

No. 64512-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

EDGAR IVAN AMELCO,

Appellant.

2010 MAR 31 PM 4:55
COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss

BRIEF OF APPELLANT

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENT OF ERROR

There was not sufficient evidence presented at trial to support the jury's verdict that Edgar Amelco was guilty of third degree assault of a police officer.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process under the United States and Washington Constitutions requires the State prove every element of the charged offense beyond a reasonable doubt. Assault of a police officer requires proof of an intent to strike the officer. Where the police were struggling with Mr. Amelco and his foot struck one of the officers, did the State fail to prove he intended to kick the officer thus entitling him to reversal of the conviction with instructions to dismiss?

C. STATEMENT OF THE CASE

On February 9, 2009, Edgar Amelco and six members of his family went to JR Phinicky's restaurant in Marysville to celebrate. RP 106.¹ The family was in the restaurant for approximately an hour when an argument began between groups of people and several people, including the Amelcos, were asked to leave. RP 126-29, 146.

¹ "RP" refers to the consecutively paginated two volume set containing the jury trial. The remaining two volumes will not be cited.

Once outside the restaurant, Mr. Amelco became separated from his family. RP 148-51. At approximately the same time the police arrived to quell the disturbance. RP 19, 65-66, 148. The police contacted Mr. Amelco. RP 25. Worried about his family, Mr. Amelco repeatedly refused police commands to cooperate. RP 149-52. Mr. Amelco was handcuffed and placed on a bench. RP 30, 151. When he again refused commands to remain seated, Mr. Amelco was taken to the ground by the police, where the struggle between he and the officers continued. RP 32-36, 152-55. During the melee that ensued, Officer Molly Ingram was struck on the leg by Mr. Amelco's leg. RP 37, 78, 155. Mr. Amelco stressed he did not intend to kick the officer. RP 157.

Mr. Amelco was subsequently charged with assault in the third degree, and after a jury trial, found guilty as charged. CP 30, 56.

D. ARGUMENT

THE JURY'S VERDICT THAT MR. AMELCO WAS
GUILTY OF ASSAULTING OFFICER INGRAM WAS
NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To support a conviction for third degree assault, the State had to prove that Mr. Amelco intended to commit and did commit an assault where: 1) the Officer Ingram was a law enforcement officer engaged in the performance of official duties at the time of assault; (2) the law enforcement officer had a reasonable apprehension and imminent fear of bodily injury at the time of the assault; and (3) the defendant's actions created that apprehension. RCW 9A.36.031(1)(g); *State v. Brown*, 140 Wn.2d 456, 470, 998 P.2d 321 (2000).

2. There was a lack of evidence that Mr. Amelco intended to strike Officer Ingram with his feet. Mr. Amelco asserts that he did not intend to strike the officer, and if he did, it was inadvertently during the officers' attempts at arresting him.

Intent is an element of assault. *Brown*, 140 Wn.2d at 470. As charged here, assault by battery requires intent to commit the physical act that constitutes the assault. *State v. Hall*, 104 Wn.App. 56, 62, 14 P.3d 884 (2000). Thus, the State was required to prove the "kick" by Mr. Amelco described by the officers was an intentional act not merely inadvertent.

Mr. Amelco testified that he assumed he was arrested for failing to heed the officers' orders to remain seated. RP 143. After

being handcuffed, Mr. Amelco was thrown to the ground by the officers, and in the ensuing melee, his foot contacted Officer Ingram. RP 155-57. Mr. Amelco testified he neither threatened Officer Ingram, nor tried to kick or otherwise strike the officer. RP 157. Mr. Amelco's testimony was corroborated by his wife, who testified she saw Mr. Amelco tossed to the ground and the officers on top of him. RP 130. Further, consistent with her husband's testimony, she did not see Mr. Amelco strike Officer Ingram. RP 130, 138.

The officers agreed that a melee occurred when they attempted to restrain then arrest Mr. Amelco. RP 31-36. The officers also agreed that Mr. Amelco continued to struggle after being thrown to the ground onto his face. RP 32. Thus, the officers' testimony corroborates the fact that Officer Ingram was most likely struck inadvertently by Mr. Amelco during the officers' attempts at arresting him. The State failed to prove Mr. Amelco intentionally assaulted Officer Ingram.

3. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Mr. Amelco's conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would

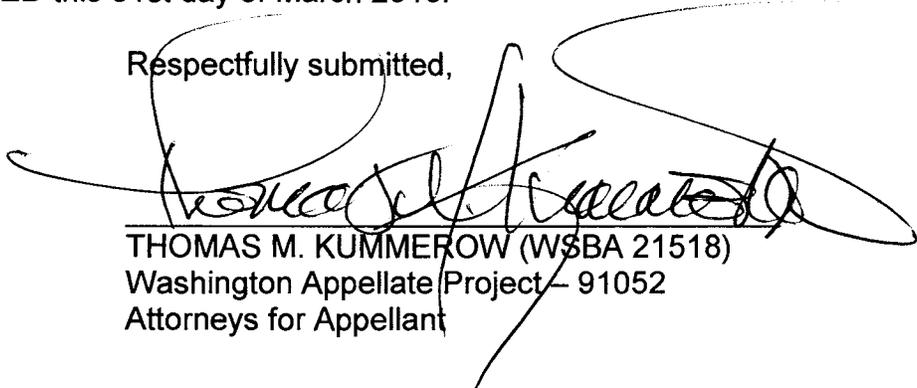
violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Edgar Amelco submits this Court must reverse his conviction for third degree assault with orders to dismiss.

DATED this 31st day of March 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and address below.

THOMAS M. KUMMEROW (WSBA 21518)
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Attorneys for Appellant

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SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF MARCH, 2010.

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