

No. 66018-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHIRLEY LOVERN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE STATE DID NOT PROVE MS. LOVERN  
INTENTIONALLY ASSAULTED ANOTHER PERSON

1. The State did not prove Ms. Lovern assaulted Patricia Ulloa. To convict Ms. Lovern of assaulting Patricia Ulloa the jury had to find Ms. Lovern “act[ed] with the objective or purpose to accomplish a result which constitutes a crime.” CP 26. Thus, it is not enough that the State prove Ms. Lovern purposefully kicked her leg and accidentally struck Ms. Ulloa. Instead, the State had to prove that Ms. Lovern kicked her leg out with the intent to strike Ms. Ulloa. The State’s evidence at trial does not support that finding.

Ms. Ulloa said that it not appear that Ms. Lovern intended to kick her. RP 204. Ms. Ulloa, as well as the second nurse in the room, Jacqueline Haynes, testified Ms. Lovern immediately apologized and said she had not meant to kick Ms. Ulloa. RP 194, 210.

The term “assault” does not include an “accidental act.” State v. Hopper, 118 Wn.2d 151, 158, 822 P.2d 775 (1992) (quoting State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683 (1984)). In its response the State does not identify a single fact to

support the conclusion that Ms. Lovern acted with the intent to assault Ms. Ulloa.

2. The State did not prove Ms. Lovern assaulted Debbie Crager. Absent very narrow circumstances, none of which are present here, Article I, section 7 of the Washington Constitution guarantees a competent adult the right to refuse medical aid. In re the Welfare of Colyer, 99 Wn.2d 114, 120-22, 660 P.2d 738 (1983), see also, McNabb v. Dep't of Corrections, 163 Wn.2d 393, 400-01, 180 P.3d 1257 (2008). Unwanted medical treatment has long been deemed an assault in Washington. Colyer. 99 Wn.2d at 121 (citing Physician's & Dentists' Business Bur. v. Dray, 8 Wash.2d 38, 111 P.2d 568 (1941)).

Ms. Lovern told Ms. Crager she did not want an IV. RP 135, 168. Ms. Crager inserted an IV nonetheless. RP 136. Ms. Lovern subsequently removed the IV. RP 141. Ms. Crager then attempted to staunch the blood flow and reestablish the IV. RP 142. Trying to loosen Ms. Crager's grip on her arm, Ms. Lovern grabbed and pulled on Ms. Crager hand and wrist. Id. In doing so, Ms. Lovern caused what Ms Crager described as a "little tiny scratch" on her wrist. RP 143.

Despite the evidence, the State now argues Ms. Lovern never objected to medical care. Brief of Respondent at 9. That argument is flatly contradicted by the State's own evidence at trial. The State further asserts that because "protocol is to insert an intravenous line" Ms. Lovern did not have the right to refuse. Brief of Respondent at 11. Indeed, the State goes so far as to assert that medical personnel would be required to ignore an unequivocal statement by a competent patient that they do not wish to have an intravenous line inserted in their body. Id. The State fantastic assertions are simply contrary to established constitutional precedent.

The State has only a limited interest in forcing unwanted care on a competent adult, most notably to preserve the person's life and to protect a third person. With respect to the later, there is no evidence that an intravenous line was necessary to protect the safety of a third person. With respect to the former, the preservation of life, is narrowly limited to "*lifesaving* treatment." Colyer, 99 Wn.2d at 123. Here, there is no evidence that Ms. Lovern was in danger of dying and the State defends the act as simply "protocol."

The State further claims that forcing unwanted care upon a competent adult is necessary to preserve the ethical standards of the medical profession. Brief of Respondent at 11. That claim is contrary to the standard of practice in the medical profession requiring informed consent for even the most basic medical procedures.

Unwanted medical treatment constitutes an assault. Colyer, 99 Wn.2d at 121. Ms. Lovern was entitled to use force to resist such assaultive conduct. RCW 9.A.16.020 provides

The use [of] force upon or toward the person of another is not unlawful . . . Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary . . . .”

Ms. Lovern was entitled to refuse medical care and was not obligated to allow Ms. Crager to ignore her wishes. Ms. Lovern’s acts were not “an unlawful touching with criminal intent” and thus were not an assault.<sup>1</sup>

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<sup>1</sup> The State contends Ms. Lovern may not raise this argument on appeal. However, because Ms. Lovern’s argument concerns the sufficiency of the State’s evidence, specifically whether the State’s evidence establishes that Ms. Lovern “unlawfully” touched Ms. Crager.

“[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal. State v.

B CONCLUSION

Because the State did not prove Ms. Lovern assaulted either Ms. Crager or Ms. Ulloa, this Court must reverse and dismiss Ms. Lovern's convictions.

Respectfully submitted this 29<sup>th</sup> day of June, 2011.



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Hickman, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998) (noting that “[a]ppel is the first time sufficiency of evidence may realistically be raised”). RAP 2.5(a) includes “failure to establish facts upon which relief can be granted” as an express exception from its general prohibition against raising new issues on appeal . . . . “  
State v. Seaway, \_\_ Wn.App. \_\_, 2011 WL 2315170, 2.

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GREGORY BANKS, DPA ERIC OHME, DPA ISLAND COUNTY PROSECUTING ATTORNEY P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] SHIRLEY LOVERN 2134 NAUTILUS RD FREELAND, WA 98249	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JUNE, 2011.

X \_\_\_\_\_ 

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