

NO. 43188-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FRED C. DURGELOH,

Appellant.

BRIEF OF RESPONDENT

**JAMES B. SMITH
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Deputy Prosecutor
for Respondent**

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I. PROCEDURAL HISTORY

The appellant was charged by amended information with two count of assault in the second degree, two counts of felony harassment, and unlawful possession of a firearm in the second degree. The State alleged the appellant was armed with a firearm during the commission of the assaults and harassments. CP 23-25. These charges stemmed from an incident that occurred on July 11th, 2009, in rural Cowlitz County when the police were summoned to the appellant’s residence and he threatened them with a pistol.

The appellant proceeded to jury trial on July 26, 2011. The jury returned guilty verdicts for all charges against the appellant, as well as four special verdicts finding he was armed with a firearm. The trial court subsequently sentenced the appellant to a standard range sentence of one hundred twenty months in prison. The instant appeal timely followed.

II. STATEMENT OF FACTS

The State generally agrees with the facts as recited by the appellant. Where appropriate, the State’s brief cites to additional facts in the record.

III. ISSUES PRESENTED

1. Did the trial court err by accepting the appellant’s stipulation that he had previously been convicted of a crime?

2. Did the trial court err by refusing to instruct the jury on unlawful display of a weapon as a lesser included offense?
3. Did the trial court sentence the appellant in excess of the statutory maximum?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.

V. ARGUMENT

I. The Appellant's Stipulation To A Prior Conviction Was Proper.

The appellant argues the record fails to establish a sufficient basis for his stipulation that he had previously been convicted of crime, the predicate offense for the charge of unlawful possession of a firearm. However, the appellant's argument applies an incorrect legal standard, and is without basis in law or the facts of this case. As such, this Court should reject this claim.

At trial, the appellant and his attorney entered into a stipulation of fact with the State. The appellant agreed that he had previously been convicted of the crime of Violation of a Protection or No-Contact order-Domestic violence, the predicate offense for count V. The appellant personally signed this stipulation, as did his trial counsel. CP 49. The trial

court also engaged the appellant in a colloquy, in which he stated that he did not necessarily remember this conviction, but agreed the stipulation was accurate. RP 216. Certified copies of the judgment and sentence and statement on plea of guilty for this prior conviction were also admitted into evidence. RP 218-219, 223. Subsequently, the appellant moved to dismiss the unlawful possession of a firearm after the State rested, arguing there was insufficient notice to the appellant that he could not possess a firearm. RP 224-228.

The appellant's brief analogizes the entry of a stipulation of fact to waiving the right to a jury trial or entering a guilty plea. However, the appellant either ignores or is unaware of the case-law that directly refutes his argument. In State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985), the Washington Supreme Court explicitly rejected an argument that stipulating to facts was the equivalent of entering a guilty plea.

Similarly, in State v. Humphries, 170 Wn.App. 777, 285 P.3d 917 (2012), the defendant stipulated that he had previously been convicted of a "serious offense" for a charge of unlawful possession of a firearm in the first degree. The defendant had first objected to the stipulation proposed by his attorney, but ultimately agreed and signed the stipulation. On appeal, the defendant argued the trial court should have engaged in an extensive colloquy to ensure he was knowingly, voluntarily, and

intelligently entering the stipulation. The Court of Appeals held otherwise, finding that a stipulation to a predicate offense did not require an in-depth colloquy or amount to a guilty plea. Humphries, 170 Wn.App. at 792. The court noted that such a stipulation is only an admission to what witnesses would have testified to, preserves the right to appeal, and for a jury to decide the defendant's guilt. Id. 791-792. See also In re Detention of Moore, 167 Wn.2d 113, 120-121, 216 P.3d 1015 (2009) (Due process did not require guilty plea like colloquy for factual stipulations).

Here, the appellant did not stipulate to all the elements of the offense, but only to the predicate crime. There is no requirement in this situation that the trial court engage in an exhaustive colloquy of the appellant, particularly where he has personally signed the stipulation after conferring with counsel. Instead, the record reflects that this was simply a factual stipulation to what the State's witnesses would testify to. The appellant did not forfeit or waive any constitutional rights by entering this stipulation. In fact, the appellant attempted to dismiss this count at trial based on an alleged failure of proof by the State, which belies his argument on appeal. RP 224-228.

Finally, even if the stipulation was somehow improper, despite the wealth of authority to the contrary, any error was harmless. The jury received as exhibits certified court documents establishing the existence of

the predicate conviction, of which there was no dispute. Even absent the stipulation, the appellant would have been convicted of Count V. Humphries, 170 Wn.App. at 796 (Even if stipulation was in error, admission of conviction paperwork would have ensured the defendant's conviction).

II. The Trial Court Correctly Denied the Appellant's Request for a Lesser Included Offense of Unlawful Display of a Weapon.

The appellant argues the trial court erred by refusing his request to instruct the jury on unlawful display of a firearm, which he proposed as a lesser included offense to assault in the second degree. However, as a statutory exemption created a bar to the appellant's conviction for this crime, the trial court correctly declined the appellant's request.

A defendant is entitled to an instruction on a lesser included offense if the two-prong test articulated in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), is satisfied. Under the legal prong of the test, "each of the elements of the lesser offense must be a necessary element of the offense charged." State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting Workman, 90 Wn.2d at 447-48.) Under the factual prong, evidence in the case must support an inference that solely the lesser crime was committed to the exclusion of the charged

offense. Fernandez-Medina, 141 Wn.2d at 455. This factual showing must be “more particularized than that required for other jury instructions.” Id.

Where a trial court refuses to give an instruction based on the facts of the case, appellate review is for an abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996); State v. Hunter, 152 Wn.App. 30, 43, 216 P.3d 421 (2009). An abuse of discretion occurs only when the trial court’s decision is “manifestly unreasonable or based upon untenable grounds or reasons.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The standard of review has been described in detail as:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775, 784 (1971); see also State v. Batten, 16 Wn.App. 313, 314, 556 P.2d 551 (1976). In short, discretion is abused only where it can be said no reasonable man would take the view adopted by the trial court. State v. Derefield, 5 Wn.App. 798, 799-800, 491 P.2d 694 (1971).

Here, the State agrees with the appellant that unlawful display of a firearm met the legal prong of the Workman test for a lesser included offense of assault in the second degree. See State v. Berlin, 133 Wn.2d 541, 550-51, 947 P.2d 700 (1997). However, this alone is not sufficient, as the specific facts of the case must support an inference that *only* the proposed lesser crime occurred. Indeed, to satisfy the factual prong, there must be “substantial evidence that affirmatively indicates” the lesser crime was committed to the exclusion of the greater offense. Berlin, 133 Wn.2d at 541. “It is not enough that the jury might simply disbelieve the State’s evidence. Instead, some evidence must be presented which affirmatively established the defendant’s theory on the lesser included offense before an instruction will be given.” State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

Here, the trial court ruled that, although the legal prong of the Workman test was satisfied, the evidence did not affirmatively support the conclusion that only the proposed lesser offense of unlawful display had been committed to the exclusion of assault in the second degree. Thus, the trial court ruled that, based on its review of the evidence, the factual prong of Workman was not satisfied and refused to instruct the jury on manslaughter as a lesser included offense. RP 272-277. As the trial court’s decision was predicated on its assessment of the facts at trial,

the standard of review is for an abuse of discretion. Hunter, 152 Wn.App. at 43.

The trial court's refusal to instruct the jury on unlawful display of a weapon as a lesser included was based on RCW 9.41.270(3)(a). This subsection of the unlawful display statute exempts from criminal liability "any act committed by a person while in his or her place of abode or fixed place of business." In State v. Haley, 35 Wn.App. 96, 665 P.2d 1375 (1983), this statute was held to bar prosecution for unlawful display where the act occurred on a deck attached to the rear of a residence. The court held the deck "was an extension of the dwelling and therefore a part of the abode." Haley, 35 Wn.App. at 98. In that case, the deck in question was attached to a home in a rural area and overlooked a river and wooded area. Id. In contrast, the "place of abode" exemption was held to not apply in State v. Smith, 118 Wn.App. 480, 93 P.3d 877 (2003). There, the acts occurred in the defendant's back yard in an urban area, with the yard directly adjacent to a church parking lot. Smith, 118 Wn.App. at 482.

The court held, on these facts, that the yard in question was exposed to the public, unlike the deck in Haley, and there did not fall within the place of abode exception. Id. 118 Wn.App. at 484-485.

In the instant case, the appellant's deck was attached to the rear of his mobile home. The home was located about one hundred yards from

the roadway, and the deck faced towards a heavily wooded area. The area where the residence was located was very rural. RP 156, 274-275. Based on the facts, the trial court found that the “place of abode” exception in RCW 9.41.270(3)(a) applied, and that unlawful display was not available as a lesser included offense. RP 277. Thus, the factual prong of the Workman test was not satisfied. Given these facts, it cannot be said that the trial court’s refusal to instruct the jury was so “manifestly unreasonable” as to constitute an abuse of discretion. Stenson, 132 Wn.2d at 701. This Court should uphold the decision of the trial court that unlawful display was not a lesser offense based on the facts of this case.

Finally, even if this Court should find the trial court erred, any error was harmless. Had the jury been instructed on unlawful display as a lesser included offense, it would have also been instructed to only consider that offense if not satisfied the appellant was guilty of assault in the second degree, or being able to agree on a verdict for that offense. As the jury returned a guilty verdict for assault in the second degree, the jury was clearly convinced of the appellant’s guilt for that charge, and would not have reached the lesser offense in any case. See State v. Grier, 171 Wn.2d 17, 41-44, 246 P.3d 1260 (2011).

III. The Trial Court Did Not Sentence the Appellant in Excess of the Statutory Maximum for Assault in the Second Degree.

The appellant argues the trial court sentenced him a term in excess of the statutory maximum for counts I and II, assault in the second degree. The appellant claims he was sentenced to 120 months on each count, followed by 18 months of community custody.¹ However, this claim is simply incorrect. In truth, the appellant was sentenced to 58 months on count I and II, based on a standard range sentence of 22 months plus the mandatory 36 month firearm enhancement, to be followed by 18 months of community custody. CP 107, 110. The actual total months that the appellant must serve is 120 months, as each of the four firearm enhancements must be served consecutively. See RCW 9.94A.533(3)(e). Notwithstanding this fact, his sentence for counts I and II clearly does not exceed the statutory maximum of 120 months. Thus, this argument is wholly without merit, and should be rejected by this Court.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal. The appellant has failed to show any

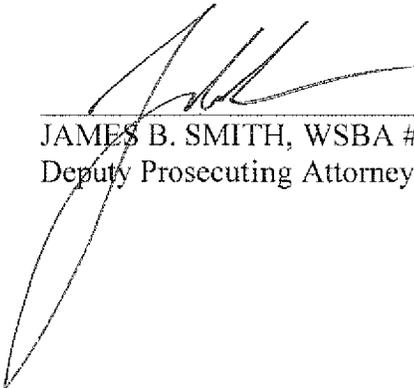
¹ Brief of appellant at 23.

error justifying relief. The State asks this Court to affirm the judgment and sentence in this cause.

Respectfully submitted this 12th day of February, 2013.

Susan I. Baur
Prosecuting Attorney
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By:



JAMES B. SMITH, WSBA #35537
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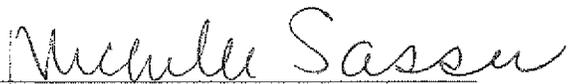
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 12th, 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 12, 2013 - 4:31 PM

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