IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARCY LYNN JACOBS, Appellant.	No. 37838-8-II UNPUBLISHED OPINION

Bridgewater, J.— Marcy Lynn Jacobs appeals her Lewis County conviction of third degree assault. We affirm.[1]

FACTS

Officer Sutherland responded to a 911 call from Jacobs's daughter-in-law, Sheila Keene, who reported that she had "almost been ran over." Report of Proceedings (RP) May 21, 2008 at

[1] A commissioner of this court considered the matter pursuant to RAP 18.14 and referred it to a panel of judges.

18. When the officer arrived at the residence, Jacobs, Keene, Keene's husband James Field, and their infant son were present. Keene was very agitated and was pacing around the room. However, she told Officer Sutherland that they did not need her.

Sutherland testified that she entered the residence nevertheless, because she felt she had a duty to make sure no one needed her assistance. While she was trying to talk to Keene, Keene picked up a small dog that was barking and threw it against a wall. When she grabbed for a second dog, the officer put her hand on Keene's shoulder to restrain her. Keene swung at Sutherland, and a scuffle ensued. Sutherland got Keene face-down on the floor, but before she could handcuff Keene, she was punched and pushed by Jacobs and Field and lost control of Keene. Sutherland called for backup. Jacobs also called 911, reporting that there was an officer out of control.

Washington State Patrol Trooper Jason Ashley responded to Sutherland's call for assistance. He testified that when he got there, it was very chaotic. Officer Sutherland had Keene down on the floor, and Jacobs was still on the phone, screaming. He helped Sutherland handcuff Keene and put her in the patrol car. He left shortly thereafter, when the Morton police chief and a deputy sheriff arrived.

Jacobs testified that Keene had not thrown the dog or made any aggressive moves towards Sutherland, and that the officer had overreacted. She agreed that Keene may have kicked Sutherland while Sutherland was trying to handcuff her, but denied that she or Field had used any force against the officer.

The jury convicted Jacobs as charged, and this appeal followed.

ANALYSIS

Rebecca Sutherland was a reserve officer. She testified that at the time of this incident, she was a full-time provisional officer, hoping to become a permanent, salaried officer. During cross examination, Jacobs's attorney asked her if she had been subject to any disciplinary action based on the incident at Keene's house. The State objected that it was "irrelevant and impermissible character evidence." The court sustained the objection. RP May 21, 2008 at 59. Jacobs contends that in so doing, the court impermissibly obstructed her right of confrontation.

The right to confront and cross examine adverse witnesses is guaranteed by the Sixth Amendment to the U.S. Constitution and Article 1, § 22 of the Washington Constitution. The right is not absolute, however. A trial court may within its sound discretion, deny cross examination if the evidence sought is vague, argumentative, or speculative. *State v. Darden,* 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). This proposed evidence was speculative, and defense counsel did not offer any proof that there had, in fact, been a disciplinary action. If the substance of the evidence sought to be admitted is not apparent, the proponent must provide an offer of proof. *See State v. Benn,* 161 Wn.2d 256, 268, 165 P.3d 1232 (2007), *cert. denied*, 128 S. Ct. 1071 (2008). The court did not abuse its discretion in sustaining the State's objection.

At that point, rather than making an offer of proof, defense counsel began questioning Officer Sutherland about the fact that she had not been offered full-time employment, querying whether that decision was related to her handling of this incident. There was no attempt by either the State or the court to limit this cross examination. Arguably, this was the "disciplinary action"

that defense counsel had in mind. RP May 21, 2008 at 59. In any case, this examination provided an adequate opportunity to show bias or a motivation to lie on the part of the officer.

Jacobs also contends that the court improperly limited her closing argument when it refused to let her argue that Officer Sutherland had lied to cover up her use of excessive force. We review decisions limiting the scope of closing argument for abuse of discretion, and we will find abuse only if no reasonable person would take the view adopted by the court. *State v. Frost,* 160 Wn.2d 765, 771, 161 P.3d 361 (2007), *cert. denied*, 128 S. Ct. 1070 (2008). Decisions limiting closing argument are subject to harmless error analysis. *Frost,* 160 Wn.2d at 781-82.

The court prohibited any reference to "excessive force" because there was no evidence to support it. RP May 21, 2008 at 111-12. It advised counsel that he could argue that Sutherland exaggerated or embellished things to justify her actions. Counsel made that argument, asking the jury to consider how a domestic violence investigation could turn into "mayhem, a melee," and asserting that if Sutherland had acted unreasonably, she might feel the need to make her actions look justified. RP May 21, 2008 at 113.

Counsel cannot argue facts that are not in evidence. *See Seattle v. Arensmeyer,* 6 Wn. App. 116, 121, 491 P.2d 1305 (1971). "Excessive force" is a term that has legal significance in that it can provide a defense to the charge at issue here. Used in that context, it connotes force that creates actual danger of serious injury. *See State v. Ross,* 71 Wn. App. 837, 842, 863 P.2d 102 (1993). Jacobs did not assert that defense and did not offer evidence to establish that Officer Sutherland used such force.

Jacobs did present evidence, if believed, that the officer was apprehensive when she

arrived at the residence and overreacted. She was not limited in making that argument, and it was sufficient to establish a motivation to lie or exaggerate. The court's ruling was not an abuse of discretion.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.