No. 98934-6
Appellate Court No. 365743

SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff-Respondent,

vs.

JAMES MICHAEL KOOGLER,

Defendant-Appellant.

On Appeal From the Court of Appeals of the State of Washington, Division III

DEFENDANT-APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is James Michael Koogler, the Defendant in Spokane County Superior Court Cause Number 18-1-00019-1, and the Appellant in Court of Appeals Division III Cause Number 36574-3-III.

II. COURT OF APPEALS DECISION

Mr. Koogler appeals the Court of Appeals Division III decision filed on July 23, 2020 under cause number 36574-3-III, affirming his conviction for Second Degree Assault.

III. ISSUES PRESENTED FOR REVIEW

1. The jury erred in finding that the State provided sufficient evidence to find that James Koogler intended to commit assault on Karolyn Koogler beyond a reasonable doubt. In a criminal proceeding, the burden is placed on the State to prove every element of a crime beyond a reasonable doubt; in the event the State does not prove an element of a crime, the jury should find the defendant not guilty, or in the alternative, the conviction should be overturned. Due to the lack of sufficient evidence presented by the State to prove beyond a reasonable doubt that Mr. Koogler specifically intended to assault Karolyn Koogler, the guilty verdict against Mr. Koogler should be overturned.

2. Mr. Koogler's counsel was ineffective in its failure to clarify testimony made by Mr. Koogler that was later used in the State's closing

argument as highly material to indicate Mr. Koogler possessed the requisite intent to be found guilty of second-degree assault.

3. Requiring that Mr. Koogler serve a prison sentence while the COVID-19 pandemic spreads throughout the country unchecked amounts to cruel and unusual punishment. Mr. Koogler's age and preexisting medical conditions puts him at higher risk of death or serious complications if he were exposed to COVID-19. Putting Mr. Koogler in prison during this pandemic amounts to deliberate indifference towards his health and safety.

IV. STATEMENT OF THE CASE

James Koogler was found guilty of Assault in the Second Degree, and acquitted of Harassment on October 31, 2018. CP at 25. Mr. Koogler timely moved for arrest of judgment and for a new trial on November 13, 2018. CP at 9. He then timely appealed the denial of his arrest for new judgment. CP at 23. His conviction was then affirmed by the Court of Appeals. Herein he argues that substantial evidence did not exist to find him guilty beyond a reasonable doubt and thus passion or prejudice overcame the rationality of the jury, and that his counsel's assistance was ineffective.

The chief evidence against Mr. Koogler was the testimony of his wife, Karolyn Koogler, who alleged that he forcefully pushed a shotgun into her

back and threatened to kill her in their bedroom. VRP at 146.[1] As reflected in the record, Karolyn testified about being pushed twice by James in front of the bedroom window. *Id.* at 152 . Specifically, Karolyn testified that James entered the room, flipped on the lights and began to berate her before pushing the shotgun into her back and finally physically pushing her twice in front of the window facing the driveway. *Id.* Deputy Darrel Smith testified that he was dispatched on a domestic violence call, arrived on scene, and then focused on the Koogler's home. VRP-I at 75-77.[2] Deputy Smith testified that the house was dark and quiet, and then watched the bedroom lights flip on and watched James standing next to the bed the whole time until Karolyn and he exited the house. *Id.*

Karolyn Koogler also testified that James threatened to kill her when he was outside the home and in the presence of law enforcement. VRP at 159. Her quote was "You're fucking dead meat as soon as I get out, bitch." *Id.* Significantly, none of the deputies present at the time testified to hearing this threat. Deputy Carlos specifically testified that he did not hear the threat, despite standing right next to Karolyn at this time. VRP at 219. Further, Deputy Carlos testified that he would have put this statement in his report if he had and that he would expect the other deputies to put it in their reports if

[1] "VRP" refers to the Verbatim Report of Proceedings for October 26, 29, 30, 31 2018; December 21, 2018; and January 18, 2019.
[2] "VRP-I" refers to the Verbatim Report of Proceedings for October 29, 2018.

they had heard it. *Id.* Karolyn Koogler was very clear in her testimony that James Koogler threatened to kill her, but the jury acquitted James of threatening to kill Karolyn, as reflected by the not guilty verdict for harassment. *Id.* at 340. As the jury instruction for the harassment charge instructed the jury that they must find Mr. Koogler threatened to kill Karolyn in order to find Mr. Koogler guilty of harassment, the acquittal means that the jury did not believe Karolyn Koogler and they shouldn't have. *Id.* at 286 (Instruction No. 11). The jury finding that Mr. Koogler did not threaten to kill Karolyn also means that James Koogler was not convicted of forcefully pushing a shotgun into Karolyn Koogler's back, but of some other conduct.

Mr. Koogler testified that he manipulated the action of the shotgun for the purpose of ensuring it was unloaded after he saw it had been moved. *Id.* at 245-46. In the process, the shotgun made a loud noise as shotguns do. Mr. Koogler testified that he said, "this sounds real loud, doesn't it" a statement similar to what Colin Mathieson testified to hearing him say. *Id.* at 246; VRP-I at 64-65. When asked why he said "this sounds real loud . . ." Mr. Koogler paused and said "I wanted her to talk to me." VRP at 267. In closing arguments, the State argued that this statement indicated that Mr. Koogler thereby *admitted* the assault and drew the conclusion that the sound of the shotgun was used to scare Karolyn into talking to him. *Id.* at 310-11. In the light of all of the evidence of the case, that conclusion is speculative and does

not amount to substantial evidence beyond a reasonable doubt which would lead a rational trier of fact to convict Mr. Koogler. Mr. Koogler had previously testified that he did not intend to scare or threaten Karolyn. Further, Mr. Koogler's counsel failed to clarify the subjective meaning behind the statement through re-direct testimony, therefore could not effectively rebut the State's closing argument.

It is argued herein that the State did not prove one of the essential elements of common law assault beyond a reasonable doubt – specifically "specific intent." Mr. Koogler maintained his innocence throughout this case. He testified that he never had any intent to place his wife in fear, but only to ensure the firearm was unloaded and safe. *Id.* at 243-46. He did so in a manner that was consistent with how the involved law enforcement officers testified they would ensure that a firearm was safe, and that doing this with a shotgun is loud. *Id.* Mr. Koogler commented on the volume of the shotgun, and he then made an innocuous statement about just wanting Karolyn to talk to him. *Id.* These actions and statements together cannot show that Mr. Koogler acted with the requisite intent to be found guilty for Second Degree Assault under a theory of common law assault. The substantial weight of the evidence in this case is that Karolyn Koogler lied under oath and James Koogler was ensuring the safety of a shotgun while trying to talk to his wife. The overall optics after the fact might be troubling, but the leap to assault is not substantially present

beyond a reasonable doubt on this record. Alternatively, his counsel was ineffective in failing to realize that this connection was made in time to rebut it.

It is worth noting that while Mr. Koogler's appeal was pending, the COVID-19 Pandemic began to and continues to impact the world. Mr. Koogler is 70 years old and recently diagnosed as asthmatic. Mr. Koogler has moved the Spokane County Superior Court to relieve him from his sentence based upon the COVID pandemic. That motion is to be heard on August 27, 2020.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **Summary**

Mr. Koogler argues that there was insufficient evidence to find that he intended to assault his wife under the theory of common law assault presented by the State in its instructions to the jury. As assault is not defined in the relevant Washington statute, Washington courts follow three alternative means as defined by the common law to define assault. *See* RCW 9A.36.021; *see also* RCW 9A.04.060. First, attempted battery requires a showing that the defendant attempted to inflict bodily injury on another with unlawful force. Next, battery is defined as an unlawful touching with criminal intent. Finally, common law assault is intentionally putting another in apprehension of harm whether or not the actor intends to

inflict or is incapable of inflicting the harm. *See State v. Hupe*, 50 Wash. App. 277, 282, 748 P.2d 263 (1988) (disapproved of on other grounds by *State v. Smith*, 159 Wash.2d 778 (2007)).

Mr. Koogler was charged with second degree assault, and the State attempted to prove the case against Mr. Koogler with alternative battery and common law assault theories. Based upon Karolyn Koogler's testimony that James forcefully pushed a shotgun into her back, the means would be battery. Under the theory presented in the State's closing argument the means would be a common law assault. Based upon the record, the State did not provide sufficient evidence to support either of these theories, and the jury was only instructed on the common law assault theory, therefore the argument will focus on the common law assault theory. VRP at 285-86 (Instruction No. 8). Because there was insufficient evidence to show that Mr. Koogler had specific intent to assault Karolyn, the conviction should be overturned.

Further, Mr. Koogler argues that his counsel was ineffective, in violation of his constitutionally guaranteed right to effective assistance of counsel. *See* U.S. Const. Amend. VI; *see also* Wash. Const. Art. I, Sec. 22. Mr. Koogler will argue that his counsel fell below the objective standard of reasonable representation given the circumstances, and that the ineffective counsel caused prejudice to Mr. Koogler as there is a reasonable probability

that the outcome would have been different had Mr. Koogler's counsel properly clarified specific testimony of Mr. Koogler's through re-direct examination.

Finally, with the novel situation presented to us all by COVID-19, Mr. Koogler's 39 month sentence could turn into a death sentence. Mr. Koogler is a 70-year-old with asthma and the rate of COVID infection in Washington prisons is 185% higher than the state average.[3] This would amount to cruel and unusual punishment, prohibited by both Amendment VIII of the United States Constitution and Article I, Section 14 of the Washington Constitution, and thus Mr. Koogler should be released from his sentence. Putting Mr. Koogler in prison shows deliberate indifference to his health and safety.

2. Supreme Court Review is Appropriate Pursuant to RAP 13.4

It is appropriate for this Court to review Mr. Koogler's case as there are significant questions of law under both the Washington Constitution and the United States Constitution. RAP 13.4(b)(3). Further, Mr. Koogler's conviction for second degree assault conflicts settled case law. RAP

[3] A STATE-BY-STATE LOOK AT CORONAVIRUS IN PRISONS, The Marshall Project, (August 14, 2020). https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons

13.4(b)(1). Finally, Mr. Koogler's petition involves an issue of substantial public interest – namely the COVID-19 pandemic. RAP 13.4(b)(4).

3. **Standard of Review**

"The standard of review for a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light 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. Sweany*, 174 Wash.2d 909, 914, 281 P.2d 305 (2012) (internal quotation marks omitted) (quoting *State v. Randhawa*, 133 Wash.2d 67, 73, 941 P.2d 661 (1997)).

"To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. Petitioner must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Byrd*, 152 Wash.2d 647, 672-73, 941 P.2d 661 (2004) (internal quotation marks omitted).

4. **The State did not present sufficient evidence to prove that Mr. Koogler committed common law assault beyond a reasonable doubt.**

The problem with Mr. Koogler's case is that he is actually innocent. He lacked any intent to place his wife in fear and he testified as such. Because he answered one question wrong and the prosecutor capitalized on it while his attorney missed it, he was wrongfully convicted.

As noted prior, common law assault requires that the State prove beyond a reasonable doubt that the defendant intended to put another in apprehension of harm, whether or not the actor intends to inflict or is incapable of inflicting the harm. *See Hupe*, 50 Wash. App. at 282. Although intending to actually inflict harm is not an essential element of common law assault, the State is required to show that the defendant *specifically intended* to put the other person in apprehension of harm. *See State v. Byrd*, 125 Wash.2d 707, 710, 887 P.2d 396 (1995). To put it another way, the State must show "an *actual intention* to cause apprehension, unless there exists the morally worse intention to cause bodily harm." *Id.* at 713 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 611 (1972) (emphasis added). Simply showing that an intentional act caused another an apprehension of harm will not allow a jury to make an inference that the requisite level of intent was present. *State v. Elmi*, 166 Wash.2d 209, 215, 207 P.3d 439 (2009).

In *Byrd*, the Washington Supreme Court overturned a conviction for Second Degree assault because the jury had not been clearly instructed on

the intent element, and the jury instructions essentially allowed to the jury to make an inference that the requisite intent was present based upon the result. *See Byrd*, 125 Wash.2d at 716. The main point of contention between the defense and State was whether the defendant's action of pulling out a gun during a verbal confrontation with the victim would indicate that the defendant had specific intent to put the victim in apprehension of bodily harm, or if it was simply an action to intimidate the victim. *Id.* at 716. The court held that the jury instruction allowed the jury to convict the defendant simply based upon the defendant's illegal displaying of a firearm. This is impermissible as one could reasonably find that a person intentionally displayed a firearm, but did not intend for that display to put another in apprehension or fear of bodily harm. *Id.* at 710. *Byrd* illustrates that the intent element in assault is not to be examined through the objective "reasonably prudent person standard," but examined through the defendant's subjective mindset. *See id.*

The record indicates that Mr. Koogler did not have the specific intent to put Karolyn in apprehension of harm. Although Mr. Koogler may have been upset and using offensive language towards Karolyn, Mr. Koogler's testimony is clear that he had the specific intent to ensure that his shotgun was safe and unloaded, and then to simply get his wife to speak to him, not to put her in fear of losing her life. Karolyn's testimony as to what

Mr. Koogler said to her on the night in question is marred with inconsistencies and is directly contradicted by the testimony of the responding officers, as well as Mr. Koogler. Moreover, the jury's acquittal of Mr. Koogler for harassment directly supports their lack of faith in Karolyn's testimony he harassment acquittal was based on a determination of whether Mr. Koogler actually threatened Karolyn's life. Thus, in order to have found Mr. Koogler guilty, the jury must have relied on his answer to the singular question about his statement that the shotgun was loud. There simply is no other evidence in the record to support the conviction and that answer was specifically relied upon by the prosecutor to support the common law assault charge.

Mr. Koogler's argument is that his answer was misinterpreted as creating a connection between his use of the shotgun and his intent at the moment of using it which was not supported by the evidence. If the Court does not agree and finds this tiny shred of evidence is sufficient to support a conviction beyond a reasonable doubt, it is respectfully submitted that trial counsel's failure to catch it and follow up at the time was ineffective as outlined below.

5. **Mr. Koogler's counsel was ineffective through failing to clarify Mr. Koogler's testimony in re-direct examination.**

Both the United States and Washington Constitutions provide the accused with the right to effective counsel in criminal proceedings. *See* U.S. Const. Amend. VI; *see also* Wash. Const. Art. I, Sec. 22. As noted prior, Washington courts will examine two factors in determining if counsel was effective, (1) the counsel's effectiveness when compared to the objective standard of reasonableness based on the circumstances; and (2) the prejudicial effect caused by the ineffective counsel. *See Davis*, 152 Wash.2d 672-73; *see also Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

i. ***Mr. Koogler's counsel did not rise to the minimum standard of which a competent criminal defense attorney should be held.***

To determine if counsel was effective when compared to the objective standard of reasonableness, the appellant must show "that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Further, "reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all of the circumstances." *Davis,* 152 Wash.2d at 673 (citations and quotation marks omitted).

Mr. Koogler's counsel's failure to clarify the meaning of Mr. Koogler's testimony to the State through the use of re-direct examination fell below the minimum standard that a competent criminal defense attorney would be held. The testimony of note and specific instance of ineffective counsel was when Mr. Koogler's counsel failed to us re-direct examination to clarify Mr. Koogler's subjective meaning as to what Mr. Koogler met when he said "I just wanted to talk to her" when Mr. Koogler was asked what the purpose of his actions were in the bedroom during the incident in question. VRP at 267. This falls below the threshold as set forth in *Davis*, as the competent criminal defense attorney would have attempted to clarify the statement in question due to its highly probative effect to prove the State's theory of common law assault as reflected in the State's closing argument. *Davis,* 152 Wash.2d at 672-73; *see* VRP at 310-11 ("He's making that noise to create a reaction, to create a fear in Karolyn."). Counsel's inability to clarify this statement left him with no evidentiary basis to rebut the State's insinuation that Mr. Koogler's racking of the shotgun had the sole purpose to scare Karolyn. *See* VRP 310-11.

ii. ***Mr. Koogler's ineffective counsel caused material prejudice towards Mr. Koogler.***

To determine if the ineffective counsel had a prejudicial effect on the defendant, Washington courts will attempt to determine if "there is a

reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would be different." *Davis*, 152 Wash.2d at 673. *Strickland* defines reasonable probability "as a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; *see Davis*, 152 Wash.2d at 673.

Mr. Koogler's counsel's failure to clarify the meaning of Mr. Koogler's statement, "I just wanted to talk to her," clearly caused material prejudice towards Mr. Koogler because the State interpreted the statement as an in-court admission of Mr. Koogler's intent to cause apprehension in Karolyn. *See* VRP at 293-95, 310-11. Mr. Koogler was not found guilty for harassment, the basis for this charge being Mr. Koogler's threats to kill Karolyn and how the; based on the finding of not-guilty for the harassment charge, it can be assumed that the jury did not believe Karolyn regarding the testimony that Mr. Koogler was going to kill her. VRP at 340. This leads Mr. Kooglers statement of wanting to talk to Karolyn to be the State's "smoking gun" that Mr. Koogler intended to assault Karolyn through the racking of the shotgun, as the jury should have disregarded the State's presenting of the death threats in closing argument. *See* VRP at 310-11. The State's interpretation of the statement was presented as direct evidence that Mr. Koogler was racking the shotgun to create fear in Karolyn. *Id.* Had Mr. Koogler's counsel properly clarified the meaning of this statement, Mr.

Koogler's counsel would have had a very strong argument to rebut the state's interpretation of the statement, thus creating a reasonable probability of a different outcome. *See id.*

As Mr. Koogler's counsel failure to clarify the meaning of material testimony provided by Mr. Koogler was clearly ineffective counsel causing a highly prejudicial effect towards Mr. Koogler, Mr. Koogler's conviction should be overturned.

6. **The State will be unable to uphold their duty to protect Mr. Koogler from contracting COVID-19.**

The Eighth Amendment, as applied to the states through the Fourteenth Amendment, bars the government from inflicting cruel and unusual punishment on people convicted of crimes. *See* U.S. Const. Amend. VIII & XIV. The Washington counterpart of the Eighth Amendment bars the State from inflicting cruel punishment and has typically been read as more protective than the Eighth Amendment. *See* Wash. Const. Art. I, Sec. 14; *see also State v. Bassett*, 192 Wash.2d 67, 76-82, 428 P.3d 343 (2018).

The Eighth Amendment imparts a duty on state prisons to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970 (1994)(citations omitted). Part of that guarantee is ensuring inmates have access to adequate medical care,

as well as ensuring that inmates are not knowingly exposed to inhumane conditions. *See generally id.*

United States Courts examine challenges to conditions of confinement through a two component test. The first component is objective, where "the prisoner must show an objectively intolerable risk of harm." *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020)(citing *Farmer*, 511 U.S. at 846). To satisfy this component, it must be shown that "the challenged conditions [are] extreme and present an unreasonable risk of serious damage to [the prisoner's] future health or safety." *Id.* (citing *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004)).

The second component of the *Farmer* test is a subjective component. That component requires a showing that a state official is acting with "deliberate indifference" to a known "excessive risk to inmate health or safety." *See Swain*, 958 F.3d at 1089 (citing *Farmer*, 511 U.S. at 837). "Deliberate indifference requires the [state official] to have a subjective state of mind more blameworthy than negligence, closer to criminal recklessness." *Id* (citing *Farmer*, 511 U.S. at 835, 839-40).

i. ***The COVID-19 pandemic presents an extreme and unreasonable risk to Mr. Koogler's health.***

This Court itself has noted and acted upon the extreme and unreasonable risk that COVID presents to our society, enacting a number of COVID related Orders with the primary purpose of those Orders being to protect the health and safety of Washingtonians. *See Generally* Washington Supreme Court Order No. 25700-B-618. Governor Inslee has also laid out a number of proclamations in regard to the COVID pandemic, most notably directing the Department of Corrections to identify individuals for potential release due to the issues presented by COVID. *See* Wash. Proclamation 20-50.

To date, the novel coronavirus, which causes COVID-19, has infected millions of people in the United States and has led to hundreds of thousands of deaths.[4] The Center for Disease Control and Prevention has issued guidance to take immediate preventative actions, including avoiding crowded areas and stay at home orders.[5] The CDC has also noted that older adults in their 70s are at very high risk for severe illness from COVID-19.[6] The CDC further notes that those with respiratory issues are also at higher

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[4] Coronavirus in the U.S., THE NEW YORK TIMES (AUGUST 12, 2020), https://www. https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (updating regularly).

[5] *If You Are at Higher Risk*, CENTERS FOR DISEASE CONTROL AND PREVENTION (March 18, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html.

[6] *Older Adults*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html

risk for severe illness from COVID-19.[7] These severe illnesses can often turn fatal, with the CDC forecasting up to 190,000 COVID-19 deaths by the end of August 2020.[8]

Remaining in custody forces individuals to be in close physical proximity to other incarcerated individuals. This is problematic and risky as "respiratory pathogens may be more easily transmitted in an institutional environment."[9] Public health experts warn that incarcerated populations are at special risk of infection and are "less able to participate in proactive measures to keep themselves safe."[10] Newly emerging evidence that the virus may be viable for hours in the air is particularly concerning for those who reside in small, confined spaces with poor ventilation.[11] While our governmental organizations are taking great strides to protect the

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[7] *People With Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

[8] *COVID-19 Forecasts: Deaths*, CENTERS FOR DISEASE CONTROL AND PREVENTION (August 6, 2020) https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html

[9] *Novel Coronavirus (COVID-19) Guidance for 24/7 State-Operated Facilities*, WASHINGTON STATE DEPARTMENT OF HEALTH, (March 16, 2020), https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/10-RecommendationsforCorrectionalFacilities.pdf.

[10] *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State and Local Leaders from Public Health and Legal Experts in the United States*, YALE UNIVERSITY, (March 2, 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf.

[11] Neeltje van Doremalen, et. al., AEROSOL AND SURFACE STABILITY OF HCOV-19 (SARS COV-2) COMPARED TO SARS-COV-1 (March 10,2020) https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf

community, infection control is particularly challenging in incarcerated populations. *See* FN 9. As of August 14, 2020, there have been at least 377 reported COVID cases in Washington prisons – the rate of infection in Washington prisons is 185% higher than the rate for the rest of the state. *See* FN 3.

Putting Mr. Koogler in prison during the COVID pandemic presents an extreme and unreasonable risk to Mr. Koogler's health. Mr. Koogler is 70 years old, and the relevant data has shown that the elderly present themselves at a higher risk of serious complications or death from COVID. *See* FN 6. Further, Mr. Koogler has recently been diagnosed with asthma, and relevant data has shown that those with respiratory problems present themselves at a higher risk of serious complication or death from COVID. *See* FN 7.

ii. ***Requiring that Mr. Koogler present himself to DOC custody is deliberately indifferent to his health and safety.***

For the reasons stated above, it would be deliberately indifferent to Mr. Koogler's health and safety to require that he report to prison during the COVID-19 pandemic. With his age of 70 years and respiratory issues, Mr. Koogler is part of two high risk populations for developing serious complications due to COVID exposure. Requiring that Mr. Koogler spend

anytime in those conditions could turn his originally 39-month sentence into a death sentence.

VI. CONCLUSION

Based upon the foregoing, the evidence presented by the state was not sufficient to support a guilty verdict against Mr. Koogler for the charge of second degree assault, therefore the verdict should be overturned.

Further, as Mr. Koogler's counsel was ineffective, the guilty verdict for the charge of second degree assault should be overturned.

Finally, due to the extreme and unreasonable risk that COVID presents to Mr. Koogler's health and safety, and how requiring Mr. Koogler to present to prison would show deliberate indifference towards that risk, Mr. Koogler's sentence should be overturned.

DATED this 24th day of August, 2020.

PARTOVI LAW, P.S.

David R. Partovi, WSBA# 30611
Attorney for Petitioner
JAMES MICHAEL KOOGLER

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2020, a true and correct copy of the foregoing was delivered directly to the following:

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FILED
JULY 23, 2020
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,	)	
	)	No. 36574-3-III
Respondent,	)	
	)	
v.	)	
	)	
JAMES M. KOOGLER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — James Koogler appeals his conviction for the second degree assault of his wife. He admitted at trial that he was intoxicated and angry at the time of the alleged assault and even told his wife he would kill her if she ever again abandoned him in cold snowy weather. But he argues that the State presented insufficient evidence that he intended to cause her to fear bodily injury. He also contends he received ineffective assistance of counsel when his lawyer failed to have him clarify an incriminating answer given in cross-examination.

The evidence was sufficient and Mr. Koogler fails to demonstrate that his lawyer's representation was deficient. For those reasons, and because Mr. Koogler raises no meritorious issues in a statement of additional grounds, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In December 2017, James Koogler had been married to Karolyn Koogler for eight years. She had adult children and grandchildren from earlier marriages. During the last week of December, Karolyn's son Colin Mathiesen and his wife and two children had traveled from Western Washington to stay at the Kooglers' home in Spokane. Karolyn's mother was flying in from Olympia on the afternoon of December 29. Plans were made for the Kooglers, Colin's family, the family of Karolyn's daughter Sarah, and Karolyn's mother to spend time that evening at a roller skating rink, followed by pizza.

At around 1:00 in the afternoon of the 29th, Mr. Koogler and Karolyn left home with plans to go grocery shopping before driving to the airport to pick up Karolyn's mother. Mr. Koogler wanted to have a drink first, so they stopped at a bar—Birdy's Sports Bar—where Karolyn suggested they had time for one beer. Mr. Koogler did not stop at one beer, and Karolyn eventually told him she needed to leave for the grocery store and would pick him up later. It turned out she had lost too much time to finish the grocery shopping and get to the airport, so she called Colin, who agreed to pick up his grandmother. Colin also agreed to pick up Mr. Koogler. Through text and voice mail messages, Karolyn and Colin notified Mr. Koogler of the changing plans, but Mr. Koogler did not hear his phone or check for messages.

Colin traveled to Birdy's at around 6:00 p.m., but Mr. Koogler was not there. After talking to the bartenders about where Mr. Koogler might have gone, Colin looked

for him at a couple of other local bars without success. He telephoned still other bars, again without success. The family roller skating and pizza went forward as planned, but Mr. Koogler never arrived.

When it was time to go home, it was decided that Colin's wife and children would stay with Sarah's family that night and Colin would return to the Koogler home with his mother. Colin would later testify that this was "because I didn't want my children to be there when Mr. Koogler returned intoxicated because of past situations." Report of Proceedings (Oct. 29, 2018) (RP) at 53.

Colin and Karolyn arrived at the Koogler home at around 9:00 p.m. Mr. Koogler was not there. They talked for a few moments and then Ms. Koogler went to bed. It had been snowing, so Colin went out to shovel the driveway. He continued shoveling the driveway until Mr. Koogler arrived, having been given a ride home by an employee of a bar. While Mr. Koogler sat in the truck and talked to the employee for about 15 minutes, Colin went back into the house.

Mr. Koogler would later testify that he had continued drinking beer at Birdy's until it started to get dark, at which point, he was given a ride part way to the family's pizza destination and began walking, but could not find it. He continued walking until around 7:00 p.m., when he stopped at another bar. He later described himself as "feeling left behind and abandoned." RP (Oct. 26, 2018) at 258. He ended up at a third bar,

where he drank a couple of pints of beer until an employee who was getting off work offered him a ride home.

Unbeknownst to Colin, Mr. Koogler had learned a day or two earlier that Karolyn had incurred almost $30,000 in credit card debt without Mr. Koogler's knowledge. A substantial part of the borrowing had been to help Karolyn's son Mark with a car purchase and education expenses. Karolyn was aware that Mr. Koogler had learned about the debt, and viewed him as initially kind and understanding about it.

But when Mr. Koogler entered his house on the night of December 29, he was angry, and Karolyn assumed it was about the debt. When he entered the home, Colin was in the guest bedroom folding laundry. Mr. Koogler walked past and entered his and Karolyn's bedroom where, according to Colin, he immediately began yelling. Colin heard Mr. Koogler yell at Karolyn about a $30,000 debt and that "she was useless and nobody would want her." RP (Oct. 29, 2018) at 58. Mr. Koogler accused her and her family of leaving him to walk home through a snowbank, and yelled, "If you ever do [that] again, I will kill you." *Id.* at 59. Colin then heard the sound of a shotgun being racked coming from the Kooglers' bedroom. When he heard the shotgun racked a second time, he ran out of the house and called police. *Id.*

According to Karolyn, when Mr. Koogler entered their bedroom, she was lying in bed but was not asleep. She would later testify that as he entered, he switched on the ceiling light and yelled, "You are a dumb fucking bitch. You are so fucking stupid, bitch,

cunt. Nobody will ever want you. You are such a fucking dumb bitch, you are fucking dead meat and I want to fucking kill you." RP (Oct. 26, 2018) at 143, 151. She was scared and pretended to be asleep.

Karolyn would later testify that as Mr. Koogler continued to insult her, he picked up a shotgun that he kept on his side of the bed, racked it a couple times, and said "'Does this sound real, fucking bitch? I'm going to fucking kill you.'" RP (Oct. 26, 2018) at 144-45. She claims he also pushed the muzzle of the gun into her back for 30 seconds to a minute and said, "'Does this feel fucking real, bitch? I'm going to fucking kill you.'" *Id.* at 147. Karolyn did not know if the gun was loaded. She testified that as it was held to her back, she feared Mr. Koogler was going to kill her. She tried to be very still because she thought "if I do anything to provoke him, who knows, he—it would have probably gone off." *Id.* at 149.

It was around 10:30 p.m. when four Spokane County sheriff's officers responded to the report of a domestic violence incident with a weapon involved. They waited outside and watched the Kooglers' bedroom window as dispatch called the Kooglers' phone numbers, attempting to make contact. Mr. Koogler answered one of the calls and at the dispatcher's request gave the phone to Karolyn, who was told to leave the house immediately. She did, and was moved to a safe location by one of the officers. Mr. Koogler then came out and was placed into handcuffs. One of the officers described him as physically cooperative but "obviously intoxicated." RP (Oct. 29, 2018) at 79.

According to Karolyn, as the officers were leading Mr. Koogler away from the home, he looked at her and said, "You're fucking dead meat as soon as I get out, bitch." RP (Oct. 26, 2018) at 159.

Mr. Koogler was charged with second degree assault with a deadly weapon against a family member and harassment with a threat to kill against a family member. The State later amended the information to add a firearm enhancement to each count.

At trial, the State called as witnesses Colin, Karolyn, and three of the responding officers. They testified to the events of December 29. Although the officers testified that Mr. Koogler yelled at Karolyn as he was being led away from the home, none of them corroborated her testimony that he had threatened violence against her "[when] I get out." One testified that Mr. Koogler had said, "You're dead meat." RP (Oct. 26, 2018) at 207.

Mr. Koogler was the sole defense witness. He testified that when he entered his and Karolyn's bedroom, he saw her lying on her stomach, "stiff as a board with her fists clenched," and he knew she was not asleep. RP (Oct. 26, 2018) at 239. He claimed he asked her twice why she left him, but she did not respond. He admitted he was intoxicated and angry because he "thought [he]'d been abandoned that afternoon, and [he] had to walk through the snow." *Id.* at 240.

He testified he never pointed his shotgun at Karolyn or held it to her back. He admitted he picked up the shotgun and racked it twice, but testified that this was only to

make sure it was unloaded because it was not where he normally kept it, which concerned him.

Mr. Koogler testified that he realized later, by looking at his phone, that both Karolyn and Colin had tried to reach him during the afternoon and evening. He admitted he had been a "drunken asshole" and testified that if he had not been arrested and realized the next morning that he was not abandoned he would have apologized. RP (Oct. 26, 2018) at 247.

In detailing how he racked the shotgun, Mr. Koogler testified that he had "picked the gun up, pointed it up in the air. I racked it, checked the chamber with my finger. I checked the elevator. I then checked the magazine. I slammed it shut, racked it open again." *Id.* at 245. He testified that when racking the shotgun, he had said, "'this sounds real loud, doesn't it.'" *Id.* at 246. The prosecutor explored that statement on cross-examination, eliciting the following testimony:

> Q And it's your testimony that what you said after racking the shotgun, I guess the first time, was "this sounds real loud now, doesn't it?"
>
> A I believe what it should have been was "this sounds real loud."
>
> Q Sounds real loud.
>
> Why did you say that?
>
> A I wanted Karolyn to say something.
>
> Q So you were drawing her attention to the fact that you had a shotgun, right?
>
> A I just said that. I presumed she knew I had it when I racked it.
>
> Q But then you said, "This sounds real loud"?

> A I wanted a reaction. I wanted her to talk to me.
>
> Q While upset and intoxicated and threatening her—
>
> [DEFENSE COUNSEL]: Objection. That's argumentative.
>
> THE COURT: Overruled.
>
> Q (By [THE PROSECUTOR])—you wanted to make sure she knew you had the shotgun and you wanted to get her attention so she'd talk to you?
>
> A I just wanted her to talk to me.

Id. at 266-67.

Mr. Koogler admitted saying to Karolyn while in the bedroom, "[i]f you ever do this again, I'll kill you," with "this" meaning abandoning him. *Id.* at 247. He testified he was not joking when he said it, but he did not mean it. Mr. Koogler did not recall saying any of the other things Karolyn alleged, but said he may have told her she was "'so fucking stupid.'" *Id.* at 248. He denied that once outside the home, he had ever said to Karolyn "'you're fucking dead meat as soon as I get out, bitch.'" *Id.* at 252. Rather, he testified, he had told Karolyn, "'We're through.'" *Id.* at 253.

In closing argument, the prosecutor reminded the jury of Mr. Koogler's testimony that he had wanted a reaction from Karolyn when he commented, as racking the shotgun, that it "sounds real loud." He told the jury "the truth kind of came out a little bit" with that answer, and, "He's making that noise to create a reaction, to create a fear in Karolyn. I mean, there's no way around it." *Id.* at 310-11.

The jury found Mr. Koogler guilty of the assault count, but acquitted him of harassment (threat to kill). His motion to arrest the judgment was denied. The trial court sentenced Mr. Koogler to a term of total confinement of 39 months, consisting of a three month sentence for the assault (the low end of the standard range) plus 36 months for the firearm enhancement. Mr. Koogler appeals.

ANALYSIS

Mr. Koogler challenges the sufficiency of the evidence to establish the intent required for assault, and contends he received ineffective assistance of counsel when his trial lawyer failed to have him clarify his testimony about why he said "this sounds real loud."

I. THE EVIDENCE WAS SUFFICIENT

The jury was properly instructed that

> [a]n assault is 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.

RP (Oct. 26, 2018) at 285-86 (Instruction 7). Mr. Koogler contends there was insufficient evidence to support the jury's implicit finding that he intended to create in Karolyn apprehension and fear of bodily injury.

As a threshold matter, we reject Mr. Koogler's argument that because he was acquitted of the harassment count, the jury must not have believed Karolyn's testimony

and its verdict must necessarily have been based on a misapprehension of *his* testimony. The offenses have different elements, so the verdicts are not inconsistent. Harassment (threat to kill) focuses on Mr. Koogler's alleged threats to kill Karolyn and whether, in the context and circumstances, a reasonable person in Mr. Koogler's position would foresee that the threat would be interpreted as serious. *See id.* at 287 (Instruction 12). Assault could be found based on evidence that Mr. Koogler racked a gun, placed its muzzle on Karolyn's back, and asked her loudly whether it sounded "real" or "loud." Moreover, even inconsistency would not necessarily require reversal, because "[j]uries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." *State v. Goins*, 151 Wn.2d 728, 733, 92 P.3d 181 (2004). Because it is generally difficult to discern "which was the verdict that the jury 'really meant,'" courts will uphold a conviction despite a conflicting acquittal if there is sufficient evidence to support the jury's guilty verdict. *Id.*

In testing for the sufficiency of the evidence, then, we assume that Karolyn's testimony was believed. The test for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence are drawn in favor of the State and are interpreted strongly against the defendant. *Id.* "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

can be drawn therefrom." *Id.* This court's role is not to reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "Credibility determinations are for the trier of fact and are not subject to review." *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008).

Whether Mr. Koogler had the criminal intent to assault Karolyn resides exclusively within his mind, "but it may be proved by facts and circumstances more readily perceived by others." *State v. Bencivenga*, 137 Wn.2d 703, 710, 974 P.2d 832 (1999). "Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt." *Id.* at 709. Appellate courts will not "invade the province of the fact finder by appropriating . . . the role of factually determining the reasonableness of an inference." *Id.* at 708.

A jury may infer intent to create apprehension of bodily injury from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded. *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). Here, not only is Mr. Koogler alleged to have pointed the gun and placed it in Karolyn's back, but by his own admission, he was angry and racked the gun loudly, twice. By all accounts other than his own, he was yelling at her, and both Colin and the testifying officers heard him make threats of several sorts. Sufficient evidence supports an inference of criminal intent.

II. INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT SHOWN

Mr. Koogler argues his attorney provided ineffective assistance when he failed to ask clarifying questions so that Mr. Koogler could explain what he meant when he testified that in saying to Karolyn, "this sounds real loud," was to get a reaction.

To succeed on a claim of ineffective assistance of counsel, a defendant must establish that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness, and the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a party fails to demonstrate one element, a reviewing court need not analyze the other. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Both prongs must be established based on facts in the record developed below. *McFarland*, 127 Wn.2d at 335-37.

Courts are highly deferential to counsel's decisions and there is a strong presumption that counsel performed adequately. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "[C]ounsel's performance is adequate as long as his challenged decisions '*can be characterized* as legitimate trial strategy or tactics.'" *State v. Carson*, 184 Wn.2d 207, 221, 357 P.3d 1064 (2015) (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). Defendants must "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693.

The problem with Mr. Koogler's ineffective assistance claim is that it is easy to conclude that trial counsel made a tactical decision not to question Mr. Koogler further because of the risk that further questions and answers might hurt, not help. With the benefit of hindsight, Mr. Koogler apparently now believes that his answers in cross-examination were partly truthful and helpful (the "wanting Karolyn to talk to me" part) and partly unartful and misunderstood (the "wanting to get a reaction" part). Even if defense counsel immediately foresaw peril from Mr. Koogler's "wanting to get a reaction" testimony, however, spending more time on what Mr. Koogler said and thought while angrily and drunkenly racking a shotgun presented its own peril. And, of course, the prosecutor would have had the right to cross-examine Mr. Koogler further about his "wanted a reaction" answer. Avoiding reemphasizing unfavorable evidence is a legitimate trial tactic that cannot be the basis of a claim of ineffective assistance of counsel. *State v. Kloepper*, 179 Wn. App. 343, 355-56, 317 P.3d 1088 (2014). Mr. Koogler fails to demonstrate either deficient representation or prejudice.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds for review (SAG), Mr. Koogler raises six.

Law enforcement investigation. Mr. Koogler contends that law enforcement failed to conduct a complete investigation because they had cameras in their patrol cars and,

having been told by Karolyn that a shotgun had been held forcefully against her back, did not document the presence or absence of marks or bruises on her back.

Due process does not require law enforcement to search for exculpatory evidence. *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373 (2017). Failure to preserve evidence only violates due process where the State acts in bad faith. *Id.* Mr. Koogler has not alleged or established bad faith.

Karolyn's testimony. Mr. Koogler argues Karolyn knew that the gun was unloaded and her own testimony established that she had the opportunity to leave if she felt threatened. We will not reweigh evidence or substitute our own judgment for that of the jury. *Green*, 94 Wn.2d at 221.

Insufficient evidence of Mr. Koogler's intent. Mr. Koogler argues he was justifiably checking the shotgun out of concern when he saw it had been moved, and the State failed to prove an intent to assault. This issue was adequately addressed by counsel and will not be reviewed again. *See* RAP 10.10(a).

Juror Bias. Mr. Koogler argues that a juror should have "recused herself" because she was a nurse who worked for the same company as Karolyn, so she may have been acquainted with Karolyn or had prior knowledge of the events. SAG at 2. He claims he expressed concern to his lawyer about the juror. Since the matter he now complains of was recognized in the trial court, the defense needed to raise any objection at that time. The issue was not preserved. *See* RAP 2.5(a).

Inadequate time to prepare for trial. Mr. Koogler argues his rights under the Sixth Amendment to the United States Constitution were violated when on a Friday afternoon, after a potential plea bargain fell apart, the court ordered trial to begin the following Monday morning. He claims he lost co-counsel as a result of the scheduling. Mr. Koogler never asked for a continuance, so any claim that one was needed was not preserved. RAP 2.5(a). He does not allege a deficiency in performance or prejudice as the basis for an ineffective assistance of counsel claim.

Sentence. Mr. Koogler states in passing that he feels his sentence is excessive. A defendant generally cannot appeal a standard range sentence, *see* RCW 9.94A.585(1), and Mr. Koogler identifies no basis for an exception.

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.

Siddoway, J.

WE CONCUR:

Fearing, J.

Pennell, C.J.

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CASE # 365743
State of Washington v. James Michael Koogler
SPOKANE COUNTY SUPERIOR COURT No. 181000191

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

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Enc.

c: **E-mail**—Hon. John O. Cooney

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PARTOVI LAW

August 24, 2020 - 12:12 PM

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