

NO. 31937-7-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JOSE AGUILAR GOMEZ,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of making a false or misleading statement to a public servant.

2. The trial court erred by refusing to give the jury a lesser included degree instruction on fourth degree assault.

## ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did Jose Aguilar Gomez's handing of a document, which clearly stated "**Not valid for identification,**" amount to a material statement?

2. Is fourth degree assault a lesser degree of third degree assault under RCW 9A.36.031(1)(g)?

## STATEMENT OF CASE

Trooper Kottong of the Washington State Patrol stopped Mr. Aguilar Gomez on June 26, 2013 on SR-243. The stop was for speed. (Bartunek RP 84, ll. 5-6; RP 86, ll. 11-18; RP 87, l. 6; RP 89, ll. 3-16)

The trooper also heard Mr. Aguilar Gomez's pickup cross the centerline rumble strips. He pursued the pickup. Upon activating the patrol

car emergency equipment the pickup pulled to the shoulder of the road. (Bartunek RP 88, ll. 9-21; RP 92, ll. 6-16)

When Trooper Kottong contacted Mr. Aguilar Gomez he discovered that there was a language barrier. The trooper only has a minimum repertoire of Spanish words. He was able to ask for the driver's license, registration and insurance in Spanish. (Bartunek RP 93, ll. 16-20; RP 96, ll. 5-8; RP 118, ll. 14-22)

The driver's license had the name of Juan Aguilar Gomez on it. Mr. Aguilar Gomez's photo was on the license. The license clearly states "**Not valid for identification**". (Bartunek RP 94, ll. 3-10; ll. 14-17)

The trooper attempted to arrest Mr. Aguilar Gomez for driving while under the influence of intoxicating liquor. Mr. Aguilar Gomez pulled away as the trooper grabbed his right hand. The trooper lost his handcuffs on the ground. (Bartunek RP 96, ll. 21-25)

The trooper tried to use his taser but it failed to activate. Mr. Aguilar Gomez then fled. The trooper pursued him into a field where he grabbed Mr. Aguilar Gomez. They both fell to the ground with the trooper on top. (Bartunek RP 97, ll. 2-17; l. 25; RP 98, ll. 3-17)

A struggle ensued. The trooper had difficulty subduing Mr. Aguilar Gomez. The trooper used increased force. Mr. Aguilar Gomez maintained a blank stare during the entire struggle. He eventually grabbed the

trooper's crotch. The trooper then hit him several times in the face until he let go. (Bartunek RP 99, l. 21 to RP 100, l. 18; RP 103, ll. 17-20; RP 104, ll. 6-16; RP 104, l. 23 to RP 105, l. 7)

Trevor Waters, a local resident, stopped to see if the trooper needed help. Officer Stump of the Mattawa Police Department arrived. He also noted the language barrier. (Bartunek RP 154, ll. 15-16; RP 157, ll. 3-4; RP 199, ll. 10-15)

Sergeant Smith of the Washington State Patrol contacted Mr. Aguilar Gomez at the hospital in Ephrata. Mr. Aguilar Gomez pointed to his taser and made a "ZZZ" sound. Mr. Aguilar Gomez also said "I'm sorry" while pointing at the taser. Sergeant Smith interpreted this as meaning that Mr. Aguilar Gomez was afraid of it. (Bartunek RP 160, ll. 13-15; RP 174, ll. 2-13; RP 189, ll. 17-19; RP 190, ll. 3-5)

An Information was filed on June 28, 2013 charging Mr. Aguilar Gomez with third degree assault of a law enforcement officer, driving while under the influence of intoxicating liquor, and making a false or misleading statement to a public servant. (CP 1)

On August 26, 2013 a motion was filed to dismiss Count III. The motion was denied. Defense counsel renewed the motion at the end of the State's case. (CP 41; Bartunek RP 218, ll. 14-20; Steinmetz RP 18, ll. 7-11; ll. 20-23)

The trial court declined to give a lesser degree instruction on fourth degree assault. (Bartunek RP 228, ll. 5-14)

The jury found Mr. Aguilar Gomez guilty of third degree assault and making a false or misleading statement to a public servant. (CP 162; CP 164)

Judgment and Sentence was entered on September 10, 2013. Mr. Aguilar Gomez filed his Notice of Appeal the same date. (CP 166; CP 185)

### **SUMMARY OF ARGUMENT**

Handing a document, which states it is “**not valid for identification,**” to a law enforcement officer does not constitute a violation of RCW 9A.76.175.

Fourth degree assault is a lesser degree offense of RCW 9A.36.031(1)(g). The trial court’s refusal to give a lesser included degree instruction constitutes reversible error.

### **ARGUMENT**

#### **I. RCW 9A.76.175**

RCW 9A.76.175 states:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. **“Material statement” means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.**

(Emphasis supplied.)

The trial court instructed the jury on the meaning of “material statement.” Instruction 19 states: “A material statement is a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” (CP 159)

The State failed to prove, beyond a reasonable doubt, that a material statement was made.

No oral statement was made.

A significant question exists as to whether or not a written statement was made.

“Written” is defined, in part, as:

1. to trace or form (characters, letters, words, etc.) on the surface of some material, as with a pen, pencil, or other instrument or means; inscribe ....
2. to express or communicate in writing; give a written account of.
3. ...
4. to execute or produce by setting down words, figures, etc. ....
5. to compose and produce in words or characters duly set down ....

**WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)**

Mr. Aguilar Gomez handed a document to the trooper. The document clearly stated "**Not valid for identification**".

The State did not present any testimony concerning who prepared the document.

The State did not present any testimony that any portion of the document contained writing by Mr. Aguilar Gomez.

Mr. Aguilar Gomez contends that the document which was produced was not "material." Furthermore, it was never admitted into evidence.

**Query:** If a document states "**Not valid for identification,**" then how is it "material?"

**Query:** Would a public servant reasonably rely upon such a document for purposes of identification?

Mr. Aguilar Gomez asserts the answer to both questions is a definite "No."

**II. LESSER DEGREE OFFENSE**

RCW 9A.36.031(1) provides, in part:

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault ....

There is no dispute that Trooper Kottong is a law enforcement officer.

There is no dispute that he was performing his official duties at the time of the assault.

The question remains whether or not assault in the fourth degree is a lesser degree offense of RCW 9A.36.031(1)(g).

A lesser included offense exists when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime.

*State v. Bishop*, 90 Wn.2d 185, 191, 580 P.2d 259 (1978).

*State v. Pelkey*, 109 Wn.2d 484, 488, 745 P.2d 854 (1987).

Fourth degree assault was formerly known as simple assault.

Since the term "assault" is not statutorily defined, Washington courts have applied the common law definition of the crime. *See: State v. Aumick*, 126 Wn.2d 422, 426 n. 12, 894 P.2d 1325 (1995).

Instruction 11 states:

An assault is an intentional touching or striking of another person, with unlawful force, 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.

(CP 151)

Instruction No. 11 clearly defines one (1) means of committing an assault. It is essentially the definition of simple assault/fourth degree assault.

RCW 10.61.003 states, in part:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto ....

Mr. Aguilar Gomez contends that the rule set forth in *State v. Young*, 22 Wash. 273, 276 (1900) is still applicable today:

Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant is not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. **If there is even the slightest evidence that the defendant may have com-**

**mitted the degree of the offense inferior to  
and included in the one charged, the law  
of such inferior degree ought to be given.**

(Emphasis supplied.)

### **CONCLUSION**

Since the State failed to prove, beyond a reasonable doubt, that the document handed to the trooper was “material,” Mr. Aguilar Gomez’s conviction for making a false or misleading statement to a public servant must be dismissed.

The trial court’s failure to give an instruction on fourth degree assault is reversible error. Mr. Aguilar Gomez is entitled to a new trial on third degree assault.

DATED this 21<sup>st</sup> day of January, 2014.

Respectfully submitted,

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**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	GRANT COUNTY
Plaintiff,	)	NO. 13 1 00397 2
Respondent,	)	
	)	<b>CERTIFICATE OF SERVICE</b>
v.	)	
	)	
JOSE AGUILAR GOMEZ,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 21<sup>st</sup> day of January, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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