

NO. 41486-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS STEWART,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00557-7

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 3, 2011, Port Orchard, WA 
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUE

Whether Stewart's claim that the trial court commented on the evidence is unpreserved where Stewart told the court the instruction was correct and should be given, is without merit where the trial court properly informed the jury that a motor vehicle may be a deadly weapon depending on the circumstances of its use, and would in any event be harmless where Stewart informed the jury that the vehicle would have undoubtedly been a deadly weapon if he had actually assaulted the victim?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Thomas Stewart was charged by information filed in Kitsap County Superior Court with second-degree assault, fourth-degree assault, and third-degree malicious mischief, all with domestic violence special allegations. CP 12. The information charged the use of a deadly weapon as an element of second-degree assault, but not for purposes of a sentencing enhancement. *Id.* A jury found him guilty as charged on all counts. CP 52-56.

B. FACTS

Thomas Stewart was convicted of malicious mischief for smashing out the window of his girlfriend's car, fourth degree assault for pushing her into a bathtub and second-degree assault for attempting to run her down with his car.

At trial it came out that Bremerton police officer Daniel Trudeau arrived at the scene and found Anna Pribbenow was sitting on the front steps, crying. RP 19-20. There was redness and markings around her neck and upper body. RP 19. There was a mark on her arm consistent with it having been grabbed. RP 19. Her right eye socket was scratched and bruised. RP 19. The jury was shown pictures of the bruising and marks. RP 19-21. (Exh. 3-5) The marks were very fresh. RP 22.

Officer Greenhill observed vehicle marks on the grass that led up to the front of the house, along with a bush that was flattened and uprooted. RP 25. It appeared to have been run over and dragged from the ground by a vehicle. RP 25. The tire marks came within a few feet of the front door. RP 25. The jury was shown several views of the front yard, including the tire marks and the uprooted bush. RP 26-27. Both the victim and a witness told him that the vehicle backed out of the driveway at a high rate of speed and took off again at a high rate of speed going through the bush and through the grass into the victim's path, causing the victim to jump out of the way. RP 28. Pribbenow said she was standing between where the tire marks on the lawn when Stewart drove onto it. RP 31. Greenhill also photographed Pribbenow's car, which had a window broken out of it. RP 29.

Greenhill subsequently spoke to Stewart at a gas station where he had been detained by the State Patrol. RP 29-30. Stewart admitted to running

over the bush and breaking the window in Pribbenow's car. RP 30.

Ronald Gingrey lived across the street from Pribbenow. RP 34. Gingrey had met Pribbenow a few weeks to a month before the incident. RP 36. He did not know Stewart. RP 37. He was unaware of anything going on before he heard the car. RP 37.

He heard a car backfiring, so he went outside to see what was going on. RP 34. He saw a car back out of her driveway, fast, burning its tires. RP 34. It stopped and then went forward, spinning its tires, and ran over a bush in the yard and cut across the grass toward the front steps of the house. RP 34. Pribbenow was standing about two feet from the steps, talking on her cell phone. RP 35. The car veered to the right and back across the lawn and took off. RP 35. If she had not jumped up onto the stairs he would have hit her. RP 35. Pribbenow was stationary the whole time before jumping. RP 37.

Pribbenow explained that she and Stewart had met about a year before the incident. RP 43. They had begun dating about five months earlier. RP 44. Stewart was staying at her house. RP 44.

The day of the assaults, Stewart woke her up and pulled her into the bathroom and pushed her into the shower. RP 44-45. He was angry because she asked him why her second cell phone was out. RP 51. She ended up laying in the tub with her feet hanging out. RP 45. He turned the water on.

RP 45. She was clothed at the time. RP 51. She reached up and turned it off. RP 45. She did not have the marks on her face and neck before the bathtub incident. RP 50.

Eventually he took her car and left. RP 46. Several hours later, he returned. RP 46. She was in the living room talking to a friend on the phone. RP 46.

She looked out the window and saw that he was changing the battery in his car. RP 46. He looked up and saw her and headed to the back door. RP 46. Pribbenow went out the front door and called 911. RP 45.

Stewart came out the front door and yelled at her. RP 47. She told him that she was talking to 911, and stepped off the porch into the front yard. RP 48, 55. He went back in and she heard glass breaking. RP 47. She later realized that he had also broken her phone and the back window of her car. RP 49. It cost her \$255.00 to have it fixed. RP 49.

After breaking the window, he jumped into his car and backed out, and then drove back onto the yard. RP 47. She was about five feet from the porch when he came onto the yard. RP 47. She jumped onto the porch when he came at her. RP 47. She felt like she needed to get out of the way or she would have been hit. RP 48. She had not moved from where she was in the yard, until the car came at her. RP 55.

Stewart, who had prior convictions for stealing a bread truck and a forklift, testified at trial and denied having been physically rough with Pribbenow. RP 61, 78. He asserted they had consensual sex in the shower after her son left. RP 61. He supposed it was possible Pribbenow could have gotten the marks on her at that time. RP 62.

They subsequently had an argument about her not giving him messages left on a cell phone that belonged to her. RP 63. She was upset because it was the only phone she had that fully worked because he previously had broken the display on her other phone by throwing it. RP 65. The argument escalated and she got “pissy” and bounced on the couch cushion and fell to the ground when he “deflected” her. RP 63-64.

She was subsequently cleaning up the water around the shower and he told her to just take a shower to cool off. RP 66. Then he turned on the cold water and she slipped and fell in the tub. RP 66. She calmed down and just stared at him with a blank stare. RP 66.

Then her son hit him in the side and accused him of pushing his mother. RP 67. The son said he was going to call the police. RP 67. The boy left with his girlfriend. RP 67.

Stewart left to get a battery out of his other car. RP 68. After a few hours he came back. RP 68. He was planning on installing the battery and

then leaving. RP 69.

Pribbenow came out while he was working on the car and then went back inside. RP 70. When he came in she was talking to the police, which “pissed [him] off.” RP 70. Then she walked out of the house and yelled “oh my god” to “show off” to the neighbor across the street, Gingrey. RP 70.

Stewart went out through the kitchen, and broke some vases on the way. RP 71. Then he took a pair of pliers and broke the window in her car as well. RP 71. He was “pissed” because she called the police:

It was – it was on now. It was like “boom, boom, boom;” just a breaking streak, really. I like doing it to tell you the truth.

RP 72.

When he backed his car out Pribbenow was standing in the flower bed. RP 75. Then he went forward with the intent to “[k]ill the bush.” It came to him as he backed out:

I decided to get that one when because when you are backing out of the driveway when you are looking, “boom.” It is perfect right there. You can’t see a fucking thing on the other side –

RP 77. After taking out the bush, he spun his tires “and fucking took off for the porch.” Pribbenow ran. RP 77. Then he took off, shouting, “Have a nice fucking life. Go fuck yourself.” RP 77. He did not intend to run her over, because he loved her. RP 78. He only broke things because “it’s not unusual

for [him] to break things when [he was] pissed.” RP 78.

III. ARGUMENT

STEWART’S CLAIM THAT THE TRIAL COURT COMMENTED ON THE EVIDENCE IS UNPRESERVED WHERE STEWART TOLD THE COURT THE INSTRUCTION WAS CORRECT AND SHOULD BE GIVEN, IS WITHOUT MERIT WHERE THE TRIAL COURT PROPERLY INFORMED THE JURY THAT A MOTOR VEHICLE MAY BE A DEADLY WEAPON DEPENDING ON THE CIRCUMSTANCES OF ITS USE, AND WOULD IN ANY EVENT BE HARMLESS WHERE STEWART INFORMED THE JURY THAT THE VEHICLE WOULD HAVE UNDOUBTEDLY BEEN A DEADLY WEAPON IF HE HAD ACTUALLY ASSAULTED THE VICTIM.

Stewart argues that the trial court commented on the evidence by instructing the jury that a motor vehicle is per se a deadly weapon. This claim is without merit because Stewart endorsed the instruction in question, because the contention is not supported by the record and because any error would be completely harmless.

The instruction of which Stewart complains read as follows:

Deadly weapon means any 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 35. Stewart did not object to this instruction; indeed, he endorsed it: “I think they are all accurate and should be given.” RP 83.

The Supreme Court has held that a party may not request an instruction and later complain on appeal that the requested instruction was given. In such circumstances any error was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Because Stewart specifically informed the trial court that all the proposed jury instructions were accurate and should be given, he may not now claim reversible error.

Even if the issue were properly before the Court, Stewart's claim is unsupported by the record. The trial court did not instruct the jury that a vehicle is per se a deadly weapon. To the contrary, the instruction informed the jurors that a vehicle *could be* a deadly weapon *if* "under the circumstances in which it [was] used," it was "readily capable of causing death or substantial bodily harm." The language came directly from WPIC 2.06.01, which in turn directly tracks the definition of deadly weapon set forth at RCW 9A.04.110(6).

More importantly, this Court has specifically rejected this very claim:

Winings also contends that the trial court improperly commented on the evidence. Specifically, he argues that by instructing the jury regarding the definition of "deadly weapon" pursuant to RCW 9A.04.110(6) in instruction 7 ... the trial court effectively "comment[ed] on the evidence by suggesting that the sword here was a per se deadly weapon, regardless of its use." ...

Here, the court properly instructed the jury as to the

meaning of “deadly weapon” for purposes of determining whether Winings committed second degree assault. The instruction clearly provides, “[d]eadly weapon means any weapon ... *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 injury.*” And this instruction followed the court's instructions regarding the elements of second degree assault and the three recognized definitions of assault. ... Nothing in the language of these instructions suggests that the jury should find that the sword was a deadly weapon per se for purposes of determining guilt.

State v. Winings, 126 Wn. App. 75, ¶¶ 24, 26, 107 P.3d 141 (2005) (emphasis the Court’s). Curiously, Stewart relies on *Winings*. Nevertheless, that case clearly holds that the precise instruction given in this case was a correct statement of the law and not a comment on the evidence. This claim should be rejected.

Finally even if error could be somehow assumed, it would be harmless. The Supreme Court has held that judicial comments are not structural errors or prejudicial per se; that is, prejudicial without further analysis. Instead, it has held “that a judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” *State v. Levy*, 156 Wn.2d 709, ¶ 32, 132 P.3d 1076 (2006).

Here, it should be first noted that the trial court specifically informed the jury that it was not making any comments on the evidence: “If it appears

to you that I have indicated in any way my personal opinion concerning any evidence, you must disregard this entirely.” RP 11.

More importantly, Stewart himself argued in closing only that no assault occurred because he did not intend to harm or frighten Pribbenow. RP 106-09. As part of that argument he specifically noted that “deadly weapon” depended upon the manner of use, but conceded that if an assault had occurred, then the vehicle would have been a deadly weapon:

[T]he defense would concede that within the definition of deadly weapon, a vehicle is mentioned as a potential deadly weapon. And then you have to look at whether or not under the circumstances, the way that weapon -- vehicle in this case was used, was that it was capable of causing, you know, injury, serious injury, and this – I would concede that the manner in which the vehicle was being operated that if there was, in fact, an assault.

RP 106.

Finally, even without that concession, there is no possibility that the vehicle could not have been found to have been a deadly weapon. Both the victim and a disinterested witness testified that Stewart drove the car directly at her at a high rate of speed, completely uprooting a bush on the way. Even Stewart testified that he intended to “kill the bush.” Any error would be harmless.

IV. CONCLUSION

For the foregoing reasons, Stewart’s conviction and sentence should

be affirmed.

DATED June 3, 2011.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'R D Hauge', written over a horizontal line.

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