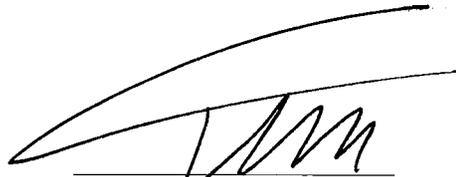
On March 22, 2011, I sent an original and a copy, postage prepaid, of the BRIEF OF  
APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite  
300, Tacoma, WA 98402.

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1 On March 22, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
2 the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-  
3 4683.

4 On March 22, 2011, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
5 LEGAL MAIL, Mr. Thomas J. Stewart, DOC #718508, Washington State Penitentiary, 1313  
6 North 13<sup>th</sup> Avenue, Walla Walla, WA 99362.

7  
8 Dated this 22<sup>nd</sup> day of March, 2011.



9  
10 Thomas E. Weaver  
11 WSBA #22488  
12 Attorney for Defendant

13  
14 SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of March, 2011.



15 Christy A. McAdoo  
16 NOTARY PUBLIC in and for  
17 the State of Washington.  
18 My commission expires: 07/31/2014

