MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 6, 1987

The thirty-seventh meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on March 6, 1987 by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All members were present.

CONSIDERATION OF HB 197: Representative Ed Grady of Cannon Creek introduced HB 197 (see Exhibit 1).

PROPONENTS: Gordon Morris, representing himself, explained a story about a car in Missoula, Montana that was his and it was parked by a sorority and it was totaled by some college kids that came around the corner and hit it. He said he had to fight with his insurance company because the people that hit his car were uninsured people. He said the people ended up paying the minumim fine and he lost his insurance policy over the deal.

Bill Lannon, representing himself, explained how a year ago he was struck by a car with uninsured motorist in it. He said the man paid a minimum fine and he has so far paid around $13,000 in medical expenses, and still has quite bit more time in the hospital to come because of operations. He felt uninsured motorist should not be able to drive.

Alice Armstrong, representing herself, said she was a victim of a drunk driver accident. She felt if one can afford to drive a car, they can pay for insurance.

Karl Englund, Montana Trial Lawyers Association, supported the bill because it is a real mess to collect from an uninsured motorist.

OPPONENTS: Mike Koehuke, representing himself, handed out some amendments (see Exhibit 2). He explained he lives on a ranch in Townsend and he has a neighbor that was hit by another motorist. He said the neighbor had never had a ticket in his life, but when he went to put a claim on his insurance for this accident, the insurance company informed him that one of his premium payment checks bounced. He explained that there was one day because of this that the neighbor was uninsured. He pointed out the officer gave the neighbor a ticket for not carrying insurance. The judge did not press any fine against the neighbor because the judge felt the gentlemen just didn't know that the check had bounced and so, therefore the judge let him go, on the grounds that he didn't willfully not want to get insurance. He said he also has an 18 year old boy working on his

place and the boy was caught night speeding near Bozeman. He explained that the boy had no insurance. He said the boy got another nighttime speeding ticket and this time spent two days in jail and around $610 worth of fines for not having insurance. He said the amendment will still present a fine but not as stiff as one that is purposed in the bill, because many times the uninsured people are young people because it is too expensive or it is an older person who can't afford it either.

DISCUSSION ON HB 197: Senator Beck asked Representative Grady if the bill address the court order reimbursements that some have brought up. Representative Grady said the bill doesn't address that.

Senator Pinsoneault asked Mike McGrath, Lewis and Clark County Attorney, if the judge could give a person 30 days to pay his fine and if he doesn't pay the fine for not having insurance, could the judge then order the 10 days in jail according to this amendment presented. Mr. McGrath said that could be done.

Representative Grady closed by giving a letter to the committee from a Captain Wood (Exhibit 1A).

CONSIDERATION OF HB 301: Representative Rapp Svrcek of Thompson Falls introduced HB 301 (see Exhibit 3).

PROPONENTS: Mike McGrath, Lewis and Clark County Attorney, said the bill is patterned to many other laws in other states. He said under the present law if a person lives after an assult there is no charge that we can charge the assailant with, such as nurses who are drug addicts will change a patients medicine so the nurse can have it and if the person who took the wrong medicine lives, the state of Montana has nothing they can charge that nurse with.

Mark Murphy, Assistant Attorney General, presented several different states statutes to the committee on this issue (see Exhibit 4). He also presented two cases dealing with this issue (see Exhibit 5).

OPPONENTS: None

DISCUSSION ON HB 301: Senator Crippen asked if there was not a way at all to charge in this state someone for tampering with medicine in a gorcery store. Mr. McGrath said we could charge them with misdemeanor criminal mischief. Senator Mazurek asked why it was necessary to reduce the cause standard and the serious bodily injury. Mr. McGrath replied that the "approximate" is dropped because it is not a criminal standard. He said serious bodily injury was dropped because that is a high standard too. Senator Mazurek felt the bill will make every car accident that had negligence involved in it a criminal matter. Mr. McGrath said the statute says right now one has to be under the influence before one can

charge him for any criminal offense.

Senator Crippen asked if a doctor injured someone because it was the first time he had done the procedure or he had always done a certain procedure in a certain way that was not on the books, could he get caught by this bill. Mr. McGrath responded that it could apply in certain cases. He said the statute is vague, but we don't have any statute right now and it is needed.

Senator Pinsoneault said Senator Crippen would be excellant in writing law examinations.

Representative Rapp Svrcek closed.

CONSIDERATION OF HB 413: Representative Ray Brandewie of Bigfork presented HB 413 (see Exhibit 6). He explained that one kilogram of marijuana is about two gorcery bags full of the stuff.

PROPONENTS: Gary Carrell, Montana Department of Justice, said people may not have the exact amount, but he felt the amount is not the most important part of this issue.

Mark Murphy, Assistant Attorney General, supported the bill because there are other factors that should be looked more closely than the fact of how much the person might have on him at the time of the arrest.

DISCUSSION ON HB 413: Senator Brown asked where the kilogram amount came from that is in the law right now. Mr. Murphy said if one can establish the proof of selling in small quantities, you have a better chance of catching the person.

Senator Yellowtail questioned if the present language state that if you have drugs on you, you are a potential seller of the drug. Mr. Murphy said the law doesn't say that.

Senator Crippen asked if the bill still has to show intent to sell. Mr. Murphy responded that the bill only works if the department can prove intent to sell.

Senator Blaylock asked what would happen if a policemen just caught a kid with some marijuana on him. Mr. Murphy said that marijuana is broken down into possession, possession with intent to sell, and sell. He said a difference between a misdemeanor and felony is the the kid would have to have 60 grams on him at the time of the arrest. Senator Blaylock inquired if the county attorneys have had a hard time convicting people because of the amount statute. Mr. Murphy stated that in his personal experience he has had minimum difficulty.

Representative Brandewie closed.

CONSIDERATION OF HB 435: Representative Ray Brandewie of Bigfork presented HB 435 to the committee (see Exhibit 7). He presented an amendment, which would provide cordination of the HB 435 and SB 241.

PROPONENTS: Mark Murphy, Attorney General's Office, stated that he supported the bill because if makes the forfeiture of personal property easier. He said it removes the 250 gram limit before the department can take property. He said one procedural problem in this bill is it requires seizure of real property in situations where there has not been a conviction. He said that makes the department have to have the forfeiture proceeding up and running before 45 days of the seizure. He said it is very difficult to get a conviction within 45 days of the seizure. He explained the bill does define how real property is tranferred if it is seized and forfeited.

Gary Carrell, Montana Department of Justice, supported the bill.

OPPONENTS: None

DISCUSSION ON HB 435: Senator Crippen asked if a co-owner would lose his part of the property that was in use during a drug sell, but the co-owner is innocent to the drug dealing. Mr. Murphy said it is very possible for him to lose it. He said with the cordinating instruction in this bill, if both bills pass, it will allow someone to lose their car if they are caught with the intent to sell from the car, but no one will lose their home over a small amount of marijuana that found in it. He said if the two bills are cordinated the only part of this bill that would be left out would be the real property sections of this bill.

Senator Blaylock questioned on page 1, (b), if a person was growing marijuana in his trailor house, then would that be subject to forfeiture. Mr. Murphy said if the trailor was stationary, the person would not lose his trailor house but if the trailor house had wheels and was ready to move, then there could be cause to forfeit the house because it is a moveable object in the drug dealings. Senator Blaylock felt the penalties were very high for a drug that is used quite often by the public. Senator Blaylock felt that whether we like it or not the drug of marijuana is like alcohol was like in the 1920's. He said this public policy might cause more harm than good. Mr. Murphy said that his group is caught in the middle of this. He said the department has to enforce the law and this is what the department has come up with.

Senator Yellowtail inquired if all property owned around the property used during the drug dealing would be thrown into forfeiture proceedings too. Mr. Murphy said no. He said the property that is owned and used in the drug processing is the only property that will be forfeited. Senator Yellowtail asked if a person owned a thousand acre place and was

using one acre for planting marijuana in the middle of the thousand acres, would the whole thousand acres be forfeited. Mr. Murphy answered that the 999 acres could be interpeted as a covert system to hide what they have in the middle and that would make the whole thousand acres possible forfeiture item. Senator Yellowtail felt the the real property language in the bill was confusing.

Senator Mazurek asked again if a farmer in Yellowstone Valley has a crop of marijuana in his garden, could he lose his house and land. Mr. Murphy said as a general rule no. Senator Mazurek asked why he would say that; what language in this bill would limit that from happening. Mr. Murphy said he didn't know what language would limit that action. Mr. Murphy echoed that if both bills pass, this language on real property will be eliminated.

Representative Brandewie closed by saying this bill is for more than the drug of marijuana, but for all drugs.

Senator Beck asked if drugs were grown on federal land would it be subject to foreclosure or whatever. Mr. Murphy said the federal government has a program that looks to see if anyone is using their property for drug growing. He said it is found quite a bit on federal lands. He said the cause of connection has to be between the property and the operation.

The committee adjourned to do executive session.

ACTION ON HB 197: Senator Yellowtail felt the bill will not make those who can't afford insurance afford it. Senator Beck asked if the judge can order court reimbursement to the party that was injuried; maybe just for auto repairs. Senator Halligan stated that restitution is part of the sentensing process usually. Senator Halligan said the bill will not harm anything, but it will not help either. Senator Pinsoneault said if a person make restitution quickly, then the judge usually does go easy on a person. Senator Galt moved the bill BE CONCURRED IN. The motion CARRIED with Senators Yellowtail and Halligan voting no.

ACTION ON HB 301: Valencia commented on the bill (see Exhibit 3). Senator Halligan stated that the bill could never handle the doctor issue that the Senator Crippen asked about. He said that is just way to complicated for this statute to handle it. Senator Pinsoneault said it is very difficult to show that a person purposefully caused injury to another in the kind of incidents that the committee has talked about. The committee decided to wait on the bill because of Valencia's comments on the bill. Senator Yellowtail asked if a person drinks a case of beer and gets into a car, is that person guilty of criminal endangerment or is it negligence endangerment. Senator Halligan said an prosecuting

attorney would charge him with the highest possible charge that they can, which is criminal endangerment. Senator Yellowtail said if it is criminal endangerment, then it is a felony. Senator Yellowtail said can the criminal endangerment be any higher than what this bill is trying to get. The committee decided to move on.

ACTION ON HB 413: Senator Beck moved the bill BE CONCURRED IN. Senator Halligan asked what year the one kilogram was put into the statute. Senator Blaylock said around 1975. The motion CARRIED.

ACTION ON HB 435: Valencia wanted to clarify that if the committee passes this bill with the cordination amendment, only the language in (h) will be struck from this bill. Senator Galt moved the Brandewie amendment to cordinate the HB 435 and SB 241. Senator Halligan thought the two should just merge into one bill instead of two. Senator Halligan thought we should table this bill and let the SB 241 go through the whole procedure and see if it will pass. Valencia said there are two other changes; on page 3, line 19 through 21 and page 5, lines 5 through 9. She said these changes are from the Brandewie amendment that was passed. Senator Pinsoneault moved the bill BE CONCURRED IN AS AMENDED. Senator Yellowtail felt Representative Brandewie should try to kill SB 241 to get this one passed instead of combining the two of them. Senator Pinsoneault made a substitute motion to to insert the language that the Judiciary Committee inserted in SB 241 and put it in place of (h). The committee decided to wait a few minutes on action.

ACTION ON HB 301 AGAIN: Senator Pinsoneault didn't want a laundry list in the bill of the kinds of "negligent vehicular assult". Senator Halligan informed the committee that he could only get a man with a misdemeanor once for leaving a two year old child in a car when it was 10 below zero outside for over two hours and the car was shut off. He said that is all he could get the guy on because their is no statute that defines what to do in cases like this. Senator Mazurek wanted to insert "unreasonably creates a substantial risk of death or bodily injury". Senator Halligan moved that motion. Senator Pinsoneault said that won't help anything. Senator Pinsoneault said the committee is mixing civil and criminal statutes in this bill with that amendment. Senator Halligan withdrew his motion and moved to insert "serious" before bodily injury in the bill. Senator Pinsoneault said that is great fun trying to define "serious". Senator Pinsoneault said people have the the vested right to drive the way they want to because that is somehow in our heritage. Senator Mazurek did not agree. Senator Blaylock moved the bill BE CONCURRED IN. The motion CARRIED with Senator Mazurek voting no.

The committee adjourned at 12:00 p.m.

Chairman

DATE March 6th

COMMITTEE ON

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Alice L. Armstrong		197	✓	
Mike McGrath	CNMI Attys Assoc	301		
Larry Mayorga		197		—
Mike Koehnke	SEAF	197		
Gordon Morris	Self	197	✓	
Bill Lamm	self	197	X	
GARY CARRELL	Mt. Dept. of Justice Crim. Invest. Bureau	HB 435 HB 413	X	

(Please leave prepared statement with Secretary)

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March 6

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

NAME: MARK J MURPHY DATE: 3/6/87

ADDRESS: 3840 KIKI DR
HELENA MONTANA

PHONE: 442-3816

REPRESENTING WHOM? MCAA

APPEARING ON WHICH PROPOSAL: 301 & 435

DO YOU: SUPPORT? X AMEND? X OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: GARY J CARRELL DATE: 3/6/87

ADDRESS: 303 Kodiak

PHONE: 414-3824

REPRESENTING WHOM? MT. Dept. of Justice
Criminal Invest. Bureau

APPEARING ON WHICH PROPOSAL: HB435, HB413

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE March 6, 1987
BILL NO. HB 197

SUMMARY OF HB197 (GRADY)
(Prepared by Senate Judiciary Committee staff)

HB197 increases the penalty for operating a motor vehicle without a valid liability insurance policy. **Under current law,** the penalty is a fine not to exceed $250 or county jail for not more than 10 days, or both. **As originally drafted,** the penalty was increased to $1,000 and 6 months. **As amended, the bill now** provides for a penalty of a fine of not less than $250 and not to exceed $500 or jail for not more than 10 days, or both. That is, the jail time remains the same as current law and the fine is increased from a maximum of $250 to a minimum of $250 and maximum of $500.

COMMENTS: None.

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HB 197

SENATE JUDICIARY
EXHIBIT NO. 1A
DATE March 6, 19
BILL NO. HB 197

Col. R. W. Landon, Chief

January 19, 1987

Representative Grady,

Captain Wood told me that you needed some data on liability insurance for automobiles.

During 1986 the Patrol issued 8,440 written warnings and 7,413 arrests for violations of the current insurance statute.

We stopped a total of 156,623 traffic violators. This indicated that one in ten traffic violators has something wrong with his/her auto liability insurance.

If we may be of help to you on any other matters, feel free to call us at 444-3780

RWL

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 6, 1987
BILL NO HB 197

AMENDMENT TO HOUSE BILL 197

Amend House Third Reading (Blue Copy)

1. Page 1, line 22.
Following: "both."
Insert: "However, on failure to pay a fine imposed under this section, the offender may be incarcerated in the county jail until the fine or others costs imposed by the court be satisfied in the proportion of 1 day's imprisonment for every $25 of fine or costs, provided that the total time of imprisonment shall not exceed 10 days per violation."

SENATE JUDICIARY
EXHIBIT NO. 3
DATE March 6, 1987
BILL NO. HB 301

SUMMARY OF HB301 (RAPP-SVRCEK)
(Prepared by Senate Judiciary Committee staff)

HB301 changes the criminal statutes by changing the definition of the offense of negligent vehicular assault and creating two new crimes: criminal endangerment and negligent endangerment.

Section 1. Amends 45-5-205. Changes the definition of "negligent vehicular assault". **Under current law,** a person must 1) be operating a motor vehicle in a negligent manner, and 2) be driving under the influence of drugs or alcohol, and 3) the conduct must be the proximate cause of serious bodily injury to another to meet the definition of negligent vehicular assault. **Under this bill,** the first two requirements remain the same but the third requirement is changed so that the conduct must just be the cause of bodily injury to another. "Cause" is a lesser standard than "proximate cause" and "bodily injury" is a lesser standard than "serious bodily injury". Therefore, these changes would make negligent vehicular assault easier to prove.

Section 2. New. Creates the crime of criminal endangerment. A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. Penalty: a fine not exceed $50,000 or imprisonment in the state prison not to exceed 10 years, or both.

SEction 3. New. Creates the crime of negligent endangerment. A person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment. Penalty: a fine not to exceed $1,000 or imprisonment in the county jail not to exceed 1 year, or both.

COMMENTS: Q- Does conduct such as a doctor operating on a patient constitute "criminal endangerment"? There are no qualifications, such as "unreasonably" creates a substantial risk. The penalty of $50,000 or 10 years seems rather high, especially compared to the penalty for negligent vehicular assault which involves driving under the influence and is only $1,000 or county jail for 1 year, or both. Q- Could conduct fall under both negligent vehicular assault and negligent endangerment? Which would apply?

C:\LANE\WP\SUMHB301.

prior felony drug convictions to become final so that defendant could cross-examine victim concerning the convictions for impeachment purposes. People v. Gagnon, 703 P.2d 661 (Colo. App. 1985).

Statute as basis for jurisdiction. People v. Rice, 37 Colo. App. 346, 551 P.2d 1081 (1976), rev'd on other grounds, 193 Colo. 270, 565 P.2d 940 (1977); People v. Pacheco, 191 Colo. 499, 553 P.2d 817 (1976); People v. Arispe, 191 Colo. 555, 555 P.2d 525 (1976); People v. Wieckert, 191 Colo. 511 554 P.2d 688 (1976), overruled on other grounds, Villafranca v. People, 194 Colo. 472, 573 P.2d 540 (1978); People v. Pickett, 194 Colo. 178, 571 P.2d 1078 (1977); McDonald v. District Court, 195 Colo. 59, 576 P.2d 169 (1978).

Applied in Miller v. District Court, 1931 Colo. 404, 566 P.2d 1063 (1977); Jones v. District Court, 196 Colo. 1, 584 P.2d 81 (1978); People v. Chavez, 629 P.2d 1040 (Colo. 1981); People v. Lichtenstein, 630 P.2d 70 (Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Trujillo, 631 P.2d 146 (Colo. 1981); People v. Jones, 631 P.2d 1132 (Colo. 1981); People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Stoppel, 637 P.2d 384 (Colo. 1981); People v. Mack, 638 P.2d 257 (Colo. 1981); People v. Sanchez, 649 P.2d 1049 (Colo. 1982); People v. Brassfield, 652 P.2d 588 (Colo. 1982); People v. Ferguson, 653 P.2d 725 (Colo. 1982); Watkins v. People, 655 P.2d 834 (Colo. 1982); People v. Dillon, 655 P.2d 841 (Colo. 1982); People v. Shearer, 650 P.2d 1293 (Colo. App. 1982); People v. Bridges, 662 P.2d 161 (Colo. 1983).

18-3-207. Criminal extortion. (1) Whoever without legal authority threatens to confine, restrain, or cause economic or bodily injury to the threatened person or another or to damage the property, economic well-being, or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an act or refrain from doing a lawful act commits criminal extortion which is a class 4 felony.

(2) Whoever without legal authority threatens by means of chemical or biological agents, weapons, or poison or by means of harmful radioactive agents to confine, restrain, or cause economic or bodily injury to the threatened person or to damage the property, economic well-being, or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an act or refrain from doing a lawful act commits aggravated criminal extortion, which is a class 3 felony.

Source: R & RE, L. 71, p. 421, § 1; C.R.S. 1963, § 40-3-207; L. 75, p. 618, § 8; L. 81, pp. 974, 981, § § 8, 4; L. 82, p. 623, § 17.

Am. Jur.2d. See 6 Am. Jur.2d, Assault and Battery, § 28.

Law reviews. For article, "Criminal Law", which discusses a recent Tenth Circuit decision dealing with extortion, see 62 Den. U. L. Rev. 153 (1985).

This section is applicable to efforts to collect a legally enforceable debt. People v. Rosenberg, 194 Colo. 423, 572 P.2d 1211 (1978).

Applied in People v. Hearty, 644 P.2d 302 (Colo. 1982).

18-3-208. Reckless endangerment. A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 3 misdemeanor.

Source: R & RE, L. 71, p. 421, § 1; C.R.S. 1963, § 40-3-208.

Am. Jur.2d. See 6 Am. Jur.2d, Assault and Battery, § 6.

Law reviews. For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Offense not lesser included offense of third degree assault. The establishment of every element of third degree assault would not necessarily include proving conduct which creates a substantial risk of serious bodily injury, an ele-

found guilty of assault in third degree. State v James (1960) 56 Wn 2d 43, 351 P2d 125.

Where facts of case limit jury to possible findings of guilt of either first or second-degree assault or not guilty at all, instruction on third-degree assault is properly refused. State v Stationak (1968) 73 Wn 2d 647, 440 P2d 457.

A criminal assault being an offense against the peace and dignity of the state as well as an invasion of the private rights of the person assaulted, it is not necessary to show apprehension by the victim in a prosecution for second-degree assault. State v Frazier (1972) 81 Wn 2d 628, 503 P2d 1073.

Whether third-degree assault, as defined in, is a lesser included offense of either first- or second-degree assault depends upon the facts of each case. State v Lewis (1976) 15 Wn App 172, 548 P2d 587.

9A.36.040 Simple assault. (1) Every person who shall commit an assault or an assault and battery not amounting to assault in either the first, second, or third degree shall be guilty of simple assault.

(2) Simple assault is a gross misdemeanor.

LEGISLATIVE HISTORY

Enacted Laws 1st Ex Sess 1975 ch 260 § 9A.36.040. Based on:
(a) Laws 1909 ch 249 §§ 155–157 p 934.
(b) Code 1881 § 103.
(c) Laws 1873 p 185 § 28, Laws 1869 p 202 § 26, Laws 1854 p 79 § 26.
See RRS §§ 2407, 2408, 2409 and former RCW 9.65.010, 9.65.020, 9.65.030.

9A.36.050 Reckless endangerment. (1) A person is guilty of reckless endangerment when he recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person.

(2) Reckless endangerment is a gross misdemeanor.

LEGISLATIVE HISTORY

Enacted Laws 1st Ex Sess 1975 ch 260 § 9A.36.050.

9A.36.060 Promoting a suicide attempt. (1) A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.

(2) Promoting a suicide attempt is a class C felony.

LEGISLATIVE HISTORY

Enacted Laws 1st Ex Sess 1975 ch 260 § 9A.36.060. Based on:
(a) Laws 1909 ch 249 §§ 135–137, 149 pp 929, 932.
(b) Code 1881 §§ 794, 796.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 6, 198
BILL NO. HB 301

Stated in Maynard v. State, Ct. App. Op. No. 136 (File No. 5501), 652 P.2d 489 (1982).

Sec. 11.41.230. Assault in the fourth degree. (a) A person commits the crime of assault in the fourth degree if

(1) that person recklessly causes physical injury to another person;

(2) with criminal negligence that person causes physical injury to another person by means of a dangerous instrument; or

(3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.

(b) Assault in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 6 ch 102 SLA 1980; am § 5 ch 143 SLA 1982)

Effect of amendments. — The 1980 amendment substituted "fourth" for "third" preceding "degree" in the introductory paragraph in subsection (a), and in subsection (b), and deleted "intentionally or" near the beginning of paragraph (1) in subsection (a).

The 1982 amendment, in subsection (a), substituted "that person recklessly" for "he intentionally" in paragraph (3).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Applied in Bidwell v. State, Ct. App. Op. No. 199 (File No. 6290), 656 P.2d 592 (1983); Jackson v. State, Ct. App. Op. No. 211 (File No. 6664), 657 P.2d 405 (1983).

Quoted in Maynard v. State, Ct. App. Op. No. 136 (File No. 5501), 652 P.2d 489 (1982).

Cited in Folger v. State, Ct. App. Op. No. 105 (File No. 5585), 648 P.2d 111 (1982); Kelly v. State, Ct. App. Op. No. 143 (File No. 6521), 652 P.2d 112 (1982); Moxie v. State, Ct. App. Op. No. 246 (File No. 7192), 662 P.2d 990 (1983).

Collateral references. — Standard for judging conduct of minor motorist charged with gross negligence, recklessness, wilful or wanton misconduct, or the like, under guest statute or similar common-law rule, 97 ALR2d 861.

Sec. 11.41.250. Reckless endangerment. (a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(b) Reckless endangerment is a class A misdemeanor. (§ 3 ch 166 SLA 1978)

Article 3. Kidnapping and Custodial Interference.

Section
300. Kidnapping
320. Custodial interference in the first degree
330. Custodial interference in the second degree
370. Definitions

ARIZONA

SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 6, 1981
BILL NO. HB 301

CHAPTER 12

ASSAULT AND RELATED OFFENSES

Sec.

Chapter 12, consisting of §§ 13–1201 to 13–1206, was added by Laws 1977, Ch. 142, § 61, effective October 1, 1978 and Laws 1978, Ch. 215, § 1, effective October 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code and derivation of sections of the revised Criminal Code, see Tables at the front of this volume.

Cross References

Classification of offenses, see § 13–601 et seq.
Fines, see § 13–801 et seq.
Indictment or information, nature and contents, see Rules Cr.Proc. Rule 13.2.
Sentencing, imprisonment, see § 13–701 et seq.

Law Review Commentaries

Assault and related offenses. Ariz. State L.J. 3, 1977, p. 510.

Criminal Code revision. 13 Ariz.Bar J. No. 2, p. 14 (1977).

§ 13–1201. Endangerment: classification

A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.

B. Endangerment involving a substantial risk of imminent death is a class 6 felony. In all other cases, it is a class 1 misdemeanor.

Added Laws 1977, Ch. 142, § 61, eff. Oct. 1, 1978.

Historical Note

• Former § 13–1201 was transferred and renumbered as § 13–3801.

Cross References

Homicide from reckless or negligent conduct, see §§ 13–1102 to 13–1104.

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DATE March 6, 1987
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date of this Act [December 6, 1984], as well as the construction and application of any defense to a prosecution for such an offense.

(2) The provisions of this Act shall not apply to any offense committed before the effective date of this Act or to any defense to a prosecution for such an offense. Such an offense shall be construed and prosecuted according to the law existing at the time of the commission of the offense in the same manner as if this Act had not been enacted.

(3) When all or part of a criminal statute is amended or repealed by this Act, the criminal statute or part thereof so amended or repealed remains in force for the purpose of authorizing the accusation, prosecution and conviction of a person who violated the statute or part thereof before the effective date of this Act.

ASSAULT AND RELATED OFFENSES

163.160 Assault in the fourth degree. (1) A person commits the crime of assault in the fourth degree if the person:

(a) Intentionally, knowingly or recklessly causes physical injury to another; or

(b) With criminal negligence causes physical injury to another by means of a deadly weapon.

(2) Assault in the fourth degree is a Class A misdemeanor. [1977 c.297 §5]

163.165 Assault in the third degree. (1) A person commits the crime of assault in the third degree if the person:

(a) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon;

(b) Recklessly causes serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or

(c) Recklessly causes physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the third degree is a Class C felony. [1971 c.743 §92; 1977 c.297 §3]

163.175 Assault in the second degree. (1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another; or

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony. [1971 c.743 §93; 1975 c.626 §1; 1977 c.297 §2]

163.185 Assault in the first degree. (1) A person commits the crime of assault in the first degree if the person intentionally causes serious physical injury to another by means of a deadly or dangerous weapon.

(2) Assault in the first degree is a Class A felony. [1971 c.743 §94; 1975 c.626 §2; 1977 c.297 §1]

163.190 Menacing. (1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury.

(2) Menacing is a Class A misdemeanor. [1971 c.743 §95]

163.195 Recklessly endangering another person. (1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(2) Recklessly endangering another person is a Class A misdemeanor. [1971 c.743 §96]

163.197 Hazing. (1) No fraternity, sorority or other student organization organized or operating on a college or university campus for purposes of participating in student activities of the college or university, nor any member of such an organization, shall intentionally haze any member, potential member or person pledged to be a member of the organization, as a condition or precondition of attaining membership in the organization or of attaining any office or status therein.

(2) As used in this section, "haze" means to subject a person to bodily danger or physical harm or a likelihood of bodily danger or physical harm, or to require, encourage, authorize or permit that the person be subjected to any of the following:

(a) Calisthenics;

(b) Total or substantial nudity on the part of the person;

(c) Compelled ingestion of any substance by the person;

(d) Wearing or carrying of any obscene or physically burdensome article by the person;

(e) Physical assaults upon or offensive physical contact with the person;

(f) Participation by the person in boxing matches or other physical contests;

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The STATE of Washington, Respondent,

v.

Dennis TURNER, Appellant.

No. 4071-II.

Court of Appeals of Washington, Division 2.

April 20, 1981.

As Changed May 12, 1981.

Defendant was convicted before the Superior Court, Kitsap County, James D. Roper, J., of three counts of second-degree assault and one count of reckless endangerment, and he appealed. The Court of Appeals, Petrich, J., held that: (1) police officer had ample probable cause for the warrantless arrest of defendant; (2) defendant's warrantless at-home arrest was lawful and consequently his voluntary in-custody statements were properly entered at trial; (3) trial court did not abuse its discretion in admitting evidence of defendant's prior hypothetical question regarding the firing of warning shots in defense of his property, and a prior incident involving the individual subsequently shot at; and (4) defendant was not subjected to "multiple punishment" by application of both the firearm statute and deadly weapon statute, as the application of both statutes did not increase the maximum sentence for second degree assault.

Affirmed.

1. Arrest ⇐63.4(2)

"Probable cause" that an offense has been committed exists where the facts and circumstances within arresting officer's knowledge, and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been committed.

2. Arrest ⇐63.4(13)

Where police officer knew that defendant possessed a .22 caliber weapon, where from the proximity of the shell casings to the defendant's residence, diagrams of probable bullet trajectories, and other information, the officer had reason to believe that the shots had been fired from nearby defendant's home, and where police officer also knew of defendant's past neighborhood quarrels, including the prior rifle-pointing incident involving the individual subsequently shot at, there was ample probable cause for the warrantless arrest of defendant on three counts of second-degree assault and one count of reckless endangerment, arising out of a series of Halloween shooting incidents.

3. Arrest ⇐66

Where officers are lawfully in a private home pursuant to a search warrant, they may make a warrantless probable cause arrest even though there are not exigent circumstances.

4. Arrest ⇐66

Criminal Law ⇐412.1(3)

Where there was probable cause for arrest of defendant on three counts of second-degree assault and one count of reckless endangerment, where a warrant had already issued for the search of defendant's dwelling, and where defendant invited the police officers into his home, defendant's warrantless at-home arrest was lawful, and his voluntary in-custody statements were properly admitted at trial. West's RCWA 10.31.100.

5. Criminal Law ⇐369.2(1)

Test of whether evidence of other crimes, wrongs, or acts is admissible is whether the evidence as to the other acts is relevant and necessary to prove an essential ingredient of the crime charged. ER 404(b).

6. Criminal Law ⇐338(1)

Determination of whether testimony is relevant is within the discretion of the trial court, and each case depends on its own facts.

7. Criminal Law ⇐371(1, 12)

In prosecution of defendant for three counts of second-degree assault and one count of reckless endangerment arising out of series of Halloween shooting incidents, evidence of defendant's previous hypotheti-

cal question to police officer regarding the lawfulness of using firearm to protect his property, and evidence that defendant had previously pointed his rifle at individual subsequently shot at, and threatened to shoot him if he did not leave the premises, was relevant and necessary to prove the essential ingredients of the offense, as evidence of the former indicated a frame of mind relevant to proof of intent, and evidence as to the latter was probative of motive. ER 401–403, 404(b).

8. Criminal Law ⇐1159.2(7)

There is substantial evidence to support a conviction when, viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

9. Criminal Law ⇐1144.13(4, 5)

In considering the evidence in a criminal case, the reviewing court must assume the truth of the state's evidence and view it most strongly against defendant, allowing the State the benefit of all reasonable inferences.

10. Criminal Law ⇐552(4)

Circumstantial evidence is as trustworthy as direct evidence in determining whether defendant's conviction is supported by substantial evidence.

11. Assault and Battery ⇐92(1)

Evidence in prosecution of defendant for three counts of second-degree assault and one count of reckless endangerment arising out of a series of Halloween shooting incidents, including discovery of shell casings near the defendant's residence, testimony regarding a prior rifle-pointing incident involving the individual subsequently shot at, and evidence of his previous hypothetical question to police officer regarding the lawfulness of using firearms to protect his property supported defendant's conviction, despite fact that the evidence was circumstantial.

12. Criminal Law ⇐161

Either successive prosecutions or multiple punishments for the same offense may constitute double jeopardy. U.S.C.A.Const. Amend. 5.

13. Criminal Law ⇐163

Application of both firearm statute and deadly weapons statute in prosecution of defendant for three counts of second-degree assault, in order to limit the sentencing discretion of the trial court and parole board in such a way that neither entity could favor defendant with a prison term shorter than five years, did not subject defendant to "multiple punishment," and therefore did not constitute double jeopardy, despite the fact that the statutory prescribed acts of being "armed with a deadly weapon" and "in possession of a firearm" clearly constitute the "same offense," as application of both enhancement statutes did not increase the maximum sentence for second-degree assault. West's RCWA 9.41.025, 9.41.025(1), 9.95.040; U.S.C.A.Const. Amend. 5.

William G. Knudsen, Port Orchard, for appellant.

C. Dan Clem, Pros. Atty., Port Orchard, for respondent.

PETRICH, Judge.

Dennis Turner appeals from his conviction of three counts of second degree assault and one count of reckless endangerment, arising out of a series of Halloween shooting incidents. We affirm.

On October 31, 1978, the Kitsap County Sheriff's office received reports of a sniper. Two vehicles passing a duplex complex on Rose Road, Port Orchard, where Turner resided with his wife and children, had been struck by what officers believed to be small caliber bullets. The first vehicle fired on was driven by a stranger to the neighborhood, who was looking for the house of a friend. He continued around the block to Cedar Road where, at 9:44 p. m., he called the Sheriff's Department to report the shooting. Officers were dispatched to Cedar Road immediately and arrived at 10:07 p. m. A few minutes later, the officers heard a volley of shots being fired from the vicinity of Rose Road. When they proceeded to Rose Road to investigate, they found

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a 1964 El Camino stopped in the middle of the street, with two bullet holes in the body and one through the rear window. The vehicle had been occupied by three teenagers including Kenneth Straight, who was the driver and a former resident of the neighborhood. While inspecting the damage done to the Straight vehicle, the officers received a call regarding a house also on Rose Road having been fired upon. One bullet had passed through a window of that house located across the street from the duplex complex, and narrowly missed an occupant before it struck a wall. That bullet was retrieved and determined to be a .22 caliber in size.

While inspecting the duplex complex premises on Rose Road with several other officers who had been called in following the second volley of shots, the investigating officers found a number of .22 caliber shell casings a few feet from the middle of three duplexes. The Turner family resided in the most westerly of the duplexes, and were the only occupants of the complex.

Turner approached the officers as they examined the shell casings and demanded to know what they were doing. Appearing very excited, he admitted that he owned a .22 caliber rifle and initially volunteered to let the officers examine it. He changed his mind, however, when an officer told him that a .22 caliber had probably been used in the shooting incidents.[1] He told them to get a warrant, and then ordered them to leave.

During his initial encounter with the officers outside the duplexes, at which time he had not yet been named as a suspect, defendant revealed that his house had been "egged." In reference to the egg throwing incident, he specifically mentioned Kenneth Straight.[2]

On November 2, at approximately 10:30 a. m., two officers with a search warrant, but no arrest warrant, visited the Turner residence. The search warrant affiant, who was the primary investigating officer on the night of the shooting incidents, told at least one of the arresting officers of the sequence of events which had occurred on the night in question, described the bullet trajectories, and also told the officer of Turner's previous problems involving Straight.

After identifying themselves and informing Turner they were investigating the shooting incidents, the officers were invited into the living room. They did not immediately tell Turner they had a search warrant because they hoped to obtain his "cooperation." They ended up arresting Turner, and executing the search warrant after he had been placed in the squad car. The arresting officer testified that defendant would have been arrested eventually, but that his "excited" behavior contributed to the arrest at that particular time. Turner had also spontaneously begun to tell the officers that he had recently test-fired his rifle because he knew that a police ballistics test would enable them to determine whether his rifle had been involved in the Halloween shooting incidents. Thinking that Turner was beginning to get into an area where advisement of his *Miranda* rights might be prudent, the officer decided to take him into custody for questioning. At the sheriff's office, after he had been read his rights, Turner gave an oral statement which was admitted at trial. In an attempt to exculpate himself, he repeated his earlier explanation that he had test-fired his rifle after the shooting incidents, because he thought the police would want to test the shell casings and seize the rifle.

1. Officers in the area investigating the first shooting had heard shots being fired in rapid succession from what sounded like a small caliber weapon. Turner's rifle is a .22 caliber semi-automatic.

2. Straight later admitted that he had driven to the neighborhood with two teenage friends to do some "harrassing." He had two dozen eggs in his possession at the time and intended to "egg" Turner's residence. He and his companions had driven by the brightly lighted duplex complex a few times, just before their truck was fired upon, but assertedly decided to abort their plans after they observed police questioning the driver of the first vehicle, the rear window of which had been shattered. At trial, a few of Straight's friends who still resided in the neighborhood, admitted that they had independently undertaken the mission of "egging" Turner's residence.

He also stated that he had altered the firing pin, but gave inconsistent responses as to when the alteration occurred.[3]

Testimony established that during a separate incident instigated by Straight in May, 1978, Turner had pointed his rifle at Straight; and threatened to shoot him if he did not leave the premises. There was also testimony that Turner had asked an officer in February, 1978, a hypothetical question regarding the use of firearms in defense of his property. Defendant's custodial statement that he had bought a .22 rather than a shotgun because it would not "hurt as bad," was also admitted into evidence.

The jury found Turner guilty of three counts of second degree assault involving Straight and his two companions, and not guilty of the fourth count involving the other vehicle. It also found him guilty of reckless endangerment regarding the bullet which entered the home of his neighbor. In addition, the jury returned special verdicts finding that defendant had been in possession of a firearm and a deadly weapon, pursuant to the respective penalty enhancement provisions of RCW 9.41.025 and RCW 9.95.040. Defendant appeals from the verdict and sentence.

On appeal, the first issue we address is whether defendant's inculpatory statements regarding the test-firing of his weapon and alteration of the firing pin should have been suppressed as the poisoned fruit of an unlawful arrest.

[1] In the usual case a warrantless arrest is legal if the arresting officer has probable cause to believe defendant has committed a felony. RCW 10.31.100. *See also State v. Todd*, 78 Wash.2d 362, 365, 474 P.2d 542 (1970); *State v. Turpin*, 25 Wash. App. 493, 497–98, 607 P.2d 885 (1980). Probable cause exists where the facts and circumstances within the arresting officer's knowledge, and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been committed. *State v. Fricks*, 91 Wash.2d 391, 398, 588 P.2d 1328 (1979).

[2] The arresting officer knew that Turner possessed a .22 caliber weapon. From the proximity of the shell casings to the Turner residence, diagrams of probable bullet trajectories, and other information, the arresting officer had reason to believe that the shots had been fired from nearby defendant's home. Defendant and his family were the only persons residing in that particular location. The arresting office knew that moments after the second volley had been fired Turner had been encountered outside by the search warrant affiant, and was assertedly waiting for a halloween prankster to "get him." He also knew of defendant's past neighborhood quarrels, including the prior rifle-pointing incident involving Kenneth Straight. His curiosity was also aroused by defendant's statement that he had test-fired his rifle the day after the shooting incidents. Accordingly, we hold that there was ample probable cause for the warrantless arrest of defendant.

[3, 4] Defendant contends, however, that absent exigent circumstances,[4] a warrantless arrest within a dwelling is per se unlawful. We do not agree. Where officers are lawfully in a private home pursuant to a search warrant, they may make a warrantless probable cause arrest even though there are no exigent circumstances. *State v. Williams*, 17 Wash.App. 186, 192, 562 P.2d 651 (1977), *aff'd* in 90 Wash.2d 245, 580 P.2d 635 (1978) (without reaching warrantless arrest issue.)[5] Here, although de-

3. Within his in-custody statement defendant cryptically asserted that he had altered the firing pin "between now and then." In contrast, on his own behalf at trial he testified that during the July preceding the incident, he had altered the firing pin for identification purposes in the event the rifle were to be stolen.

4. Because of the manner in which we decide this case, we need not determine whether exigent circumstances supported the warrantless at-home arrest.

5. Defendant argues that the holding of *Williams* is erroneous because of the court's reliance on *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (warrantless probable cause arrest in a *public* place lawful even absent exigent circumstances where specific act of Congress authorized postal inspectors to make such arrests). Since the

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fendant may properly assert that entry was not made *pursuant* to the search warrant, for the warrant was not served until after his arrest,

> when an officer has sought and obtained a magistrate's disinterested determination that a suspect's *right of privacy* must reasonably yield to a law officer's need to search in a private home, it would be unreasonable to require either an arrest warrant or a showing of exigent circumstances to justify a warrantless arrest upon probable cause.

(Italics ours.) 17 Wash.App. at 192–93, 562 P.2d 651. Since a neutral and detached magistrate had already determined that there was probable cause to conduct a search of defendant's dwelling, the arrest of Turner in his home did not constitute a significantly greater intrusion upon his privacy merely because an arrest warrant had not first been obtained. The fact that Turner invited the officers into his home further negates any assertion that the warrantless arrest in his home constituted an invasion of privacy.[6] *See State v. Teuber*, 19 Wash.App. 651, 654–55, 577 P.2d 147 (1978) (defendant in misdemeanor case waived right to privacy by inviting arresting officers into home).

Because (1) there was probable cause for the arrest, (2) a warrant had already issued for the search of defendant's dwelling, and (3) defendant invited the officers into his home, we hold that Turner's warrantless at-home arrest was lawful and consequently, that his voluntary in-custody statements were properly admitted at trial.

We next address the question of whether the trial court abused its discretion in admitting evidence of defendant's prior rifle-pointing incident involving Kenneth Straight, and of his previous hypothetical question to a police officer regarding the lawfulness of using firearms to protect his property.

[5, 6] Although evidence of other crimes, wrongs, or acts is not admissible to prove character or that a person acted in conformity therewith, it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). This list of exceptions is not exclusive, the true test being whether the evidence as to other acts is relevant and necessary to prove an essential ingredient of the crime charged. *State v. Goebel*, 40 Wash.2d 18, 21, 240 P.2d 251 (1952); *State v. Irving*, 24 Wash.App. 370, 601 P.2d 954 (1979). Relevant evidence is generally admissible, ER 402, but may be excluded if its probative value is substantially outweighed by the danger of prejudice. ER 403. Where admission of evidence of prior bad acts is unduly prejudicial, the minute peg of relevancy is said to be obscured by the dirty linen hung upon it. *See* Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv.L.Rev. 954, 983 (1933). Relevant evidence is evidence having *any* tendency to make the existence of any fact that is of consequence to determination of the action more or less probable than it would be without the evidence. ER 401; *Cf. State v. Ranicke*, 3 Wash.App. 892, 479 P.2d 135 (1970). The determination of whether testimony is relevant is within the discretion of the trial court, *State v. Bonner*, 21 Wash.App. 783, 793, 587 P.2d 580 (1978), and each case depends on its own facts. 3 Wash.App. at 895, 479 P.2d 135.

[7] Applying these principles to the present case, it does not appear that the trial court abused its discretion. Testimony showed that Straight's 1964 El Camino, which was nearly identical to the one he had owned while he was a neighbor of the Turner family, had made repeated, slow trips past the Turner duplex immediately before it was fired upon. Straight had

Supreme Court's decision in *Watson* turned more on fulfillment of the constitutional requirement of probable cause than on legislative authorization to arrest without a warrant, we decline to accept defendant's invitation to depart from the holding of *Williams*.

6. The fact that the arresting officers entered defendant's home with the consent of the occupant, *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), does not invalidate the arrest.

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gone to the neighborhood with the purpose of throwing eggs at the Turner residence, and eggs had in fact been thrown at it before the shootings, although assertedly by friends of Straight acting on their own. Because defendant's prior hypothetical question regarding the firing of warning shots in defense of his property indicated a frame of mind relevant to proof of intent in the present case, and the prior incident involving Straight was probative of motive, testimony regarding both incidents was proper. Although under different circumstances defendant might be correct in asserting that evidence of his prior conduct was introduced to indicate a propensity to improperly utilize firearms in the course of defending his property, under the facts of this case we hold that the prior incidents were relevant and necessary to prove the essential ingredients of the offense.

[8–11] The next issue we must decide is whether defendant's conviction is supported by substantial evidence. There is substantial evidence to support a conviction when, viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). In considering the evidence, the reviewing court must assume the truth of the State's evidence and view it most strongly against defendant, allowing the State the benefit of all reasonable inferences. *State v. Braxton*, 10 Wash.App. 1, 516 P.2d 771 (1973). Circumstantial evidence is as trustworthy as direct evidence. *State v. Gosby*, 85 Wash.2d 758, 766, 539 P.2d 680 (1975). After careful review of the record, we conclude that the evidence in support of defendant's conviction, albeit circumstantial, was substantial.

The final issue on review is whether application of both the firearm statute, RCW 9.41.025, and deadly weapon statute, RCW 9.95.040, to limit sentencing discretion of the trial judge and parole board constituted double jeopardy. We respond in the negative.

[12] Either successive prosecutions or multiple punishments for the same offense may constitute double jeopardy. *See, e. g., State v. Cunningham*, 23 Wash.App. 826, 859, 598 P.2d 756 (1979); *State v. Bresolin*, 13 Wash.App. 386, 393, 534 P.2d 1394 (1975). Here, the statutorily proscribed acts of being "armed with a deadly weapon" and "in possession of a firearm" clearly constitute the "same offense." *See State v. Roybal*, 82 Wash.2d 577, 581–82, 512 P.2d 718 (1973) (if evidence required to support a conviction on one charge sufficient to warrant conviction on the other, they are the "same offense" for double jeopardy purposes); *State v. Whittington*, 27 Wash.App. 422, 425, 618 P.2d 121 (1980).

[13] Although here the firearm and deadly weapon statutes cover the same offense, Turner is not the object of "multiple punishment." Application of both enhancement statutes did not increase the maximum sentence for second degree assault. It merely limited the sentencing discretion of the trial court and parole board in such a way that neither entity may favor defendant with a prison term shorter than 5 years. In our view, definite punishment is not tantamount to double punishment.

None of the cases defendant cites support his double jeopardy theory.[7] In particular,

7. Although *State v. Frazier*, 81 Wash.2d 628, 503 P.2d 1073 (1972) indicates that a specific distinction must be made between a deadly weapon under RCW 9.95.040 and a firearm under RCW 9.41.025, its holding is merely that a defendant may not be sentenced under RCW 9.41.025(1) where defendant was not given notice in the information that this statute would apply, and where no special finding appropriate to this statute was returned by jury verdict. Here, defendant was given ample notice in the information that both enhancement statutes might apply. In addition, the jury verdict returned special findings appropriate to both statutes.

Defendant's reliance on *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978) is also misplaced. There, the court held that it was improper to enhance the penalty for first degree robbery under RCW 9.41.025 because (1) possession of a deadly weapon is an element of the crime, and (2) penalty enhancement is already incorporated in the punishment for first degree robbery. Neither rationale applies here.

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we disagree with defendant's reliance on *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), which has been applied in *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978) and *State v. Stephens*, 22 Wash.App. 548, 591 P.2d 827 (1979). That case is inapplicable to the case at bench because (1) its resolution did not rest on double jeopardy principles, (2) it involved the imposition of additional cumulative sentences, and (3) the enhancement statutes were directed only at the discretion of a single sentencing entity. In the present case, the applicable enhancement statutes, in effect, provide for concurrent, rather than consecutive minimum terms, and limit the sentencing discretion of both the trial court and parole board. Accordingly, we hold that application of both the firearm statute and deadly weapon statute to enhance defendant's sentence did not result in his being twice placed in jeopardy for the same offense.

Since we are unable to concur in any of defendant's numerous assignments of error, his convictions and sentence are affirmed.

PEARSON, Acting C. J., and PETRIE, J., concur.

29 Wash.App. 150

MEAT CUTTERS LOCAL # 494 AFFILIATED WITH AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA and Ronald E. Scott, Appellants,

v.

ROSAUER'S SUPER MARKETS, INC., a Washington Corporation, Respondent.

No. 3618-III-9.

Court of Appeals of Washington, Division 3, Panel One.

April 28, 1981.

Reconsideration Denied June 30, 1981.

Union appealed from decision of the Superior Court, Spokane County, Donald N. Olson, J., which dismissed its petition against employer for specific performance of a collective bargaining agreement providing for arbitration. The Court of Appeals, Green, J., held that: (1) claim by union that prior to and during negotiations of a collective bargaining agreement with employer, employees were allowed to wear beards, and that therefore they should continue to be allowed to do so was a question properly to be submitted to arbitration, and (2) resolution of claim by union that change by employer in appearance standard, from allowing beards to disallowing them, violated collective bargaining agreement between the parties because it was not a proper exercise of management powers in light of past history and bargaining practices, required an interpretation of the agreement, and therefore was arbitrable.

Reversed.

Munson, J., dissented and filed opinion.

McInturff, C. J., concurred and filed opinion.

1. Arbitration ⇐1.1

Obligation to submit an issue to arbitration is wholly contractual and arbitrability of a dispute depends upon the terms of the agreement.

2. Arbitration ⇐23.14

In an action to compel arbitration, the threshold question of arbitrability is for the court; the sole inquiry is whether the parties bound themselves to arbitrate the particular dispute, and if the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator.

3. Labor Relations ⇐434.5

Claim by union that prior to and during negotiations of a collective bargaining agreement with employer, employees were allowed to wear beards, and that therefore they should continue to be allowed to do so was a question properly to be submitted to arbitration, despite facts that there was no express provision covering facial hair in the agreement, and that the agreement provided that the arbitrator would not decide on any subject the condition of which was not

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diligently inquired into whether reasonable grounds existed for an examination. His examination of the psychology intern and request for a full court clinic evaluation were part of his determination of reasonable grounds for examination, not competency itself. We see no error in vacating the rule 11 proceedings after Dr. Ginnetti's evaluation, which was much more complete and reliable than that of the intern, showed that there were no reasonable grounds for an examination. There is no substantial evidence in the record that appellant may have been mentally incompetent to stand trial. *But cf., Tillery v. Eyman*, 492 F.2d 1056 (9th Cir. 1974) (where extremely erratic and irrational behavior by defendant during trial was held to compel a competency hearing).

There is sufficient evidence to support the verdict and we find no fundamental error in the record.

Affirmed.

HOWARD and BIRDSALL, JJ., concur.

128 Ariz. 362

STATE of Arizona, Appellee,

v.

Gail (Toby) MORGAN, Appellant.

No. 1 CA-CR 4474.

Court of Appeals of Arizona,
Division 1,
Department C.

Feb. 10, 1981.

Rehearing Denied March 19, 1981.

Defendant was convicted after jury trial in the Superior Court, Maricopa County, John H. Seidel, J., of one count of assault with deadly weapon or dangerous instrument and she appealed. The Court of Appeals, O'Connor, J., held that: (1) defendant was not entitled to instruction on "endangerment" or "threatening or intimidating" as lesser included offenses of aggravated assault with deadly weapon or dangerous instrument; (2) time sought by State for continuance was properly excluded and matter proceeded to trial within time limits required by rule governing speedy trial; (3) defendant failed to establish how she was prejudiced by failure of one victim to appear as witness in case or that trial court abused its discretion in granting State's motion for continuance; (4) prosecutor's comment in closing argument did not support unfavorable inference against defendant for her exercise of her constitutional privilege against self-incrimination; and (5) gun and bullets were properly admitted into evidence.

Affirmed.

1. Criminal Law ⇐795(1)

Criminal defendant is entitled to instructions on any lesser included offense of offense charged where evidence supports giving such instruction.

2. Criminal Law ⇐795(1)

If offense alleged to be lesser offense has element in addition to and separate from elements of offense which is asserted to be greater, it is not lesser included offense.

3. Assault and Battery ⇐48

One of required elements of "endangerment" is that victim must be placed in actual substantial risk of imminent death or physical injury, but there is no requirement that victim be aware of conduct of actor. A.R.S. § 13-1201.

See publication Words and Phrases for other judicial constructions and definitions.

4. Assault and Battery ⇐56

Elements of aggravated assault with deadly weapon or dangerous instrument are that actor intentionally placed another person in reasonable apprehension of imminent physical injury using deadly weapon or oth-

er dangerous instrument. A.R.S. §§ 13–1203, subd. A, par. 2, 13–1204, subd. A, par. 2.

5. Assault and Battery ⇐56

"Deadly weapon" may be unloaded gun. A.R.S. § 13–105, subds. 9, 12.

See publication Words and Phrases for other judicial constructions and definitions.

6. Assault and Battery ⇐60

Aggravated assault with deadly weapon or dangerous instrument may be committed by using unloaded gun; thus, it is not necessary element of aggravated assault with deadly weapon or dangerous instrument that victim be in actual substantial risk of imminent death or physical injury, but rather, victim need only be in reasonable apprehension of physical injury, therefore, endangerment is not lesser included offense of aggravated assault with deadly weapon or dangerous instrument. A.R.S. §§ 13–1201, 13–1204, subd. A, par. 2.

7. Assault and Battery ⇐96(1)

Defendant who was charged with assault with deadly weapon or dangerous instrument was not entitled to instruction on offense of endangerment as lesser included offense. A.R.S. §§ 13–1201, 13–1204, subd. A, par. 2.

8. Extortion and Threats ⇐25

Elements of "threatening or intimidating" are intent to terrify, threatening or intimidating by word or conduct, to cause physical injury to another. A.R.S. § 13–1202.

9. Assault and Battery ⇐54

Distinction between "threatening or intimidating" and "aggravated assault" lies not in victim's mental state, but in defendant's subjective concern with victim's mental state. A.R.S. §§ 13–1202, subd. A, par. 1, 13–1204, subd. A, par. 2.

10. Extortion and Threats ⇐25

To be found guilty of threatening or intimidating, defendant must intend to fill victim with intense fright; in other words, defendant must subjectively and specifically intend that victim's mental state be one of terror. A.R.S. § 13–1202.

11. Assault and Battery ⇐56

To be found guilty of aggravated assault with dangerous instrument or deadly weapon, defendant need only intentionally act using deadly weapon or dangerous instrument so that victim is placed in reasonable apprehension of imminent physical injury; defendant must intend to so act, and victim must react with apprehension, but defendant need not have any subjective concern whatever for victim's mental state.

12. Criminal Law ⇐795(1)

While assault, especially aggravated assault, may terrify victim, offense does not require that defendant intend to evoke terror in victim, therefore, threatening or intimidating is not lesser included offense of aggravated assault with deadly weapon or dangerous instrument; thus, defendant charged with aggravated assault with deadly weapon or dangerous instrument was not entitled to instruction on offense of threatening or intimidating as lesser included offense. A.R.S. §§ 13–1202, subd. A, par. 1, 13–1204, subd. A, par. 2.

13. Criminal Law ⇐586, 1151

Granting or denial of motion for continuance is within sound discretion of trial court and such ruling will not be reversed on appeal unless it is shown that trial court had abused its discretion so as to result in prejudice to defendant.

14. Criminal Law ⇐577.10(7, 8)

Certain time periods are properly excludable when determining speedy trial limits, including delays occasioned by or on behalf of defendant and delays mandated by extraordinary circumstances where such delay is indispensable to interests of justice. 17 A.R.S. Rules of Criminal Procedure, Rules 8.1 et seq., 8.4, subd. a, 8.5, subd. b.

15. Criminal Law ⇐577.10(7)

Where trial court granted State's motion for continuance in order to subpoena victims of aggravated assault but ordered that none of days were to be excluded, where on day set for trial State again

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moved for continuance because it had been unable to secure appearance of victims, presented evidence that it had made good faith and diligent effort to obtain out-of-state witnesses and showed that it had promptly mailed subpoenas to such witnesses but they were delayed in post office, and where trial court determined that extraordinary circumstances existed and granted State continuance, time was properly excluded, and matter proceeded to trial within time limits required by rule governing speedy trials. 17 A.R.S. Rules of Criminal Procedure, Rules 8.1 et seq., 8.4, subd. a, 8.5, subd. b.

16. Criminal Law ⇐594(1), 1166(9)

Where one out-of-state witness did not appear at trial after Colorado court found that compliance with subpoena would have resulted in undue hardship for her, where approximately one week prior to trial defense counsel received word that such witness would not testify and had opportunity to take witness' deposition if defendant wanted to preserve such witness' testimony, and where count of charge which alleged assault on absent victim was dismissed at close of State's case, defendant failed to show how she was prejudiced by failure of absent victim to appear as witness in case or that trial court abused its discretion in granting State's motion for continuance in order to obtain out-of-state witnesses.

17. Criminal Law ⇐721(1)

Comment by prosecution upon failure of defendant to testify violates defendant's Fifth Amendment privilege against self-incrimination. A.R.S. § 13–117, subd. B; A.R.S.Const. Art. 2, § 10; U.S.C.A.Const. Amends. 5, 14.

18. Criminal Law ⇐721(1)

Only comments which actually direct jury's attention to failure of defendant to testify are impermissible. A.R.S. § 13–117, subd. B; A.R.S.Const. Art. 2, § 10; U.S.C.A. Const. Amends. 5, 14.

19. Criminal Law ⇐721(6)

Where in closing argument defendant had reminded jurors that she had not taken witness stand and admonished them not to draw unfavorable inference against her because of her failure to testify, where prosecutor's closing comments did no more than restate what defense counsel had already argued, that is, that defendant produced no evidence, and where comment did not focus jury's attention on failure of defendant to testify in that defendant was not only person who could have explained or contradicted evidence, but rather, absent victim was also present at residence at time of offense, prosecutor's comment did not support unfavorable inference against defendant for her exercise of her constitutional privilege against self-incrimination. A.R.S. § 13–117, subd. B; A.R.S.Const. Art. 2, § 10; U.S.C.A. Const. Amends. 5, 14.

20. Criminal Law ⇐720(6)

Counsel is permitted considerable latitude in closing argument, including right to draw reasonable inferences from evidence.

21. Criminal Law ⇐730(8)

Where jury was instructed that arguments of counsel were not evidence, and where implication that bullets which were found on lawn in front of house where aggravated assault with deadly weapon or dangerous instrument took place belonged to gun which was found in defendant's closet was reasonable inference to be drawn from evidence, trial court did not err in failing to give jury suitable cautionary instruction following prosecutor's closing arguments which implied that bullet found in yard belonged to gun found in defendant's closet.

22. Criminal Law ⇐404(4)

Where gun which was seized was in bedroom closet in residence where defendant lived, and where it appeared that gun had been recently fired at time it was seized, gun became additional piece of circumstantial evidence used to complete story of crime, and trial court did not err in admitting into evidence gun found in closet on grounds that State failed to lay proper foundation prior to admitting gun in prosecution of defendant for aggravated assault with deadly weapon or dangerous instrument. A.R.S. § 13–1204, subd. A, par. 2.

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23. Criminal Law ⇐1043(3)

Where defendant charged with aggravated assault with deadly weapon or dangerous instrument objected to admission of gun on ground that it was immaterial and irrelevant, rather than upon ground that improper foundation had been presented, defendant failed to preserve issue of admissibility of gun for purposes of appeal. A.R.S. § 13–1204, subd. A, par. 2.

24. Criminal Law ⇐404(4)

Where bullets were seized as result of defendant's statement to police indicating that bullets could be found on lawn near house, and where, when officer searched premises, they found bullets which were ultimately introduced into evidence, investigating officer's testimony provided sufficient foundation for admission of bullets.

25. Criminal Law ⇐404(4)

Where investigating officer's testimony provided sufficient foundation for admission of bullets, defendant's argument that bullets were not sufficiently identified by officer went to weight of evidence and not to its admissibility, in prosecution of defendant for aggravated assault with deadly weapon or dangerous instrument. A.R.S. § 13–1204, subd. A, par. 2.

26. Criminal Law ⇐1036.1(4)

Although defendants' motion to suppress admission of certain statements made by her to police officer was granted, where defendant did not move to suppress pistol and bullets prior to trial, and where, at time their admission was sought at prosecution of defendant for aggravated assault with deadly weapon or dangerous instrument, defendant did not object on grounds that they were fruits of previously suppressed statements, defendant waived such issue for appeal. A.R.S. § 13–1204, subd. A, par. 2.

Robert K. Corbin, Atty. Gen., by William J. Schafer, III, Chief Counsel, Criminal Division, and Barbara A. Jarrett, Asst. Atty. Gen., Phoenix, for appellee.

Theodore C. Jarvi, Scottsdale, for appellant.

OPINION

O'CONNOR, Judge.

Appellant was convicted of one count of assault with a deadly weapon or dangerous instrument in violation of A.R.S. §§ 13–1203(A)(2) and 13–1204(A)(2) and (B), following a trial by jury. She was sentenced to serve five years in the Arizona State Prison. She timely filed her notice of appeal and raises five issues for our consideration: 1) whether she was entitled to instructions on the offenses of threatening or intimidating, and endangerment, as lesser included offenses of assault; 2) whether she was denied a speedy trial; 3) whether the prosecutor improperly commented upon her refusal to testify in closing argument; 4) whether the prosecutor improperly misstated the evidence during his closing argument and the court erred in failing to provide a curative instruction to the jury; 5) whether the trial court erred in admitting into evidence a pistol and bullets found at the scene of the offense.

The trial testimony reveals that on May 5, 1979, Pat Pirkle, a witness in the case, visited Jeanette Schuerman. Ms. Schuerman was a friend of appellant and was living in a rental unit attached to appellant's home. When Ms. Pirkle arrived at Ms. Schuerman's residence, appellant was visiting with Ms. Schuerman. She left soon after Ms. Pirkle's arrival. Sometime after midnight, as Ms. Pirkle and Ms. Schuerman were watching television, Ms. Pirkle heard Ms. Schuerman's dog suddenly begin barking in the bedroom. Ms. Pirkle went to the bedroom window and observed a figure standing outside. As the figure revealed itself, Ms. Pirkle could see that it was the appellant and that she was armed with a gun. Appellant demanded to speak to Ms. Schuerman. Ms. Pirkle testified at trial that she refused to allow Ms. Schuerman to come to the window and that she continued to speak with appellant for approximately 15 minutes. Ms. Pirkle further testified that appellant threatened to use the gun unless Ms. Schuerman came to the window.

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After denying appellant's demands, Ms. Pirkle turned from the window and took approximately two steps to the doorway of the room when she heard a gun being fired.

Ms. Pirkle and Ms. Schuerman called the police, who investigated the scene and discovered a bullet hole through the window and screen near the place appellant had been standing. According to the investigating officer's testimony at trial, a bullet apparently entered through the window in front of which appellant was standing and exited through a second window in the bedroom. The officers apprehended appellant riding a bicycle in front of her home. They also found a pistol wrapped in a towel in a box on a closet shelf in a bedroom of the house where appellant was living. Finally, appellant told the officers where to find some bullets which she had dropped and which were identified as being of the same caliber as the gun found in the bedroom of the residence.

INSTRUCTIONS ON THREATENING OR INTIMIDATING AND ENDANGERMENT

For appellant's first claim of error, she argues that the trial court erred in failing to instruct the jury that the offenses of threatening or intimidating (A.R.S. § 13–1202) and endangerment (A.R.S. § 13–1201) are lesser included offenses of aggravated assault, as contended by appellant at trial. The trial court refused to give either of appellant's requested instructions and gave only an instruction on simple assault as a lesser included offense of aggravated assault.

Our discussion of this issue and our holding herein is limited solely to the offense charged in this case, namely aggravated assault in violation of A.R.S. § 13–1204(A)(2). We do not address the issue of whether endangerment or threatening or intimidating is a lesser included offense of either simple assault or aggravated assault as defined by any of the remaining provisions of A.R.S. § 13–1203 or A.R.S. § 13–1204.

[1, 2] A criminal defendant is entitled to instructions on any lesser included offense of the offense charged where the evidence supports the giving of such an instruction. *State v. Dugan*, 125 Ariz. 194, 608 P.2d 771 (1980). "An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense." *Id.* at 195, 608 P.2d at 772. Thus, if the offense alleged to be a lesser offense has an element in addition to and separate from the elements of the offense which is asserted to be greater, it is not a lesser included offense.

The question of whether the offenses of threatening or intimidating and endangerment are lesser included offenses of aggravated assault is one of first impression in Arizona. The new statutes defining those offenses are based on the Model Penal Code, §§ 211.2 through 211.3. A number of states have similar statutes. *E. g.*, Oregon Revised Statutes § 163.195; New York Penal Law § 120.20; Texas Penal Code § 22.05. However, there are few cases from other jurisdictions addressing the issue. *See*, however, *People v. Miller*, 69 Misc.2d 722, 330 N.Y.S.2d 925 (1972); *Gallegos v. State*, 548 S.W.2d 50 (Tex.Cr.App.1977).

ENDANGERMENT

[3] "A person commits endangerment by recklessly endangering another person with the substantial risk of imminent death or physical injury." A.R.S. § 13–1201(A). The comments of the Criminal Code Commission indicate that the offense supplements the law of criminal attempt by adding a provision for reckless actions. *Arizona Revised Criminal Code Commission Report* at 134 (1975). The statute is designed to cover "situations where the actor's recklessness endangers another's well being without the actor technically intending or knowing he is doing so." R. Gerber, *Criminal Law of Arizona* at 163 (1978). According to the Commission, conduct punishable under the statute would include such actions as "recklessly discharging firearms in public, pointing firearms at others, obstructing public highways or abandoning

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life-threatening containers which are attractive to children." *Arizona Revised Criminal Code Commission Report* at 134 (1975). It is thus clear, both from a reading of the statute and from the Commission's comments, that one of the required elements of endangerment is that the victim must be placed in actual substantial risk of imminent death or physical injury. There is no requirement that the victim be aware of the conduct of the actor.

[4-7] The elements of aggravated assault which are pertinent to this case are set forth in A.R.S. § 13-1203(A)(2) and § 13-1204(A)(2). They require that the actor intentionally place "another person in reasonable apprehension of imminent physical injury" using a deadly weapon or other dangerous instrument. A deadly weapon may be an unloaded gun. A.R.S. § 13-105(9) and (12). Aggravated assault pursuant to A.R.S. § 13-1204(A)(2) may, therefore, be committed by using an unloaded gun, and it is easy to imagine situations in which the assault could be committed without placing the victim in actual risk. Thus, it is not a necessary element of aggravated assault that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury. Endangerment is therefore not a lesser included offense of aggravated assault as defined in A.R.S. § 13-1204(A)(2), and appellant was not entitled to an instruction on the offense of endangerment as a lesser included offense.

THREATENING OR INTIMIDATING

Appellant argues additionally that she was entitled to a jury instruction on the offense of threatening or intimidating in violation of A.R.S. § 13-1202(A)(1) as a lesser included offense of aggravated assault. A.R.S. § 13-1202(A)(1) provides:

> A person commits threatening or intimidating if such person with the intent to terrify threatens or intimidates by word or conduct: (1) To cause physical injury to another person....

The Criminal Code Commission's comments indicate that the statute was designed to proscribe "threats that cause serious alarm for personal safety" on the ground that "[p]eople who are attempting to avoid what they believe to be immediate serious harm may often take action so precipitous as to harm themselves." *Arizona Revised Criminal Code Commission Report* at 135 (1975). The comments point out that while the defendant may be found guilty of a more serious offense if actual harm does result, the statute authorizes conviction for "the inchoate threat".

[8-12] The elements of threatening or intimidating are: (a) intent to terrify, (b) threatening or intimidating by word or conduct, (c) to cause physical injury to another. "Terrify" is defined in Webster's Third New International Dictionary (1966) as "to fill with terror: frighten greatly," and "terror" is defined as "a state of intense fright or apprehension: stark fear." "Apprehension" is defined as "anticipation especially of unfavorable things: suspicion or fear especially of future evil." Appellant argues that the intent required for threatening or intimidating is the same as that required for assault, asserting that there is no appreciable distinction between terror and apprehension. Appellant's argument misses the point, because the distinction between threatening or intimidating and aggravated assault lies not in the victim's mental state, but in the defendant's subjective concern with the victim's mental state. To be found guilty of threatening or intimidating, the defendant must intend to fill the victim with intense fright; in other words, the defendant must subjectively and specifically intend that the victim's mental state be one of terror. By contrast, to be found guilty of assault under A.R.S. § 13-1204(A)(2) the defendant need only intentionally act using a deadly weapon or dangerous instrument so that the victim is placed in reasonable apprehension of imminent physical injury. In other words, the defendant must intend to do the act, and the victim must react with apprehension, but the defendant need not have any subjective concern whatever for the victim's

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mental state. While an assault, especially an aggravated assault, may terrify a victim, the offense does not require that the defendant intend to evoke terror in the victim. Therefore, threatening or intimidating in violation of A.R.S. § 13-1202(A)(1) is not a lesser included offense of aggravated assault as charged here in violation of A.R.S. § 13-1204(A)(2). Appellant was thus not entitled to an instruction on the offense of threatening or intimidating as a lesser included offense.

SPEEDY TRIAL

Appellant next contends that she was denied her right to a speedy trial by virtue of various continuances that were granted by the trial court. The case proceeded from initial appearance to trial as follows: appellant's initial appearance occurred on May 6, 1979, and her arraignment occurred on June 6, 1979. Appellant was not in custody and therefore she was required to be brought to trial within 120 days from her initial appearance or 90 days from her arraignment, whichever was greater. *State v. Rose*, 121 Ariz. 131, 589 P.2d 5 (1978); rule 8.2(c), Arizona Rules of Criminal Procedure. In this case, the greater period was 90 days from the arraignment, and the last day for trial was thus September 4, 1979. Appellant moved for a continuance which was granted on August 23, 1979, and the new last day for trial thus became October 2, 1979. Rule 8.4(a), Arizona Rules of Criminal Procedure. On September 18, 1979, the State moved for a 14-day continuance in order to subpoena the victims, who were residing in Colorado at the time. The trial court granted the continuance and ordered that none of the days were to be excluded. Thus the last day for trial remained October 2, 1979. Appellant did not object to the continuance. Finally, on October 2, 1979, the State again moved for a continuance because it had been unable to secure the appearance of the two victims. At the hearing on the motion to continue, the State presented evidence that it had made a good faith and diligent effort to obtain the out-of-state witnesses. The State showed that it had promptly mailed the subpoenas to Colorado but that they were delayed in the post office because they showed an incorrect zip code. Appellant objected to the continuance and moved for dismissal based on an alleged violation of her right to a speedy trial. The trial court determined that extraordinary circumstances existed and granted the State a 16-day continuance to October 18, 1979. The matter proceeded to trial on October 18, 1979.

[13-15] It is clear in Arizona that the granting or denial of a motion for continuance is within the sound discretion of the trial court and that such a ruling will not be reversed on appeal unless it is shown that the trial court has abused its discretion so as to result in prejudice to the defendant. *State v. Blodgette*, 121 Ariz. 392, 590 P.2d 931 (1979). Certain time periods are properly excludable when determining speedy trial limits. Those include delays occasioned by or on behalf of the defendant pursuant to rule 8.4(a), and delays mandated by extraordinary circumstances where such delay is indispensable to the interests of justice. Rule 8.5(b), Arizona Rules of Criminal Procedure. We find the trial court did not abuse its discretion in this instance by finding that extraordinary circumstances existed to justify the continuance and that the delay was indispensable to the interests of justice. We find that the time was properly excluded, and that the matter proceeded to trial within the time limits required by rule 8.

[16] Finally, appellant claims that she was prejudiced by the failure of the State to produce both of the out-of-state witnesses at trial. The Colorado witnesses were the victims, Pat Pirkle and Jeanette Schuerman. Ms. Pirkle complied with the subpoena and ultimately testified at trial. However, a hearing was held in Colorado regarding the subpoena of Jeanette Schuerman, and the Colorado court found that compliance with the subpoena would have resulted in undue hardship for her. Thus, she did not appear at trial. However, we fail to see how appellant was prejudiced by the failure of Ms. Schuerman to appear as a

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witness in this case. Appellant was originally charged with two counts of aggravated assault, one pertaining to each victim. At the close of the State's case, the trial court dismissed Count One of the charge which alleged an assault on the absent victim, Jeanette Schuerman.

Furthermore, as the trial court pointed out, approximately a week prior to trial, trial counsel for appellant received word that the witness Schuerman would not testify in the case. At that time appellant had the opportunity to take the witness' deposition in Colorado if she wanted to preserve her testimony. Having actual notice that the witness would not appear at trial, appellant nevertheless failed to initiate the procedures necessary to preserve the witness' testimony for trial. Under the circumstances, we find that appellant has failed to show that the trial court abused its discretion in granting the State's motion for a continuance or that she was prejudiced thereby.

COMMENTS ON SILENCE

For her third issue on appeal, appellant claims that the prosecutor committed reversible error in his closing argument by commenting on her failure to testify in her own behalf. In the State's rebuttal argument, the prosecutor made the following statements:

> Mr. Jarvi decried the explanation of some of the facts. *And although the defense can elect to produce no evidence; that, they did. The facts here have been presented and they are the State's evidence.* And the evidence does, when taken with fair inferences, prove beyond a reasonable doubt that the defendant, Toby Morgan, committed the offense of aggravated assault with a deadly weapon. [emphasis added]

Immediately following the statement, defense counsel moved for a mistrial, which was denied.

Appellant argues that the remarks were made for the purpose of emphasizing her refusal to testify. Additionally, she asserts that she was the only person other than Ms. Pirkle who could have testified as to the facts of the offense.

[17, 18] A comment by a prosecutor upon the failure of the defendant to testify violates the defendant's fifth amendment privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Such comments also violate Art. 2 § 10 of the Arizona Constitution and A.R.S. § 13-117(B). However, not all such comments are improper. Only comments which actually direct the jury's attention to the failure of the defendant to testify are impermissible. *State v. Arredondo*, 111 Ariz. 141, 526 P.2d 163 (1974). "To be constitutionally proscribed, a comment must be adverse; that is, it must support an unfavorable inference against the defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege." *State v. Mata*, 125 Ariz. 233, 238, 609 P.2d 48, 53 (1980). *See also Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978).

[19] In the instant case, an examination of the context in which the remark was made reveals that it did not raise an unfavorable inference against the defendant. In her own closing argument, appellant had reminded the jurors that she had not taken the witness stand and admonished them not to draw an unfavorable inference against her because of her failure to testify. The prosecutor's comments did no more than restate what defense counsel had already argued, that is, that the defendant produced no evidence. In addition, the comment does not focus the jury's attention on the failure of the defendant to testify. The appellant was not the only person who could have explained or contradicted the evidence. Jeanette Schuerman was also present at the residence at the time of the offense, and the jury was not aware that she was unavailable to testify. *State v. Still*, 119 Ariz. 549, 582 P.2d 639 (1978). We find, therefore, that the comment did not support an unfavorable inference against the appellant for her exercise of her constitutional privilege against self-incrimination.

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PROSECUTOR'S CLOSING ARGUMENT

Appellant next claims that the prosecutor made critical misstatements of fact in his closing argument, and that the trial court erred in failing to give the jury a suitable cautionary instruction. At trial, Kevin Davis, the investigating officer, testified that he found a gun, which appeared to have been fired recently, in a bedroom closet in the residence where appellant lived. He also testified that appellant asked him if he would like to know where the bullets to the gun were. She had told him that she had placed the bullets in her underwear and they had scattered around the yard surrounding the residence. However, the State was unable to prove conclusively at trial that the gun which was found in the bedroom closet was the gun used by appellant to commit the offense.

In closing argument, the prosecutor stated as follows:

> Later at the police station, she told Officer Kevin Davis that she had placed the cartridges, shells *for the gun* in her underwear and apparently they had fallen out as she was leaving the scene. [emphasis added]

Counsel for appellant objected to the statement and moved for a mistrial. The trial court denied the motion, but told the prosecutor to make it clear he was not quoting from the evidence. When the prosecutor resumed his argument, he cautioned the jury as follows:

> Now, I would point out to you that in indicating what the defendant said to Officer Davis that I was paraphrasing my understanding or intent of the statement and was not intending to quote the defendant exactly, and I'm not sure that even the testimony indicated an exact quote of her words.

Appellant claims that the cautionary statement of the prosecutor did nothing to cure the taint left by his previous remarks. She also claims that the prosecutor erred in making the following statements during his rebuttal argument:

> And then we have the defendant, Toby Morgan, while down at the police station, saying: "You want to know where the bullets are?" Bullets to what? First, what do bullets go to? They go to guns. "You want to know where the bullets are? I put them in my underwear and they dropped out as I was leaving." The officer goes back and he finds .38 caliber bullets.

[20, 21] Counsel is permitted considerable latitude in closing argument, including the right to draw reasonable inferences from the evidence. *State v. Jaramillo*, 110 Ariz. 481, 520 P.2d 1105 (1974). In the instant case, the implication that the bullets which were found on the lawn belonged to the gun which was found in the closet was a reasonable inference to be drawn from the evidence, and was thus proper argument. Additionally, the jury was instructed that arguments of counsel were not evidence. We find no error.

ADMISSION OF PISTOL AND BULLETS

[22] Finally, appellant argues that the trial court erred in admitting into evidence the gun found in the closet and the bullets in the yard. Appellant argues first that the State failed to lay a proper foundation prior to admitting the gun. She asserts that the State failed to prove that the gun which was found in the closet was the gun used by appellant in the commission of the crime. She also argues that the bullets were admitted without proper foundation linking them to the gun or to the incident.

[23] We disagree. The gun which was seized was in a bedroom closet in the residence where appellant lived. Officer Davis testified that it appeared to have been fired recently. The gun thus became an additional piece of circumstantial evidence used to complete the story of the crime. Additionally, at trial, appellant objected to the admission of the gun on the ground that it was immaterial and irrelevant, rather than upon the ground that an improper foundation had been presented. Thus, as to the admissibility of the gun, appellant has failed to preserve the issue for purposes of

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this appeal. *United States v. Markham*, 440 F.2d 119 (9th Cir. 1971).

[24, 25] The bullets were seized as a result of appellant's statements to the police indicating that the bullets could be found on the lawn near the house. When the officers searched the premises, they found the bullets which were ultimately introduced into evidence. At trial, appellant objected to the admission of the bullets on the ground that they had not been sufficiently identified. Even if such an objection could be construed as an objection on the ground that the prosecutor failed to establish a proper foundation, we do not believe that the trial court abused its discretion in allowing the bullets to be admitted. We find that the investigating officer's testimony did provide sufficient foundation for the admission of the bullets. Her argument that they were not sufficiently identified by the officer goes to the weight of the evidence and not to its admissibility. *State v. Blazak*, 114 Ariz. 199, 560 P.2d 54 (1977); *State v. Mays*, 7 Ariz.App. 90, 436 P.2d 482 (1968).

[26] Appellant also asserts that the pistol and bullets should have been suppressed as the "fruit of a poisonous tree." Prior to trial, appellant filed a motion to suppress the admission of certain statements made by her to the police officers. The motion was granted. She contends that the pistol and bullets were seized as a result of the statements which had been suppressed. Appellant did not move to suppress the pistol and the bullets prior to trial. Moreover, at the time their admission was sought at trial, appellant did not object on the grounds that they were the fruit of her previously suppressed statements. Appellant has thus waived this issue for appeal. *State v. Marahrens*, 114 Ariz. 304, 560 P.2d 1211 (1977).

For the foregoing reasons, the judgment and sentence are affirmed.

OGG, J., and YALE McFATE, Judge (Ret.), concur.

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STATE of Arizona, Appellee,

v.

Dennis LIMPUS, Appellant.

No. 1 CA-CR 4394.

Court of Appeals of Arizona,
Division 1,
Department B.

Feb. 19, 1981.

Rehearing Denied March 17, 1981.

Review Denied March 31, 1981.

Appellant pled guilty in the Superior Court, Maricopa County, No. CR-107147, Robert L. Myers, J., to two counts of sexual exploitation of a minor and one count of photographing a minor engaged in sexual conduct and was sentenced to two terms of seven years and one term of five years, respectively, all sentences to run concurrently. Defendant appealed. The Court of Appeals, Eubank, J., held that: (1) state did not breach its plea agreement with defendant not to take a position on sentencing by its cross-examination of defendant's psychologist for credibility at mitigation hearing; (2) word "lewd" in statute prohibiting sexual exploitation of minors did not make statute unconstitutionally vague; (3) the record established that before the trial court accepted his guilty plea, the defendant understood the nature of the charges against him; and (4) the trial court did not abuse its discretion by imposing presumptive sentences.

Affirmed.

1. Criminal Law ⇐273.1(2)

In criminal prosecution, breach by state of agreement with defendant to make no recommendation on sentencing constitutes reversible error.

2. Criminal Law ⇐273.1(2)

In criminal prosecution, breach by state of plea agreement with defendant to take

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DATE March 6, 1987
BILL NO. HB 413

SUMMARY OF HB413 (BRANDEWIE)
(Prepared by Senate Judiciary Committee staff)

HB413 changes the statute relating to criminal possession with intent to sell as it applies to possession of marijuana. **Under current law,** a person does not commit the offense of criminal possession with intent to sell marijuana unless he possesses 1 kilogram or more. **This bill** would remove the exception for amounts of marijuana of less than 1 kilogram. That is, possession of any amount of marijuana could be prosecuted as criminal possession with intent to sell.

COMMENTS: None.

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DATE March 6, 1987
BILL NO. HB 435

SUMMARY OF HB435 (BRANDEWIE)
(Prepared by Senate Judiciary Committee staff)

HB435 amends the statutes relating to forfeiture of property. The bill removes the exemption from forfeiture for quantities of marijuana of less than 250 grams. What this means is that personal use of marijuana will subject a person to forfeiture. Under current law, it is just commercial amounts that is subject to forfeiture. The bill also allows forfeiture of real property of persons convicted of possession with intent to sell.

COMMENTS: A representative of the Attorney General's office says that this bill should have a coordinating instruction sith SB241 the AG's forfeiture bill and that the conviction requirement could cause practical problems in terms of time for forfeiture.

STANDING COMMITTEE REPORT

March 6 19 87

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 197

Third ~~XXXXX~~ reading copy (blue color)

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~

Operating motor vehicle without liability insurance -- increase penalties.

Grady (Pinsonneault)

Respectfully report as follows: That HOUSE BILL No. 197

~~XXXXXXXXX~~
~~DO PASS~~

BE CONCURRED IN

~~XXXXXXXXXX~~
~~DO NOT PASS~~

Senator Mazurek Chairman.

STANDING COMMITTEE REPORT

March 6 19 87

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 301

Third reading copy (blue color)

Negligent endangerment and negligent vehicular assault criminal laws.
Rapp-Svrcek (Van Valkenburg)

Respectfully report as follows: That HOUSE BILL No. 301

~~DO PASS~~

~~DO NOT PASS~~

BE CONCURRED IN

Senator Mazurek Chairman.

STANDING COMMITTEE REPORT

March 6 19 87

MR. PRESIDENT

We, your committee on SENATE JUDICIARY

having had under consideration HOUSE BILL No. 413

Third reading copy (blue color)

Remove amount of Marijuana required for intent to sell.
Brandevie (Beck)

Respectfully report as follows: That HOUSE BILL No. 413

~~DO PASS~~

~~DO NOT PASS~~

BE CONCURRED IN

Senator Joe Mazurek Chairman.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 6, 1987
BILL NO HB 197

AMENDMENT TO HOUSE BILL 197

Amend House Third Reading (Blue Copy)

1. Page 1, line 22.
Following: "both."
Insert: "However, on failure to pay a fine imposed under this section, the offender may be incarcerated in the county jail until the fine or others costs imposed by the court be satisfied in the proportion of 1 day's imprisonment for every $25 of fine or costs, provided that the total time of imprisonment shall not exceed 10 days per violation."