No. 318664

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

THOMAS MITZLAFF, Appellant

APPEAL FROM THE SUPERIOR COURT

OF WALLA WALLA COUNTY

THE HONORABLE JUDGE DONALD SCHACHT

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The Evidence Was Insufficient To Sustain A Conviction For Felony Harassment.

B. The Evidence Was Insufficient To Sustain A Conviction For First Degree Assault.

C. Mr. Mitzlaff Received Ineffective Assistance Of Counsel.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Is the evidence insufficient to sustain a conviction for felony harassment where the State presented no evidence that the complaining witness heard the threat or was in reasonable fear that the threat would be carried out?

B. Was the evidence sufficient to prove intent to inflict great bodily harm?

C. Where the jury instructions for first-degree assault contain the technical term "great bodily harm", is it ineffective assistance of counsel to fail to request a jury instruction defining the statutory term?

II. STATEMENT OF FACTS

Thomas Mitzlaff was charged by amended information with first-degree assault domestic violence, with a deadly weapon, and felony harassment, domestic violence, for events that occurred on November 25,

2008. (CP 30-32). After he was declared competent to stand trial, the following pertinent information was presented at a jury trial. (CP 28-29).

Around 5 p.m. that evening, Mr. Mitzlaff was at the home he shared with his grandmother, Marilee Topel. (RP 26). As she prepared and ate her dinner, she told him several times that he needed "to do something" with his life. (RP 26). Mr. Mitzlaff got up from the table and grabbed Ms. Topel's hair and put the dull edge of a knife against her throat. (RP 26-32). She testified the only words she heard him say were, "See how easy this would be." (RP 27).

When he pulled her hair, the chair rolled, her head hit the wall two to three times and a potted plant fell on her. (Id.). At some point, she heard a neighbor knocking at the front door, and without using any force, she walked past Mr. Mitzlaff and went out the door. (RP 27;32).

The neighbor, Stacie Page, testified she saw Mr. Mitzlaff grab and pull Ms. Topel's hair. (RP 37). She reported he had "an average knife with a black handle" in his hand and "he didn't make any motions or anything. He just had it..." (RP 39). She heard him say, "I'm going to fucking kill you" to his grandmother. (RP 37-38). She called 9-1-1, knocked on the door, and when it opened, took Ms. Topel to her home. (RP 38-39).

After the State rested, the defense made two motions to dismiss all charges based on insufficient evidence. (RP 43-44). The Court denied both motions. (RP 46).

Without objection, the Court gave jury instruction number 6:

> A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon." (CP 41).

And jury instruction number 8, in pertinent part:

> To convict the defendant of the crime of Count 1: Assault in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 15th day of November, 20008, the defendant assaulted Mary Lee Topel;
> (2) That the assault was committed with a deadly weapon;
> (3) That the defendant acted with intent to inflict great bodily harm upon Mary Lee Topel; and
> (4) That the acts occurred in the County of Walla Walla, Washington. (CP 43).

And jury instruction number 13

> To convict the defendant of the crime of Count 2: Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) that on or about the 25th day of November 2009, the defendant knowingly threatened to kill Marilee Topel;
> (2) That the words or conduct of the defendant placed Marilee Topel in reasonable fear that the threat would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the acts occurred in Walla Walla, Washington.

(CP 48).

The court also gave an instruction for assault in the second degree. (CP 45-46). Mr. Mitzlaff was convicted of the charges. (CP 59-61). He makes this appeal[1]. (CP 59-61)

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain A Conviction For Felony Harassment.

The State is required to prove each element of a charged offense beyond a reasonable doubt. *In re Winship,* 297 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ; U.S. Const. XIV Amend.; Wash. Const. Article 1§3. In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). An essential element of a crime is one that must be proved to establish the illegality of the behavior. *State v. Johnson,* 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).

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[1] Mr. Mitzlaff's notice of appeal was filed in 2013, four years after his conviction. The Court of Appeals set the matter on the Commissioner's docket on the Court's motion to dismiss for failure to timely file the notice of appeal. The Commissioner ruled the State had not shown a knowing and intelligent waiver of the right to appeal. The Court of Appeals denied the State's motion to modify the Commissioner's Ruling on December 11, 2013. Commissioner Pierce of the Washington Supreme Court denied discretionary review on March 28, 2014.

To convict for the crime of felony harassment, each of the following elements must be proved beyond a reasonable doubt: (1) Without lawful authority, (2) The person knowingly threatened to kill the person threatened or any other person, immediately or in the future, and (3) The words or conduct placed the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.929(1)(a)(b), (2)(b)(ii). Thus, the State must show not only that the person was aware of the threat, but, in order to convict based upon a threat to kill, the statute also requires the State to prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out, as an element of the offense. *State v. C.G.,* 150 Wn.2d 604, 610, 80 P.3d 594 (2003).

The reviewing court reversed a conviction for felony harassment in *State v. Kiehl,* 128 Wn.App. 88, 113 P.3d 528 (2005). There, the defendant made statements to a mental health counselor that he was going to kill a judge. *Kiehl,* 128 Wn.App. at 89. The mental health counselor testified she reported the threat to the judge. The State was required to prove that the judge, not a third party, was aware of the threat and that he was placed in reasonable fear the threat would be carried out. *Kiehl,* 128 Wn.App. at 94. In that case, the State did not present any evidence the judge was aware of the threat or that he reasonably feared he would be

killed. The conviction was reversed based on insufficiency of the evidence. *Id.*

Similarly, here a third party, Ms. Topel's neighbor, testified she heard Mr. Mitzlaff threaten to kill Ms. Topel. However, Ms. Topel testified that she only heard him say, "See how easy it would be?" She specifically testified she did not hear him say anything else. (RP 27). Further, the State pointed out in closing argument: " Stacie [the neighbor] said that the Defendant threatened to kill Marilee. Marilee told you how scared she was. *Marilee didn't say anything about him threatening to kill her* but Stacie heard it." (RP 66) (Emphasis added). In *J.M.*, the Court concluded the felony harassment statute required that the accused place *the person threatened* in reasonable fear that the threat will be carried out. *State v. J.M.,* 144 Wn.2d 472, 482, 28 P.3d 720 (2001). In other words, the person must be aware of the threat, a third party's awareness is irrelevant, and being aware of the threat, must be the one who reasonably fears the charged harm. Here, the State did not prove that Ms. Topel heard or was aware of the threat, the State proved the neighbor heard the threat.

Moreover, the State presented no evidence that Ms. Topel feared he was going to kill her. She reported she was shaken up and frightened by the events, but never stated that she feared he was going to kill her. It

is insufficient for the State to show the threat (words or conduct) caused the victim to fear some lesser harm. *C.G.* 150 Wn.2d at 609.

Where, as here, there is no evidence the alleged victim heard a threat to kill, and no evidence she was placed in reasonable fear that the threat would be carried out, as a matter of law, the evidence is insufficient to sustain the conviction. *J.M.* 144 Wn.2d at 477. Insufficiency of the evidence requires the Court to reverse the conviction and dismiss the charge. *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

B. The Evidence Was Insufficient To Establish Intent to Inflict Great Bodily Harm.

Due process rights, guaranteed under the State and Federal Constitutions, require every element of a crime to be proved beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 365, 90 S.Ct. 1968, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art.1 §3. In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 615 P.2d 628 (1980). Evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza,* 100 Wn.2d 487, 491, 670

P.2d 646 (1983). If the reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Smith,* 155 Wn.2d 496,505, 120 P.3d 559 (2005).

The State must prove intent to inflict great bodily harm in order to establish first-degree assault. RCW 9.94A.011(1)(a). Under Washington assault law, the intent is a specific intent : specific intent means intent to produce a specific result, as opposed to intent to do the physical act that produces the result. *State v. Elmi,* 166 Wn.2d 209, 217, 207 P.3d 439 (2009). Evidence of intent is to be gathered from all of the circumstances, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats. *State v. Woo Won Choi,* 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *rev. denied,* 114 Wn.2d 1002, 788 P.2d 1077 (1990).

Thus, the State must show that the accused specifically intended to inflict a bodily injury, which creates a *probability* of death, or which causes *significant serious permanent disfigurement*, or which causes a *significant permanent loss or impairment of the function of any bodily part or organ.* RCW 9A.04.110(4)(c). (Emphasis added). In its essence, the term "great bodily harm" encompasses the most serious injuries short of death. *State v. Stubbs,* 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

It is clear from the facts and the circumstances of this case that Mr. Mitzlaff did not act in a manner indicating he intended to cause a probability of death, or significant and serious injury to Ms. Topel. First, the manner in which the knife was used does not demonstrate intent to inflict great bodily harm. Ms. Topel reported he placed the dull edge of a kitchen knife to her throat and did not harm her with it. Significantly, the witnessing neighbor testified that as she watched through the window she saw that he had "an average knife with a black handle" in his hand and "*he didn't make any motions or anything. He just had it...*" (RP 39). (Emphasis added). The State produced no evidence that he used or attempted to use the knife in a manner that reflected intent to create a probability of death, serious permanent disfigurement, or a significant permanent loss or impairment of the function of her body. If Mr. Mitzlaff had intended to inflict great bodily harm, he had ample opportunity to use the knife to harm her. He did not do so. Additionally, when they heard the neighbor knocking, without the use of any force, Ms. Topel was able to walk away from Mr. Mitzlaff , open the front door, and leave.

Secondly, the relationship between Mr. Mitzlaff and Ms. Topel does not support intent to inflict great bodily harm. She was his grandmother, she shared her home with him, and there was no evidence of previous threats or violence between them.

A conviction for first-degree assault cannot stand without proof beyond a reasonable doubt that the defendant intended to inflict great bodily harm. *State v. Ferreira,* 69 Wn.App. 465, 468, 850 P.2d 541 (1993). Even viewing the evidence most favorably to the State, it is insufficient in this case to establish Mr. Mitzlaff intended to inflict great bodily harm. Insufficiency of the evidence requires the Court to reverse the conviction and dismiss the charge. *Hickman,* 135 Wn.2d at 103.

C. Defense Counsel Provided Ineffective Assistance of Counsel By Not Requesting A Jury Instruction That Defined An Essential Element.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. Art. 1 §22. A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed de novo. *In re Pers. Restraint of Brett,* 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Mr. Mitzlaff argues on appeal that he received ineffective assistance of counsel, in violation of his constitutional rights where counsel did not propose a jury instruction on the term "great bodily harm."

1. Great Bodily Harm Is A Technical Legal Term, Which Should Have Been Defined For The Jury.

The term "great bodily harm" is a technical term defined by statute to mean "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). While the trial court need not define words and expressions that are of ordinary understanding or self-explanatory, the court must define technical words and expressions used in jury instructions. *State v. Brown,* 132 Wn.2d 529, 612, 940 P.2d 546 (2007) (reversed on other grounds);*State v. Young,* 48 Wn.App. 406, 416, 739 P.2d 1170 (1987).

A term is technical if its legal definition differs from the common understanding of the word or words. *State v. Olmeda,* 112 Wn.App. 525, 533-34, 49 P.3d 960 (2002); *In re Detention of Pouncy,* 168 Wn.2d 382, 391, 229 P.3d 678 (2010). Definitions of technical terms, as contemplated by the "technical term rule" is an attempt to "ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law." *State v. Scott,* 110 Wn.2d 682, 690, 757 P.2d 492 (1988). In instructing a jury, a trial court should use the statute's language "where the law governing the case is expressed in the statute." *State v. Hardwick,* 74 Wn.2d 828, 830, 447 P.2d 80 (1968).

The WPIC treats great bodily harm as a distinct and technical term. It instructs practitioners that "bodily injury", "bodily harm", "substantial bodily harm", "great personal injury" and "serious bodily harm" are different from great bodily harm and the great bodily harm instruction should *not* be used to define those terms. Washington Pattern Jury Instructions Chapter 2.04. Simply put, great bodily harm has its own definition, which is not commonly understood, and differs in quality and degree from similar terms.

In this case, the jury was instructed on the essential elements of first-degree assault; however, it was left to cobble together its own meaning for the distinguishing term of "great bodily harm" because it was not given a legal definition. Jury instructions must, when taken as a whole, make the applicable legal standards "manifestly apparent to the average juror.'" *State v. Walden* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The difference between first-degree assault and second degree assault are the intent to inflict great bodily harm and the level of bodily injury. RCW 9A.36.011,.021. The instructions here did not make the applicable legal standard manifestly apparent to the average juror.

2. The Failure To Request A Definition Instruction Was Ineffective Assistance of Counsel.

To establish a claim of ineffective assistance of counsel, Mr. Mitzlaff must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland,* at 687; *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To meet the first part of the test, the representation must have fallen below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Thomas,* 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Prejudice occurs where, but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. *McFarland,* 127 Wn.2d at 335. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Thomas,* 109 Wn.2d at 226. If counsel's conduct can be characterized as legitimate trial strategy, the performance is not deficient. *State v. Hendrickson,* 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). However, merely determining that a decision was strategic or tactical does not necessarily satisfy the *Strickland* reasonableness standard. *State v. Grier,* 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011).

The question of whether counsel's performance was ineffective is not derived by measuring against per se rules, but rather, reviewed on a

case by case analysis. *State v. Cienfuegos,* 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In *Gordon,* the defendants argued they received ineffective assistance of counsel because trial counsel failed to request an instruction that detailed the two aggravators and followed the Washington Pattern Jury Instructions. *State v. Gordon,* 172 Wn.2d 671, 681, 260 P.3d 884 (2011). The Court reasoned that the better practice may be to request the pattern instructions, however, the larger issue was whether the defendants were prejudiced by the trial counsel's failure to request the detailed instructions. That is, whether the error was so serious as to deprive the defendant of a fair trial, that is, a trial whose result is reliable. *Id.* (internal citations omitted).

Here, the result of the trial is unreliable. Defense counsel failed to request a definition of the specific risk contemplated by the statute, great bodily harm. The WPIC recommends the definition be used in an assault first-degree instruction. *Washington Pattern Jury Instruction* 35.02. There was no tactical or strategic reason for failure to request the instruction: the jury was instructed on both first and second degree assault and intent and degree of harm are the distinguishing features. RCW 9A.011, .021. It was ineffective assistance of counsel to fail to request the instruction. Further, because the jury was left to its own devices to

determine the meaning of great bodily harm, Mr. Mitzlaff was deprived of a fair trial.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mitzlaff respectfully asks this Court to reverse his convictions with prejudice, based on insufficiency of the evidence. In the alternative, he asks this Court to find that he received ineffective assistance of counsel and remand for retrial.

Respectfully submitted this 25th day of July 2014.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Thomas Mitzlaff, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Brief was sent by first class mail, postage prepaid on July 25, 2014 to:

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