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Supreme Court No. 101323-0
(COA No. 38222-2-III)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CALEB STANLEY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Mr. Caleb Stanley, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(1) and (4).

B. COURT OF APPEALS DECISION

Mr. Stanley seeks review of the Court of Appeals decision dated August 30, 2022, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals correctly hold there is sufficient evidence an individual is guilty of third degree assault when that individual spits in the direction of a police officer; no evidence the spit would have hit a vital organ; and/or no evidence the defendant had a communicable disease?

2. Does the Court of Appeals correctly hold that an individual assault conviction can be sustained by a definition of assault not submitted to the jury?

D. STATEMENT OF THE CASE

On March 1, 2020, officers responded to a call reporting an unwanted person at a residence. At the time, Mr. Stanley was with his father drinking alcohol. After a brief confrontation, officers arrested Mr. Stanley on an outstanding Department of Corrections (DOC) warrant. After another brief struggle, Mr. Stanley was placed in a police cruiser and transported to the county jail.

Two officers at the jail contacted Mr. Stanley, while he was in the back of the police cruiser. RP 128, 147. Mr. Stanley refused all commands to exit the vehicle which prompted one of the officers, Sergeant Gagnon to physically remove Mr. Stanley from the vehicle. While doing so, Sergeant Gagnon heard Mr. Stanley make throat noise as if preparing to spit. RP 130. In anticipation of spit,

Sergeant Gagnon moved to the side of the door to prevent any potential contact. The officer stated he was concerned getting spit on because “That was right after the Covid had hit and everything else. I mean there’s several diseases that you can get from the transfer of saliva. So it’s a concern.” RP 130. The sergeant went on to explain that a variety of diseases can be transmitted through saliva including “Hepatitis B, C, various viral infection, you can get herpes.” RP 130. But there was no testimony the sergeant believed Mr. Stanley had a disease or COVID-19.

The second officer, Deputy Niegel, was standing behind Sergeant Gagnon and ducked when he heard Mr. Stanley’s throat noises. RP 148, 154. Deputy Niegel observed Mr. Stanley spit in his direction, causing the officer to move his head to avoid getting hit. RP 147, 154. The officer testified the spit was about head high. RP 154. Deputy Niegel testified that “I’d rather take a punch than get spit on as a matter of fact.” RP 147.

The case was submitted to a jury. Jury instruction 14 defined assault in two ways. Applicable to this petition, assault was defined as

an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 24.

The jury found Mr. Stanley guilty of assault in the third degree, count 3, for his conduct of spitting in the direction of Sergeant Gagnon. CP 19, 35. The jury did not return a verdict on count 2, assault in the third degree, for Mr. Stanley's conduct of spitting in the direction of Deputy Niegel. CP 18, 34.

On appeal, Mr. Stanley argued the State failed to prove beyond a reasonable doubt Sergeant Gagnon was actually placed in reasonable apprehension and fear of

imminent bodily injury. The Court of Appeals disagreed and affirmed Mr. Stanley's conviction.

The Court stated "Stanley was convicted of third degree assault under the common law definition of assault that requires proof that the defendant attempted to inflict bodily injury on another with the apparent ability to do so." Slip Opinion at 3. The Court noted the common law definition of assault applies in Washington State and that there are three definitions 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." OP at 4.

Under the third definition of assault, the Court stated, "it is not necessary to show that Stanley was actually capable of transmitting a disease." OP at 6 (citing *State v. Music*, 40 Wn. App. at 432). Thus, there was sufficient evidence Sergeant Gagnon was placed in reasonably

apprehension of bodily harm because the officer testified spit can transmit diseases. OP at 6-7.

This timely petition follows.

E. ARGUMENT

1. THE COURT OF APPEALS IMPERMISSIBLY EXPANDED THE DEFINITION OF ASSAULT WHEN THERE WAS NO TOUCHING.

The Court of Appeals erred when it held that spitting in the direction of another, without more, is enough to demonstrate spit can cause bodily injury. The Court erred because the State must demonstrate, spit, generally offensive conduct, could cause bodily injury either inherently or under the circumstances of the act.

Washington State uses the common law definitions of assault. Of the three recognized definitions, only two are relevant to Mr. Stanley's case: (1) assault by actual touching, which includes offensive touching, and (2) assault by placing another in reasonable fear and apprehension of bodily injury. CP 24. Offensive conduct

was defined as “A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.” CP 24. Under the second definition, the trial court instructed the jury that assault can also be

an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 24. Bodily injury was defined as “physical pain or injury, illness, or an impairment of physical condition.” CP 23.

The definitions of assault, and jury instructions in this case, represent ascending levels of conduct which the State must prove beyond a reasonable doubt. CP 24. For example, an act can be offensive yet not cause bodily injury. The Court of Appeals in Mr. Stanley’s case failed to recognize this distinction and this Court must accept review to determine if ordinarily offensive conduct is per se capable of causing bodily injury.

Spitting on another can be considered offensive conduct. OP at 5 (citing *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130 (1978)). But whether spit can inherently and reasonably cause bodily injury is unknown in this State. Courts in Ohio have addressed this issue in an almost identical fact pattern at to the one here in Mr. Stanley's case. These cases, and in particular *Sepulveda*, hold that spitting on another is only offensive conduct unless the State demonstrates the specific spit contained a communicable disease or that the act of spitting was done in a way that could cause bodily injury, such as directing the spit towards a sensitive part of the eye. *State v. Sepulveda*, 71 N.E.3d 1240 (Ohio Ct. App. 2016).

In *Sepulveda*, the defendant was charged with assault after spitting in the direction of two officers while being detained. Assault was defined as "knowingly cause or attempt to cause physical harm to another or to another's unborn." *Id.* at 1243 (quoting Ohio Rev. Code

Ann. § 2901.01(A)). Physical harm was defined as “any injury, illness, or other physiological impairment, regardless of its gravity or duration.” R.C. 2901.01(A)(3).

The Court reversed Sepulveda’s conviction for insufficient evidence. The Court recognized that spit can constitute assault, both under the offensive and actual battery prongs, but which specific prong depends on the circumstances of the case. In Sepulveda’s case, there was no testimony “as to what kind of harm could have resulted or might have been intended from the spit had it connected with Patrolman Bartlett.” *Sepulveda*, 71 N. E.3d at 1249. One of the officers testified “he did not know what potential diseases Sepulveda had, but that if Sepulveda had some disease it could have harmed Patrolman Bartlett.” *Id.* The Court also emphasized that there was “no testimony that Sepulveda’s spit was tainted or of the potential harm his spit might have caused or been intended had it made contact.” *Id.* Further supporting its reasoning, the Court

noted there were “no cases where a defendant has been convicted of Assault in violation of R.C. 2903(A) for simply spitting upon an officer, or attempting to spit on an officer, without additional testimony that the spit could cause harm or did cause harm, no matter how slight.” *Id.* In a footnote, the Court noted that accepting the State’s theory would mean the defendant, for merely spitting in the direction of an officer, constitutes a felony assault. *Id.*

The same rationale from *Sepulveda* applies to Mr. Stanley’s case. The State in Mr. Stanley’s case was required to demonstrate that his spit could have caused harm, either inherently or in the act itself. But the State failed to do that in this case. Just as in *Sepulveda*, there was no testimony Mr. Stanley had a disease that could be transmitted through his saliva. Moreover, there was no testimony Mr. Stanley’s spit was directed at a sensitive area of the officer’s body. It was the State’s bare assertion

that spit can cause bodily, not that Mr. Stanley's spit could cause bodily injury.

The distinction in this case is similar to the distinction in cases that involve weapons that are not per se deadly weapons, such as a pencil. *State v. Barragan*, 102 Wn. App. 754, 761, 9 P.3d 942 (2000). When an item is used as a weapon, and that weapon is not per se a deadly weapon, then the State is required to demonstrate the weapon had the inherent capacity and was readily capable of causing such injury "under the circumstances of its use." *Id.* (citing *State v. Skenandore*, 99 Wn. App. 494, 499, 994 P.2d 291 (2000)). Some of the factors to consider when considering its use include "the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted." *Id.* (citing *State v. Shilling*, 77 Wn. App. 166, 171-72, 889 P.2d 948 (1995)).

Just as there is a distinction between when a pencil is merely an object, a weapon, or a deadly weapon, so to

is there a distinction between when spit is offensive conduct or conduct that can cause bodily injury.

The Court of Appeals in Mr. Stanley's case failed to recognize this distinction, instead relying on definitions of assault not submitted to the jury. For example, the Court notes that under the third definition of assault merely "putting another in apprehension of harm whether or not the actor actually intends to inflict or incapable of inflicting that harm" can constitute assault. But jury instruction 14 required the State to prove beyond a reasonable doubt Mr. Stanley's spit could actually cause bodily harm. CP 24.

The Court of Appeals semi-reliance on a jury instruction not provided to the jury violates the law of the case doctrine and is in conflict with at least this Court's opinion in *Hickman*. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). In *Hickman*, this Court stated "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added

elements are included without objecting in the “to convict” instruction.” *Hickman*, 135 Wn.2d at 102.

In Mr. Stanley’s case, the “to-convict” jury instruction used the term “assault” which was later defined by Jury Instruction 14. That definition of assault was not objected to by either party. Therefore, the Court of Appeals reliance on *Music*, in holding that the State did not need to prove *actual* capability to cause bodily injury, is improper. *Hickman*, 135 Wn.2d at 102.

Under RAP 13.4(b), this Court should accept review to determine whether offensive conduct is also per se capable of causing bodily injury. As applied to this case, whether spitting, without more, is enough to constitute a felony conviction under third degree assault. As a connected and ancillary matter, this Court should accept review to determine whether the Court of Appeals can properly rely on a definition of assault not provided to the jury.

F. CONCLUSION

Based on the foregoing, petitioner Mr. Stanley respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 27th day of September 2022.

I, Kyle Berti, in accordance with RAP 18.7, certify that this document is properly formatted and contains 2100 words.

Respectfully submitted,



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I, Kyle Berti, a person over the age of 18 years of age, served the Stevens County Prosecutor trasmussen@stevenscountyway.gov a true copy of the document to which this certificate is affixed on. Service was made by electronically to the prosecutor by depositing in the mails of the United States of America, properly stamped and addressed.



KYLE BERTI
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Attorney for Petitioner

APPENDIX

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

STATE OF WASHINGTON,)	
)	No. 38222-2-III
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
CALEB JOEL STANLEY,)	
)	
Appellant.)	

STAAB, J. — Caleb Stanley was arrested on a Department of Corrections (DOC) warrant. During transport to jail, he became combative and hit one officer with a car door. As he was being booked into jail, he spit at two of the corrections officers. A jury found him guilty of two counts of third degree assault and one count of obstructing a law enforcement officer.

On appeal, Stanley contends that spitting toward a law enforcement officer is insufficient evidence to support a conviction for third degree assault under the common law definition of placing another in apprehension of imminent fear of bodily harm. We disagree and affirm his conviction.

BACKGROUND

On March 1, 2020, Officer Christine Clark was dispatched to a report of an unwanted person. Caleb Stanley’s father had requested help removing his intoxicated

adult son. Officer Clark made contact with Stanley inside the residence. As Officer Clark spoke with Stanley, he directed profanities at Officer Clark and attempted to grab her leg. After another deputy arrived on scene to assist, Officer Clark advised Stanley that he was being arrested on a DOC warrant. Stanley was obstructive and resistive.

After being placed in the patrol car, Stanley complained that his handcuffs were too tight. As Officer Clark opened the door to the patrol car to check on the handcuffs, Stanley pushed the door with his body causing the door to hit Officer Clark and knock her back several steps. Stanley was eventually transferred to the Stevens County Jail. During transport, he continued to make unsolicited statements including threatening Officer Clark “you had better watch out and be careful. Strange things happen around here.” Report of Proceedings (RP) at 97.

Arriving at the jail, Corrections Sergeant Wayne Gagnon and Corrections Sergeant Kenneth Niegel contacted Stanley in the back of the patrol vehicle. Stanley refused to exit the vehicle on his own accord, and was physically removed. Once outside the car, Sergeant Gagnon testified that he was placing Stanley in a restraint chair when he heard Stanley give an indication he was going to spit and then watched Stanley spit at him. Sergeant Gagnon moved to the side to avoid being hit with spit and continued detaining Stanley. Sergeant Gagnon testified that he was concerned about being spit on because of the potential for transmission of disease, infection, and COVID.

Sergeant Niegel testified that he was standing directly behind Sergeant Gagnon to assist when he similarly heard Stanley make “distinct throat noise” and saw Stanley look at Sergeant Gagnon and himself before spitting at them. RP at 147. Sergeant Niegel ducked backward to avoid being hit by spit. The spit passed in front of Sergeant Niegel’s face and would have otherwise hit him if he had not moved. Stanley was eventually placed in a restraint chair, and a spit hood was placed over his head.

The State charged Stanley by amended information with one count of obstructing law enforcement and three counts of third degree assault for hitting Officer Clark with the car door and spitting at sergeants Niegel and Gagnon. A jury returned verdicts of guilty on the obstructing charge and the charges of assault against Officer Clark and Sergeant Gagnon, but could not reach a verdict on the assault charge for spitting at Sergeant Niegel.

ANALYSIS

On appeal, Stanley argues that the evidence is insufficient to support his conviction for assault by spitting at Sergeant Gagnon. Stanley was convicted of third degree assault under the common law definition of assault that requires proof that the defendant attempted to inflict bodily injury on another with the apparent ability to do so. Stanley contends that the evidence is insufficient because spitting on another cannot inflict bodily injury. We disagree and affirm the conviction.

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *State v. Rodriguez*, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). An insufficient evidence claim “admits the truth of the State’s evidence and all reasonable inferences from that evidence.” *Id.* The critical inquiry is ““whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”” *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court views the evidence in the light most favorable to the prosecution and determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Garcia*, 179 Wn.2d 828, 836, 318 P.3d 266 (2014).

A person commits assault in the third degree when that person, “under circumstances not amounting to assault in the first or second degree . . . [a]ssaults 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.” RCW 9A.36.031(1)(g). The term “assault” is not defined in the Washington Criminal Code, therefore the common law definition applies. *See* RCW 9A.04.110; *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d 507 (1984). Washington recognizes three common law definitions 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. Godsey*, 131 Wn. App. 278,

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287, 127 P.3d 11 (2006) (quoting *State v. Hall*, 104 Wn. App. 56, 63, 14 P.3d 884 (2000)). The term “bodily injury” was defined in this case as “physical pain or injury, illness, or an impairment of physical condition.” Clerk’s Papers at 23.

Under the actual battery prong, spitting on another person without their consent is an unlawful touching and can constitute assault when it is offensive. *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130 (1978). However, Stanley only attempted to spit on Sergeant Gagnon; he did not actually hit Gagnon. Thus, the State asserts that the third alternative definition of assault applies in this case. Under the third definition, an assault may be committed “‘merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.’” *State v. Music*, 40 Wn. App. 423, 432, 698 P.2d 1087 (1985) (quoting *Krup*, 36 Wn. App. at 458).

Viewing the evidence in a light most favorable to the State, a rational juror could conclude that Stanley placed Sergeant Gagnon in reasonable apprehension of bodily harm by spitting at him. Sergeant Gagnon testified, without objection, that the COVID pandemic was just beginning when the incident took place, and there were several other diseases and infections that could be transferred by saliva.

Stanley points out that apprehension of bodily injury needs to be reasonable. Unlike other cases where the fear of bodily injury is self-evident, he argues that it is not common knowledge that one can contract a communicable disease from spit. Thus, he contends, the State needed expert testimony to prove reasonable apprehension that an

illness can be transmitted by spit. Because the State did not present expert testimony on this subject, Stanley argues that the State's evidence cannot show that Sergeant Gagnon's apprehension of contracting an illness was reasonable.

We do not need to decide whether expert testimony is necessary to establish whether saliva can transmit communicable diseases. In this case, Stanley did not object to Sergeant Gagnon's testimony to this effect. Thus, his testimony was in evidence and could be considered by the jury. Any further challenges to Sergeant Gagnon's testimony go to weight and not admissibility. From this evidence, a jury could find that Sergeant Gagnon was placed in apprehension of harm and that his apprehension was reasonable.

Stanley argues that there is no evidence that his spit was directed at a sensitive area. Both officers testified that Stanley spit at them, and they had to take evasive steps to avoid being hit. Stanley also argues that there is no evidence that his saliva contained a communicable disease. However, for purposes of assault under the apprehension prong, it is not necessary to show that Stanley was actually capable of transmitting a disease. *Music*, 40 Wn. App. at 432.

When considered in a light most favorable to the State, the evidence is sufficient to show that Stanley placed Sergeant Gagnon in reasonable apprehension of bodily harm by spitting at him.

Stanley raises several additional issues in his statement of additional grounds, all of them without merit or beyond the record on appeal. Stanley contends that his trial

counsel was constitutionally ineffective for failing to make objections, failing to call his father as a witness, and discouraging Stanley from testifying on his own behalf. Stanley does not articulate which objections his attorney failed to make that would constitute deficient performance and prejudice. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (defendant claiming ineffective assistance of counsel has the burden of proving counsel was deficient and deficiency caused prejudice). The other two claims rely on facts outside the record and cannot be resolved on direct appeal. *See State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013) (Issues that turn on facts outside the record on appeal cannot be resolved in the direct appeal and are properly raised through a personal restraint petition, where they must be supported by admissible evidence.).

Stanley also challenges the prosecutor's authority to amend the information to add felony charges when he was initially charged with a misdemeanor in district court. He contends generally that the prosecutor was prejudiced against him. Stanley does not articulate grounds for reversal on any of these issues. While references to the record and citations to authority are not necessary in a statement of additional grounds, we will not review an alleged error if the statement does not inform the court of the nature and occurrence of the alleged error. RAP 10.10(c).

Stanley challenges his standard-range sentence but does not articulate an exception to the general rule that standard-range sentences cannot be appealed.

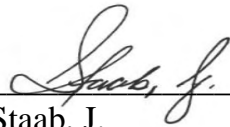
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Finally, Stanley contends that it took three months to bring him to trial and he did not sign a speedy trial waiver. It is not clear if Stanley raised a speedy trial objection below, but regardless the record on appeal is insufficient for us to review this alleged error. RAP 2.5(a).

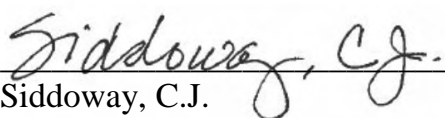
Affirm.

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.




Staab, J.

WE CONCUR:



Siddoway, C.J.



Pennell, J.

LAW OFFICES OF LISE ELLNER

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