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

STATE OF WASHINGTON,	)	No. 29928-7-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
KYLE J. STODDARD,	)	
Appellant.	)	

Korsmo, C.J. — Kyle Stoddard challenges his convictions for first and third degree assault, arguing that the evidence was insufficient on the greater charge and that all of the convictions were the product of misconduct in closing argument. We affirm.

FACTS

Mr. Stoddard was charged in Kittitas County Superior Court with one count of first degree assault and three counts of third degree assault after an incident in Ellensburg on January 29, 2011. Officer Ryan Potter of the Cle Elum Police Department was driving away from the Kittitas County Corrections Center when he observed a man and woman arguing outside the corrections center. He pulled over and parked his car, hoping that his

presence would calm the situation. It did not.[1]

The man, Kyle Stoddard, started walking toward the patrol car while continuing to argue loudly with the woman, Kendra Gibson. Officer Potter stepped out of his car and called out, "'hey, what's going on?'" Report of Proceedings (RP) at 44. Mr. Stoddard yelled back, "'fuck you, po po,'" while continuing his argument with Ms. Gibson. RP at 44. The officer told him to stop, but Mr. Stoddard put his hands on his chest and continued to yell obscenities. Ms. Gibson hugged Mr. Stoddard from behind and the officer called for backup, believing that the situation was escalating.

Mr. Stoddard threw off Ms. Gibson and pulled out and opened a pocket knife, telling the officer "'I am going to cut right through you, fucker.'" RP at 52. Officer Potter, who had his arm on Mr. Stoddard's shoulder, backed up five or six steps and pulled out his gun. Mr. Stoddard pursued Officer Potter and lunged toward him with the knife. Believing his life in danger, the officer started to pull the trigger when Ms. Gibson again grabbed Mr. Stoddard from behind. She yelled at Mr. Stoddard to stop, while he continued to threaten the officer. Officer Potter told him to drop the knife and get down on the ground.

[1] Much of the incident was video recorded and the recording played at trial.

Officer Jason Brunk of the Ellensburg Police Department arrived, and Mr. Stoddard threw the knife away. Officer Brunk attempted to handcuff Mr. Stoddard, who turned and spit at the officer. Officer Potter and Officer Brunk both tried to take Mr. Stoddard to the ground, but Mr. Stoddard lunged forward and the three men all fell to the ground. Both officers suffered injuries, but they succeeded in handcuffing Mr. Stoddard. Additional officers arrived and took control of the situation. Mr. Stoddard continued to yell threats at them and also spit in the face of Corrections Officer Derek Holmes. The discarded knife was recovered. It was a folding knife with a three-inch blade.

Mr. Stoddard was charged with first degree assault for the knife attack on Officer Potter and three counts of third degree assault for his scuffles with Officer Potter, Officer Brunk, and Officer Holmes. The case proceeded to a jury trial.

During closing argument, the prosecutor made several statements that went unchallenged. The jury ultimately acquitted Mr. Stoddard on the count of third degree assault against Officer Potter, but convicted him on the remaining three counts.[2] The court imposed concurrent standard range sentences, the greatest of which was a 207-month term on the first degree assault count.

[2] The jury was instructed on second degree assault as an inferior degree crime to the first degree assault charge. CP at 89-91 (instructions 12-14).

Mr. Stoddard then timely appealed to this court.

ANALYSIS

This appeal challenges the sufficiency of the evidence to support the first degree assault and two aspects of the prosecutor's closing argument. We will address each contention in turn.

Sufficiency of the Evidence

Mr. Stoddard argues that the evidence established that he committed, at most, only second degree assault and that this court should reduce his conviction to that lesser offense. While unsuccessful assaults such as this one often result in a lesser verdict, our task is to review this jury's verdict. A properly focused review of the evidence supports the jury's verdict.

Evidentiary sufficiency challenges are reviewed to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.* Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150

Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

As charged in this case, the State had to prove that Mr. Stoddard, with intent to inflict great bodily harm, assaulted Officer Potter with a deadly weapon. RCW 9A.36.011(1)(a); Clerk's Papers (CP) at 41. While admitting that the evidence would establish that he assaulted Officer Potter, Mr. Stoddard argues that proof was lacking that he used a deadly weapon or did so with the intent to inflict great bodily harm. Those two elements will be considered separately.

Deadly Weapon. Mr. Stoddard argues that the evidence does not establish that the knife was a deadly weapon. We disagree.

The jury was instructed that:

> Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is use[d], attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP at 88 (instruction 11). This instruction tracks RCW 9A.04.110(6) and 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 2.06.01, at 38 (3d ed. 2008). The jury was not instructed on the definition of "substantial bodily harm," but was told that "great bodily harm" meant bodily injury that carried with it "a probability of death" or caused permanent disfigurement or loss of body part or organ. CP at 87 (instruction

10).

First degree assault does not require proof of actual harm, but the weapon must be used and must have at least the potential to carry out the threatened injury. That is the case here. The knife was pulled out when the two men were in actual physical contact, thus putting the officer at actual risk of being stabbed. The weapon was drawn and opened with the stated intent (discussed more fully below) of using it on the officer. These factors establish the use or threatened use element of the deadly weapon definition.

The remaining question is whether the three-inch knife was "readily capable of causing death or substantial bodily harm." Substantial case law recognizes that knives less than three inches in length can cause death, even when death did not result from the injury or threatened injury. *E.g.*, *State v. Thompson*, 88 Wn.2d 546, 549, 564 P.2d 323 (1977); *State v. Cook*, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993) (holding knife to throat of victim); *State v. Hall*, 40 Wn. App. 162, 167-68, 697 P.2d 597 (1985) (same); *State v. Rolax*, 7 Wn. App. 937, 503 P.2d 1093 (1972) (used to stab victim); *State v. Sorenson*, 6 Wn. App. 269, 492 P.2d 233 (1972) (neck wound).[3] Similarly here, the jury was free to conclude that Mr. Stoddard wielded an object capable of causing death or

[3] "It is not denied that a knife having a blade 3 inches or less in length can be capable of producing death and is in fact likely to produce death if strategically used." *Thompson*, 88 Wn.2d at 549.

substantial bodily injury, even though he did not actually kill or injure. The jury saw Mr. Stoddard's actions, including his proximity to the officer when he pulled the weapon, and heard descriptions of the event. The evidence was sufficient to conclude that the knife, as threatened to be used, constituted a deadly weapon.

Intent. Mr. Stoddard also argues that the evidence did not allow the jury to find that he acted with the intent to cause great bodily harm because there was no indication how severely he intended to harm Officer Potter. Again, we disagree.

The only direct statement Mr. Stoddard made at the time bearing on the issue was his threat to "cut right through" the officer. RP at 52. In and of itself, that threat showed the intent to use the knife in a manner suggesting that substantial harm would occur. The entire incident was unprovoked and the threat was accompanied by continuous invectives. Mr. Stoddard attempted to carry out the attack even after the officer retreated and pulled his gun. The entire incident was exemplified by inexplicable rage.

We believe the jury was permitted under these facts to conclude that Mr. Stoddard intended to cause substantial bodily harm. This element, too, was proven.

The jury saw the offense and heard the testimony of Officer Potter. It saw the knife. This evidence permitted the jury to conclude that Mr. Stoddard's threat and his approach with the knife amounted to an assault with a weapon that was capable of

causing death or significant bodily injury. While first degree assault convictions are unusual when the victim did not actually receive an injury, they are permissible under the statute when a weapon capable of causing significant injury is used.

The evidence was sufficient to support the jury's verdict.

Prosecutor's Closing Argument

Mr. Stoddard also takes issue with two parts of the prosecutor's closing argument that were unchallenged at trial. He has not met his burden of proving that there was such significant error that the arguments require reversal.

The standards for reviewing this type of alleged error in closing argument are well settled. If there was no objection to the challenged argument at trial, relief can be granted only if the error was so egregious that it was beyond cure by the trial judge. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Moreover, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

It is improper for a prosecutor to tell the jury that its verdict will reflect on society

in general or send a message to others. *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991). Similarly, arguments that make an emotional appeal to the jury to send a message to society are improper. *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

Mr. Stoddard contends that the prosecutor gave an improper instruction to the jury during argument and also a "golden rule" argument. At best, it is unclear if either challenged statement bears his interpretation. As a result, any error was not so flagrant that it was beyond cure from a timely objection.

Mr. Stoddard first alleges that the prosecutor improperly told the jury to presume intent in his closing argument:

> [Mr. Stoddard] certainly struck [Officer Brunk] when he goes down to the ground. Whether he hits his leg and got his hand all scratched up, it doesn't have to be his act of striking. *He was intending for reasonable consequences of his actions were for them to get hurt and they were.*

RP at 267 (emphasis added). Because intent is an element of the offense, it cannot be presumed. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). However, intent can be inferred from the evidence. *Id*.

Nothing in this statement by the prosecutor masquerades as a jury instruction nor does the prosecutor claim that the law required the jury to presume intent from Mr.

Stoddard's actions.[4] Instead, the challenged statement simply urges the jury to infer that Mr. Stoddard intended to hurt the officers by lunging to the ground. The statement was not erroneous. But, even if it had been, the statement was subject to correction by timely objection. Mr. Stoddard's first argument does not establish error.

The second challenge contends that the prosecutor made an improper "golden rule" argument in rebuttal when he stated:

> Instruction says that you're to assure that all parties receive a fair trial. The state deserves a fair trial. Don't be swayed by this compromise theory. *Officer Potter deserves validation* for his actions. We have action and safety. *The community deserves validation* by all the officers who's [sic] actions were involved to get Mr. Stoddard under control. *Mr. Stoddard deserves to be held accountable* for his actions as well. And that's the result of a fair trial.

RP at 284 (emphasis added).

A "golden rule" argument is one that asks the jurors to put themselves in the position of one of the parties or to grant relief that they themselves would want. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 142, 750 P.2d 1257, 756 P.2d 142 (1988). It is not clear that this type of argument is prohibited in criminal cases. *State v. Borboa*, 157 Wn.2d 108, 124, 135 P.3d 469 (2006). It is not a question we need reach here, however,

[4] An instruction that tells the jury that it must presume that a defendant intended the consequences of his actions is unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); *State v. Caldwell*, 94 Wn.2d 614, 618 P.2d 508 (1980).

because this argument does not ask jurors to put themselves in the position of one of the parties. It is not a "golden rule" argument.

By stating that Officer Potter and the community "deserve validation," the argument comes close to suggesting the jury should send a message or consider how its ruling would reflect on society. Such arguments are improper. *Powell*, 62 Wn. App. at 918. It is unclear exactly what the phrase "deserve validation" means. It is not a clear request to send a message nor does the reference to the community deserving validation necessarily suggest that the jury should consider how its ruling reflects on society. Thus, the most we can conclude here is that these phrases *might* have been construed improperly. In such circumstances, the alleged error is not so flagrant and ill-intentioned that it was beyond cure. The failure to object thus waived any challenge.

Mr. Stoddard has not established that the challenged statements were so egregiously erroneous that they amounted to incurable error. Thus, his failure to object at trial waived any challenge to the statements.

Affirmed.

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.

_____
Korsmo, C.J.

WE CONCUR:

_____ _____
Brown, J. Kulik, J.