

FILED
May 8, 2013
Court of Appeals
Division III
State of Washington

NO. 31479-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ETHAN LEVI DOOLEY,

Defendant/Appellant.

APPELLANT'S BRIEF

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STATEMENT OF CASE

September 30, 2012 was not a good day in the life of the Dooley family. Catherine Dooley started a verbal argument with her husband Ethan. The argument escalated throughout the day. (RP 39, ll. 16-19; RP 43, ll. 10-16)

The argument ensued after Ms. Dooley's parents told them they had one (1) hour to move out of the basement. Mr. Dooley did not want to leave. He went into the bathroom and closed the door. Ms. Dooley continued the argument through the door. She eventually pushed the door open and Mr. Dooley was knocked against a towel rack. (RP 41, ll. 21-24; RP 43, l. 18 to RP 44, l. 7; RP 114, ll. 11-14)

As Mr. Dooley attempted to close the door Ms. Dooley pushed it into his shoulder at least two (2) times. He then kicked her in the leg. She started kicking back. (RP 44, ll. 14-22; RP 115, ll. 2-89; ll. 12-24)

Mr. Dooley then backed Ms. Dooley into a corner. She punched him in the mouth. They began kicking one another again. The telephone rang and Ms. Dooley answered it. She returned and kicked Mr. Dooley in the testicles. (RP 45, ll. 1-11; ll. 16-19; RP 58, ll. 9-11; RP 117, ll. 1-14; RP 118, ll. 2-18)

Ms. Dooley then went outside and continued to talk on the phone. Mr. Dooley came out and grabbed the phone from her. As he walked

away she began hitting him in the back of the head. (RP 46, ll. 4-8; ll. 21-24; RP 121, ll. 22-25; RP 122, ll. 5-8)

Ms. Dooley continued to hit Mr. Dooley. He pushed her, grabbed her hair, pushed her head down and then began to hammer the back of her head with his fist approximately five (5) to six (6) times. Ms. Dooley fell to the ground and he continued to hit her three (3) to four (4) more times. (RP 27, ll. 8-18; RP 47, ll. 2-6; ll. 11-14; RP 123, ll. 1-20; RP 125, ll. 4-6)

Ms. Dooley, who was disoriented at that time, went into the house and called 9-1-1. She went to a neighbor's house who also called 9-1-1. She was crying and talking gibberish. She was eventually transported to Sacred Heart Medical Center. (RP 28, ll. 12-13; RP 29, ll. 12-17; RP 47, ll. 19-21; RP 49, ll. 1-2)

Dr. Uhron was the attending emergency room physician. Ms. Dooley complained of head, eye and neck pain. Officer Conrath of the Spokane Police Department arrived while Ms. Dooley was awaiting examination. He described her as crying and upset. No photographs were taken. (RP 65, ll. 17-23; RP 75, ll. 20-25; RP 89, ll. 18-19; RP 96, ll. 9-13)

After Dr. Uhron examined Ms. Dooley she was discharged. There were no external signs of trauma. The neurological examination was normal. The X-rays and CAT scan were all negative. (RP 77, ll. 17-18; RP 81, ll. 19-22; RP 82, l. 23 to RP 83, l. 3; RP 83, ll. 14-21)

Mr. Dooley arrived at the Spokane Police Department the next day. He contacted Officer Mann at the Public Safety Building. He turned him-

self in. At that time it was noted that he had a fat lip. No photographs were taken of Mr. Dooley. (RP 101, ll. 3-6; ll. 8-9; ll. 20-23; RP 102, ll. 14-15)

An Information was filed on October 3, 2012 charging Mr. Dooley with second degree assault - domestic violence. (CP 5)

Mr. Dooley filed *pro se* motions on December 19, 2012. The motions included a suppression motion, a CrR 8.3 motion for prosecutorial mismanagement, a discrimination challenge due to the fact that he was represented by a female attorney and there was female judge presiding at that time, raising the issue of self-defense and his wife's mental health. The suppression motion involved photographs and/or the lack of photographs. (CP 12; CP 20)

Various scheduling orders were entered and trial eventually commenced on February 5, 2013. (CP 8; CP 9; CP 46; CP 47)

There were no objections to the jury instructions. The jury instructions included a lesser degree offense of fourth degree assault. Self-defense instructions were also given. (CP 55; CP 67; CP 68; CP 69; CP 70; CP 71)

Defense counsel argued that there was insufficient evidence of Mr. Dooley committing an assault. The State, in rebuttal, argued self-defense by Ms. Dooley. (RP 176, l. 16 to RP 177, l. 10)

Mr. Dooley was found guilty of the lesser included offense of fourth degree assault. (CP 80)

On February 15, 2013 Mr. Dooley submitted a letter to the judge. He complained that his attorney had included the fourth degree assault instruction against his wishes. Mr. Dooley again raised the issue at the sentencing hearing. (CP 83; CP 84; RP 195, l. 13 to RP 196, l. 11)

Defense counsel provided an explanation to the Court for her reasons behind requesting the lesser included instruction. The trial court further indicated that the lesser included instruction would have been given even if it had not been requested. (RP 192, l. 22 to RP 193, l. 3; RP 200, ll. 7-25)

Judgment and Sentence was entered on February 19, 2013. (CP 88)

Mr. Dooley filed a Notice of Appeal on March 5, 2013. (CP 93)

ARGUMENT AND MOTION TO WITHDRAW

RAP 18.3(a)(2) provides:

If counsel appointed to represent an indigent defendant can find no basis for a good faith argument on review, counsel should file a

motion in the appellate court to withdraw as counsel for the indigent. The motion shall identify the issues that could be argued if they had merit and, without argument, include references to the record and citations of authority relative to the issues. ...

After reviewing the Verbatim Report of Proceedings, along with the Clerk's papers, no meritorious issue is apparent.

This brief is filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 498 (1967) and *State v. Hairston*, 133 Wn.2d 534, 946 P.2d 397 (1997). Defense counsel requests that he be allowed to withdraw as counsel for Mr. Dooley.

Mr. Dooley identifies issues that would include ineffective assistance of counsel and failure to preserve potentially exculpatory evidence.

The issue of exculpatory evidence is controlled by *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed.2d 281 (1988) (in the absence of bad faith there is no constitutional duty for police to preserve evidence that is favorable to a defendant).

The issue of ineffective assistance of counsel appears to be controlled by *State v. Releford*, 148 Wn. App. 478, 497-98, 200 P.3d 729 (2009) (request for a proper jury instruction does not constitute ineffective assistance of counsel); *State v. Breitung*, 173 Wn.2d 393, 400-401 (2011) and *ABA Standards for Criminal Justice, Standard 4-5.2(c)*, Commentary.

CONCLUSION

Mr. Dooley requests that the appellate court independently review the record to determine if there were any other errors. *State v. Hairston, supra.*

DATED this 8th day of May, 2013.

Respectfully submitted,

s/ Dennis W. Morgan

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|----------------------|---|-------------------------------|
| STATE OF WASHINGTON, |) | |
| |) | SPOKANE COUNTY |
| Plaintiff, |) | NO. 12 1 03481 9 |
| Respondent, |) | |
| |) | CERTIFICATE OF SERVICE |
| v. |) | |
| |) | |
| ETHAN LEVI DOOLEY, |) | |
| |) | |
| Defendant, |) | |
| Appellant. |) | |
| |) | |

I certify under penalty of perjury under the laws of the State of Washington that on this 8th day of May, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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