95630-8

NO. 35039-8-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JONATHAN M. NORRIS,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

Dennis W. Morgan WSBA #5286
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1. IDENTITY OF PETITIONER

JONATHAN M. NORRIS requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Norris seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated February 20, 2018. (Appendix "A" 1-4)

3. ISSUE PRESENTED FOR REVIEW

Why shouldn't an individual, convicted under the attempted battery prong of the definition of assault for third-degree assault of a law enforcement officer, be sentenced the same as any other individual convicted of an attempted class "C" felony; *i.e.* as a gross misdemeanor?

4. STATEMENT OF THE CASE

Mr. Norris was outside the Fred Meyer store in the Spokane Valley at 6:00 a.m. on October 23, 2016. He was yelling and cursing at employees arriving for work. (Kerbs RP 36, ll. 6-18; RP 37, ll. 3-8)

Jesse Smith, an assistant manager at Fred Meyer, requested that Mr. Norris leave. Mr. Norris told him to fuck off; that he was going to kill his family; and that he was the son of God. (Kerbs RP 35, ll. 23-25; RP 37, ll. 17-21)

Mr. Norris began to walk across the parking lot. As he neared Sullivan Road Deputy Booth arrived. Mr. Norris was still using vulgar language, waving his hands in the air, had his fists clenched and took an

aggressive stance as the deputy approached. (Kerbs RP 61, ll. 22-24; RP 67, ll. 17-22)

Deputies Schaum and Hinckley also arrived while Deputy Booth was contacting Mr. Norris. (Kerbs RP 96, l. 23 to RP 97, l. 6; RP 98, ll. 17-22; RP 110, ll. 9-12)

When Deputy Booth identified himself Mr. Norris stated: "Fuck you, you're going to have to take me in cuffs." (Kerbs RP 68, ll. 12-18)

The contact between the deputies and Mr. Norris intensified. Mr. Valentine said that Mr. Norris charged the officers and a struggle ensued. Deputy Booth indicated that Mr. Norris would approach him and then back off. Deputy Booth alleged that Mr. Norris took a swing at him but did not connect. He resisted arrest and continued to swing his arms. (Kerbs RP 53, ll. 21-24; RP 69, ll. 5-8; RP 70, ll. 2-17; RP 71, ll. 4-11)

An Information was filed on October 24, 2016 charging Mr. Norris with third degree assault of Deputy Booth and disorderly conduct. (CP 5)

Mr. Norris was found guilty of both charges following a jury trial on January 4-5, 2017. (CP 48; CP 49)

Judgment and Sentence was entered on January 12, 2017. (CP 84)

Mr. Norris filed his Notice of Appeal on January 20, 2017. (CP 108)

The Court of Appeals issued its unpublished decision on February 20, 2018.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Any individual convicted of an attempt involving a class "C" felony is sentenced in accord with the gross misdemeanor statute. RCW 9A.28.020 (3)(d).

Mr. Norris was charged with third degree assault under RCW 9A.36.031(1)(g). RCW 9A.36.031(1) provides, in part:

> A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
> …
>
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault ….

The jury instructions only used the definition for an attempted battery. WPIC 35.50, NOTE ON USE, provides: "Use the second bracketed definition in cases involving an attempt to inflict bodily injury but not resulting in a battery."

Since Mr. Norris's swing never connected with Deputy Booth there was no actual physical contact to constitute a battery. He attempted to strike him and failed.

> A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1); *see also: State v. O'Neil,* 24 Wn.(2d) 802, 807, 167 P.(2d) 471 (1946).

When Mr. Norris tried to hit Deputy Booth he took a substantial step toward the commission of third degree assault.

Mr. Norris takes the position that once an individual is charged with and convicted of an assault which is not a completed assault, then it is the equivalent of an attempt and should be sentenced as a gross misdemeanor opposed to a class "C" felony.

Other individuals convicted of class "C" felonies receive a sentence for a gross misdemeanor. This accords with one of the purposes of the Sentencing Reform Act (SRA).

RCW 9.94A.010 provides, in part:

> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
> …
> (3) Be commensurate with the punishment imposed on others committing similar offenses… .

RCW 9A.28.020(3) states, in part: "An attempt to commit a crime is a : … (d) Gross misdemeanor when the crime attempted is a class C felony …."

Third degree assault is a class C felony. An attempt to commit third degree assault is a gross misdemeanor.

Mr. Norris recognizes that there is no instructional error in his case. The fact is that the State limited itself to the attempt to inflict bodily injury portion of the assault definition.

The Court of Appeals properly analyzed the law on assault. Yet, it failed to take into consideration that a completed assault did not occur. If only a substantial step is taken toward an assault, it is an attempt crime.

There does not appear to be any valid reason why an individual convicted of attempted assault should be treated differently than any other person convicted of an attempted class "C" felony. Common sense dictates that they should be treated equally.

Since the Legislature has not addressed this issue, it is Mr. Norris's position that he is entitled to the same benefits as any other defendant who has been convicted of an attempt crime. These benefits include the statutory directives contained in RCW 9A.28.020(1) and (3).

Mr. Norris cannot conceive of any reasoning that should deprive him of the benefits indicated. An attempted crime is an attempted crime is an attempted crime.

In the absence of any other statutory directive, legislative enactment, or contrary case law, the rule of lenity should be applied and his case remanded to the trial court for resentencing. *See: State v. Reeves,* 184 Wn. App. 154, 158-59, 336 P.3d 105 (2014).

6. CONCLUSION

The Legislature has never taken any steps to provide a definition of assault, and the assault definition therefore relies on the common-law. The common-law should control in respect to sentencing issues related to an attempted assault.

As recognized in *Lundgren v. Whitney's Inc*, 94 Wn.2d 91, 95, 614 P.2d 1272 (1980): "… [W]e have often discharged our duty to reassess the common-law and alter it where justice requires."

Judges had past discretion with regard to sentencing issues at the common-law.

The SRA has eliminated much of the court's discretion.

Nevertheless, the Legislature, in the SRA, provided that attempt crimes are to be sentenced differently than completed crimes. There is nothing in the SRA to preclude a gross misdemeanor sentence for an attempted third-degree assault.

Mr. Norris urges the Court to clarify whether or not a sentencing court's hands are tied in this respect. He posits that it is an issue of first impression and it should be given a full hearing.

DATED this __14th___ day of March, 2018.

Respectfully submitted,

____s/ Dennis W. Morgan_____
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APPENDIX “A”

FILED
FEBRUARY 20, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 35039-8-III
v.	)	UNPUBLISHED OPINION
JONATHAN M. NORRIS, Appellant.	)	

LAWRENCE-BERREY, J. — Jonathan Norris was convicted of third degree assault after swinging at a law enforcement officer during his arrest in a grocery store parking lot. Norris argues that he was improperly sentenced for the completed crime of third degree assault rather than the attempted crime. We reject his claim and affirm.

FACTS

Jonathan Norris was outside the Fred Meyer store in Spokane Valley early one morning yelling and cursing at employees arriving for work. When told to leave by the assistant manager, Norris cursed in response, stating that he did not have to leave.

Deputy Nathan Booth arrived on the scene, identified himself to Norris, and Norris

responded that he would have to be taken out in cuffs. Norris, who had a drink in his dominant hand, swung at Deputy Booth with his other hand, but failed to connect.

PROCEDURE

The State charged Norris with third degree assault, a class C felony. The charge cited RCW 9A.36.031(1)(g), which provides in part:

> A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
> . . . .
> (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault . . . .

At trial, the court instructed the jury:

Instruction No. 9

> An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

Clerk's Papers (CP) at 42. This instruction mirrors 11 *Washington Practice: Washington*

Pattern Jury Instructions: Criminal (WPIC) 35.50, at 581 (4th ed. 2016). In the "Note on

Use," the pattern instruction states to use this particular definition "in cases involving an attempt to inflict bodily injury but not resulting in a battery." WPIC 35.50, Note on Use at 581.

ANALYSIS

Norris argues that the State chose to proceed with the third degree assault charge based on "attempted battery." Appellant's Br. at 4. Elsewhere he asserts that an "attempted battery is an attempted assault." Appellant's Br. at 6. Citing RCW 9A.28.020(3)(d), he argues that an attempted class C felony is reduced to a gross misdemeanor. Under this theory, he requests to be resentenced. We reject Norris's argument.

Because Washington lacks a statutory definition of assault, courts turn to the common law definition. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014). Washington recognizes three forms of assault: (1) assault by actual battery, (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury, and (3) assault by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). The present case rests on a theory of the second definition, that Norris attempted to inflict bodily injury on Deputy Booth by swinging at him, and Norris had the apparent present ability to inflict such injury.

Here, the State charged and the jury was instructed on assault, not attempted battery. Norris did not commit "an attempted battery" or "an attempted assault." He committed an actual assault. RCW 9A.28.020(3)(d) has no application here.

Affirmed.

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

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

NO. 35039-8-III

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff, Respondent, v. JONATHAN M. NORRIS, Defendant, Appellant.	)	SPOKANE COUNTY NO. 16 1 04145 1 CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 14th day of March, 2018, I caused a true and correct copy of the *PETITION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals, Division III
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Spokane, Washington 99201

E-FILED

SPOKANE COUNTY PROSECUTOR'S OFFICE E-FILE
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March 14, 2018 - 9:18 AM

Transmittal Information

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