

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

**STATE OF WASHINGTON,**

**Appellant,**

**v.**

**RICHARD A. BOLING,**

**Respondent.**

**No. 28306-2-III**

**Division Three**

**UNPUBLISHED OPINION**

Kulik, C.J. — The State of Washington appeals an order vacating Richard Boling’s convictions for intimidating a witness and second degree assault, and granting Mr. Boling a new trial. The State concedes that Mr. Boling is entitled to a new trial on the intimidating a witness charge, but argues that Mr. Boling’s second degree assault conviction was entirely free from error. We disagree.

The court’s failure to properly instruct the jury on the elements of intimidating a witness resulted in an erroneous second degree assault conviction because the court’s elements instruction required the jury to find that Mr. Boling committed the assault with intent to commit intimidating a witness. Because we affirm the trial court’s

determination of instructional error requiring a new trial on both counts, we need not reach any other assertions of error raised by Mr. Boling.

#### FACTS

On February 1, 2008, Brett Baker and his girl friend, Sarah Nodine, went to the Pacific Express restaurant in Walla Walla, Washington, to have dinner. As the couple was eating, Richard Boling and several others entered the restaurant. Mr. Baker recognized Mr. Boling and another member of the group from a prior encounter in 2002 when Mr. Baker was threatened and accused of being a police informant.

Mr. Baker heard Mr. Boling and the other group members talking about him in what Mr. Baker perceived to be a threatening manner. Mr. Baker and Ms. Nodine left the restaurant. As the couple left, Ms. Nodine confronted Mr. Boling's group and demanded that they leave Mr. Baker alone.

Mr. Baker attempted to explain his involvement in the 2002 case to Mr. Boling. Mr. Boling and his group were not receptive to Ms. Nodine's demands or Mr. Baker's explanations. Several members of the group called Mr. Baker a "rat," a "narc," and a "snitch." Report of Proceedings (Sept. 16-17, 2008) at 71, 101, 123. Mr. Boling contradicted Mr. Baker's explanation of the events.

At some point, Mr. Boling punched Mr. Baker. Mr. Baker then fought with Chris

Leal, one of the people in Mr. Boling's group of friends. Four or five others came to Mr. Leal's aid, attacking Mr. Baker as he lay on the ground.

The State charged Mr. Boling by amended information with second degree assault and intimidating a witness. Specifically, the amended information alleged that Mr. Boling "did direct a threat to an individual who [Mr. Boling] knew was a former witness, to wit: BRETT BAKER, *because of the former witness' role in an official proceeding.*" Clerk's Papers (CP) at 12 (emphasis added).

Pursuant to defense counsel's request, the court provided the jury with an instruction regarding the lawful use of force. In pertinent part, instruction 8 states:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, in preventing, or attempting to prevent, an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP at 24. The court also presented the jury with the following "to convict" instruction for intimidating a witness:

To convict the defendant of the crime of Intimidating a Witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 1st day of February, 2008, the defendant directed a threat to BRETT BAKER, a person who the defendant knew was a former witness in an official proceeding;

(2) That the defendant directed the threat to BRETT BAKER by assaulting him; and

(3) That the acts occurred in Walla Walla County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 28. This instruction did not contain the “because of” language used in the amended information or the Washington jury instruction for intimidating a witness.

*See* RCW 9A.72.110; 11A Washington Practice: Washington Pattern Jury Instructions:

Criminal 115.51, at 434 (3d ed. 2008) (WPIC) (“To convict the defendant . . . (1) That on or about . . . the defendant directed a threat to a former witness *because of* the witness’s role in an official proceeding.”) (Emphasis added.)

During its deliberations, the jury sent the following question to the judge:

Are we to determine that [Mr. Boling’s] motive for hitting [Mr. Baker] was the previous witness’ testimony (statement), or just that 1) [Mr. Boling] hit [Mr. Baker], and 2) [Mr. Boling] knew that [Mr. Baker] was a witness[?]

To clarify, are we determining the causal (sp?) connection?

CP at 120. The court and the parties convened outside the presence of the jury to discuss an appropriate response. The court ultimately instructed the jury that “[m]otive is not an element for either charge. I cannot comment on the balance of your inquiry.” CP at 120.

Approximately an hour and one-half later, the jury submitted another question:

Are we required to correlate our verdicts for the two charges? [Second degree] assault [and] int[imidating a] witness. Are the two mutually inclusive?

CP at 122. The court and the parties drafted a response, but the jury announced that it had reached a verdict before the response could be returned. The jury found Mr. Boling guilty on both counts.

Mr. Boling moved for a new trial, alleging that the court's elements instruction for the intimidating a witness charge misstated the law and that Mr. Boling received ineffective assistance from his trial counsel.<sup>1</sup>

The trial court did not reach the ineffective assistance of counsel arguments. Instead, the court ruled that the "to convict" instruction for intimidating a witness was erroneous. On August 13, 2009, the court entered an order granting Mr. Boling a new trial. The State filed a timely notice of appeal on August 17, 2009.

#### ANALYSIS

The State seeks only a *partial* reversal of the order granting Mr. Boling a new trial. Specifically, the State asks this court to reinstate the second degree assault conviction and

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<sup>1</sup> Mr. Boling's motion also alleged that there had been juror misconduct, but Mr. Boling does not raise that issue on appeal.

remand for sentencing on that count alone. The State concedes that instruction 13 was flawed and does not seek reinstatement of the intimidating a witness conviction.

Furthermore, the State asserts that it will not retry Mr. Boling for intimidating a witness if this court remands for sentencing on the second degree assault conviction.

“An appellate court will not reverse an order granting or denying a new trial motion, except when the trial court has abused its discretion.” *State v. Crowell*, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). However, this principle is subject to the limitation that, when such an order is predicated upon rulings as to the law, no element of discretion is involved. *Worthington v. Caldwell*, 65 Wn.2d 269, 278, 396 P.2d 797 (1964) (quoting *Coleman v. George*, 62 Wn.2d 840, 841, 384 P.2d 871 (1963)). “A much stronger showing of an abuse of discretion ordinarily will be required to set aside an order granting a new trial.” *Crowell*, 92 Wn.2d at 145-46.

We conclude that remanding for sentencing on the second degree assault charge would be improper because the erroneous jury instruction may have tainted the jury’s verdict on that charge. The State charged Mr. Boling with second degree assault in violation of RCW 9A.36.021(1)(e). This charge required the State to prove that Mr. Boling committed an assault “[w]ith intent to commit a felony.” RCW 9A.36.021(1)(e). As the State acknowledged at trial, its theory of the case was that Mr. Boling committed

the assault with intent to commit the felony offense of intimidating a witness.

Accordingly, the court instructed the jury that, in order to convict Mr. Boling of second degree assault, it would be required to find that Mr. Boling committed an assault “with intent to commit intimidating a witness.” CP at 22. The court also instructed the jury that it could find Mr. Boling guilty of the lesser-included offense of fourth degree assault, for which no finding of felonious intent was required.

The record demonstrates that the second degree assault and intimidating a witness charges were closely related. The jury clearly understood that an important relationship did, in fact, exist between the two charges. During its deliberations, the jury asked the presiding judge whether it was “required to correlate [its] verdict for the two charges,” and whether the two charges were “mutually inclusive.” CP at 122. After conferring with the parties, the court drafted the following response: “The [second degree] assault charge requires a finding of intimidation of a witness in order to find the defendant guilty.” CP at 122. Before this response could be returned to the jury, however, the jury announced that it had reached a verdict.

As discussed above, the elements instruction for second degree assault listed “assault . . . committed with intent to commit intimidating a witness,” as an element of the offense. CP at 22. Although the elements instruction itself is legally sound,<sup>2</sup> there is

little support for the State’s argument that the correct legal definition of intimidating a witness was incorporated by reference into this instruction.

The State’s incorporation argument is unavailing for three reasons. First, the court’s second degree assault instruction does not expressly incorporate the correct legal definition found in instruction 12 by reference. To the extent that the instruction impliedly incorporates a definition of “intimidating a witness,” that definition is just as likely to be found in the erroneous instruction 13 as in the correct instruction 12. Second, the elements instruction references “intent to *commit* intimidating a witness.” CP at 22 (emphasis added). A reasonable juror would likely interpret the word “commit” as a reference to the *offense* of intimidating a witness (instruction 13) rather than the simple act of intimidation (instruction 12). Thus, a reasonable juror forced to choose between the two definitions would likely choose the erroneous definition set forth in the “to convict” instruction for the offense of intimidating a witness (instruction 13).

In sum, a reasonable juror would likely have concluded that the two charges were closely related. In light of the jury’s question regarding whether it was required to correlate its verdicts—and the substantial possibility that the jury relied upon the erroneous definition of “intimidating a witness” set forth in instruction 13 in concluding

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<sup>2</sup> See 11 WPIC 35.11, at 467.



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that the felonious intent element of the second degree assault charge had been satisfied—there is simply no way to verify that the second degree assault conviction was insulated from error. Accordingly, we decline to remand for sentencing on the second degree assault charge.

We affirm the court’s order granting Mr. Boling a new trial on both counts.

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

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.