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RULING AND ORDER ON APPEAL

**E-FILED**

JUN 18 2004

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The People of the State of Colorado,

v.

WILLIAM M. ELLIOTT,

Defendant.

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This matter comes before the Court pursuant to Defendant-Appellant's (Defendant) appeal from the January 28, 2004, conviction entered by a jury in case number 2003 M 2193, before Judge Archuleta of the Boulder County Court, Division 10. The Defendant filed his Opening Brief on May 13, 2004. The Court did not have the benefit of the Prosecution's position because the District Attorney did not file a Response. Having considered the record, pleadings and applicable law, the Court enters the following Ruling and Order.

**I. Introduction**

On July 8, 2003, the Defendant was arrested and charged with one count of Third Degree Assault – Domestic Violence. The Defendant entered a not guilty plea. On October 6, 2003, the Prosecution filed a motion to add a second charge of Third Degree Assault. That motion contained no details as to the specific acts forming the basis for the charge. The trial court granted that motion without allowing the Defendant to respond. At trial, it became clear that the Prosecution's theory of the case was that the Defendant committed two acts of assault, one which involved tweaking the victim's nose, and the other involved pushing her into a chair. The jury returned a mixed verdict of guilty of the first count of Third Degree Assault and not guilty as to the second count of Third Degree Assault. It is from this conviction that the Defendant appeals.

**II. Standard of Review**

Criminal appeals from county courts of record shall be in accordance with C.R.S. § 16-2-114 (2002). In reviewing the trial record on appeal from county court, a district court cannot act as fact finder. People v. Gallegos, 533 P.2d 1140, 1142 (Colo. 1975); People v. Williams, 473 P.2d 982, 984 (Colo. 1970). Findings of fact based upon disputed evidence are binding upon the district court. People v. Brown, 485 P.2d 500 (Colo. 1971). Objections not raised at trial are deemed waived and cannot be raised for the first time on appeal. Christianson v. Hoover, 643 P.2d 525 (Colo. 1982). On appeal, questions of law are reviewed *de novo*; questions of fact are reviewed for clear error; and questions of discretion are reviewed for abuse of discretion. Valdez v. People, 966

P.2d 587 (Colo. 1988).

### III. Merits

#### A. Inadmissible Hearsay

The Defendant claims that the trial court improperly admitted hearsay testimony which led to his conviction. At trial, Jodie Elliott, the victim, denied that the Defendant pushed her. The Prosecution then used her written statement to police in an attempt to refresh her recollection. Ms. Elliott still denied that the Defendant pushed her. The Defendant claims that the police report was impermissibly admitted because it was hearsay under C.R.E. 801(c). The responding officer, Officer Aaron Kafer, then testified that Ms. Elliott told him that the Defendant pushed her and tweaked her nose. The Defendant also claims this testimony is hearsay. The trial court admitted the evidence at trial under the theory that it was not hearsay because it was offered to refresh the victim's recollection and for its effect upon the listener. The Defendant claims it constitutes reversible error for the trial court to allow this hearsay testimony.

This Court finds that the admission of that evidence was not in error because its admission constituted proper impeachment under C.R.E. 613 and C.R.S. § 16-10-201. See People v. Jenkins, 768 P.2d 727, 730 (Colo. App. 1988)(victim's written statement to police was admissible for both substantive and impeachment purposes while victim was still testifying, and hence had the opportunity to explain the prior statement). Both the report and the Officer's testimony were properly admitted. Therefore, the Defendant's request for relief based on this argument is DENIED.

#### B. Judgment of Acquittal

The Defendant argues that the trial court committed error when it denied his motion for judgment of acquittal as to the pushing incident. The Defendant claims that there was insufficient evidence to convict him absent the improperly admitted hearsay evidence he refers to in Part III, Section A of this Opinion.

When ruling on a motion for judgment of acquittal claiming insufficient evidence, a reviewing court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilty beyond a reasonable doubt. People v. Beatty, 80 P.3d 847 (Colo. App. 2003). The trial court must consider both the prosecution and defense evidence. *Id.* In doing so, the court is bound by five principles of law. "First, the court must give the prosecution the benefit of every reasonable inference, which might be fairly drawn from the evidence. Second, the determination of the credibility of the witnesses is solely within the province of the jury. Third, the trial court may not serve as a thirteenth juror and determine what specific weight should be accorded to various pieces of evidence. Fourth, a modicum of relevant evidence will not rationally support a conviction beyond a reasonable doubt. Finally, verdicts in criminal cases may not be based on guessing, speculation, or conjecture." *Id.* at 851 – 852.

Because the Court ruled that the contested evidence was properly admitted as impeachment evidence, the Court finds that there was no error by the trial court in failing to grant the Defendant's Motion for Judgment of Acquittal.

The Defendant is not entitled to relief on these grounds.

### **C. Bias**

The Defendant claims that the trial court was biased and failed to maintain the appearance of impartiality. He claims this violated his Due Process rights as guaranteed by both the Colorado and United States Constitutions. The Court finds that this argument as presented by Defendant fails to present argument which would entitle him to a reversal.

### **D. Added Count 2**

On October 6, 2003, the Prosecution filed a motion to add a second count of Third Degree Assault. On that same day, the trial court granted the motion without giving the Defendant a chance to respond. The Defendant filed both a response to the Prosecution's motion and a Motion to Vacate once he learned the motion had already been granted. The trial court dismissed those motions without a hearing.<sup>1</sup>

The Defendant argues that the trial court committed reversible error by allowing the District Attorney to proceed on two counts of Third Degree Assault. In People v. Berner, 600 P.2d 112, 113 (Colo. App. 1979), the Colorado Court of Appeals found that multiple blows delivered to the same victim within a short period of time as part of a continuous harangue cannot sustain multiple convictions of third degree assault. In Berner, the defendant's conviction arose out of an altercation where the defendant went to the victim's home demanding to know the whereabouts of his estranged wife. *Id.* During a ten minute period, the defendant struck the victim twice. The Court found that under these circumstances, the two blows did not constitute separate transactions, but were part of a single criminal transaction arising from a single episode. *Id.* citing Blockburger v. United States, 284 U.S. 299 (1932) ("...when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.") The Court of Appeals held that it was error to convict the defendant twice for the same transaction, and set aside one count of Third Degree Assault.

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<sup>1</sup> While the Court does not believe this action itself constitutes error, the Court disapproves of the trial court's procedure whereby the trial court does not wait a reasonable period of time in order for the defense to respond before ruling on a motion filed by the prosecution. A better practice would be to allow the opposing party an opportunity to respond to pending motions before the court issues its ruling.

In this case, the Court finds that the Defendant's actions may sustain only one count of Third Degree Assault. The testimony elicited at trial shows that the nose tweaking and the alleged pushing by the Defendant occurred within seconds of each other and were both part of the same transaction. They occurred much closer in time to each other than the ten minute interval that existed in Berner, likely within a few seconds of each other. See Transcript, January 28, 2004, Vol. 1, pg. 26, ll. 2 – 23, and pg. 71, ll. 19 – 21. In addition, both acts resulted from the same argument between Defendant and victim.

This Court finds that it was error for the trial court to allow two counts of Third Degree Assault to be submitted to the jury. Consequently, the Court must REVERSE the Defendant's conviction for Third Degree Assault.

### **E. Jury Instructions**

In addition to the trial court's error in allowing the Prosecution to charge two counts of assault for a single transaction, the Court finds that the jury instructions were also in error. The jury instructions do not indicate to the jury which conduct is charged in each of the two separate counts. In addition, the trial court omitted the necessary unanimity instruction. See Colorado Jury Instruction 38:05.

The Colorado Supreme Court issued the following ruling in Thomas v. People:

...when the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance. If the prosecutor decides not to designate a particular instance, the jurors should be instructed that in order to convict the defendant they must either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts described by the victim and included within the time period charged.

803 P.2d 144, 153 – 154 (Colo. 1990).

The jury instructions in this case fail to instruct the jury on which count of third degree assault charges each action. In fact, nowhere in the instructions does it advise the jury that separate conduct is charged in each count. The Court has no way to determine whether the jury thought the Defendant tweaked the victim's nose, pushed her, or if they could not agree as to either charge. In addition, there is no unanimity instruction, explaining to the jury that they must be unanimous as to each count and agree that the Defendant committed the specifically charged action. Due to these omissions, there is a substantial likelihood that the jury compromised in order to reach a verdict. In addition, this Court cannot be certain that they unanimously agreed that the Defendant committed either conduct as charged. Therefore, the jury instructions are in error, and do not comply with Thomas v. People. Based on a review of the instructions, the Court is unable to determine which conduct the Defendant was acquitted on, and which he was convicted for committing.

The trial court has a duty to properly instruct the jury on all elements of the charged offenses. People v. Cowden, 735 P.2d 199 (Colo. 1987). If the defendant objects to an instruction given by the court, the objection is preserved for appellate purposes, and is subject to harmless error review. People v. Garcia, 28 P.3d 340 (Colo. 2001). Under a harmless error standard, reversal is only required when the error affects a substantial right of the defendant. *Id.*; see also C.R.Crim.P. 52(a). Generally, if the error is not of constitutional dimension, the error will be disregarded if there is not a reasonable probability that the error contributed to the defendant's conviction. Garcia, 28 P.3d at 344, citing Salcedo v. People, 999 P.2d 833, 841 (Colo. 2000).

However, if the defendant fails to object to the trial court's instruction, a plain error standard of review is applied. Garcia, 28 P.3d at 344. Plain error occurs when the error so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Id.* In addition, there must be a reasonable possibility that the alleged error contributed to the defendant's conviction. *Id.*

Arguably, the Defendant failed to make an objection on these grounds at trial. Therefore, the matter should be reviewed for plain error. In this case, the Court finds that there was plain error because the failure to distinguish the conduct charged in each count and lack of a unanimity instruction undermines the fundamental fairness of the trial itself and casts serious doubt on the reliability of the conviction. The Court is unable to tell from a review of the instructions for which act, if any, the jury unanimously convicted the Defendant. Because the Defendant was convicted on one count, and acquitted on the other, there is a serious concern that the jury compromised when returning its verdict. Therefore, the Court has no confidence in the Defendant's conviction, and finds that it must be REVERSED.

#### IV. Conclusion

The Defendant's conviction for Third Degree Assault must be reversed for the reasons stated above. The Defendant was also acquitted of one charge of Third Degree Assault. Both the United States and Colorado constitutions prevent retrial of the Defendant on the count for which he was acquitted. U.S. Const. amend. V and XIV; Colo. Const. art. II, § 18; Deutschendorf v. People, 920 P.2d 53 (Colo. 1996).

In this case, the Court has found that it was error to allow two charges to be filed against the Defendant for one continuous criminal episode. Because only one count could properly be submitted to the jury, and the Defendant was acquitted of one count, the Court finds that the Double Jeopardy clause of both the United States and Colorado Constitutions prevents retrial of the Defendant on both charges.<sup>2</sup> Therefore, the Defendant's acquittal on Count 2 will stand. His conviction on Count 1 is REVERSED, and Double Jeopardy and the principles announced in Berner prevent retrial by the

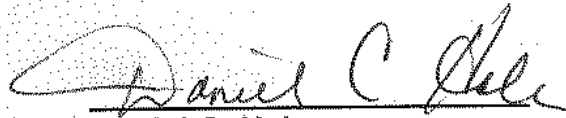
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<sup>2</sup> The Prosecution requested the second count be added in violation of Berner, and in doing so, invited error into the proceedings.

Prosecution on this count. Based upon this Ruling, the case is REMANDED to the County Court with directions to dismiss the case.

BY THE COURT

This 17 Day of June, 2004



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District Court Judge

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