

Original

No. 34958-2-II

IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ROBERT RICHARD RUDNER, JR.,
Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 JUN -9 AM 9:43
REPLY

APPELLANT'S REPLY BRIEF

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ARGUMENT

Point I: When the State Argued Before the Jury that the Assaults in this Case Constituted Separate Conduct, Capable of Satisfying Distinct Prongs of the Second Degree Assault Statute, Mr. Rudner was Prejudiced by the Trial Court's Failure to Provide a Unanimity Instruction

On appeal, the State argues that the assaults in this case were part of a continuous course of conduct and, accordingly, did not trigger the need for a unanimity instruction. Thus, it argues that the entire episode in the Faranda/Riley apartment was a single, continuous, first degree assault on Mr. Faranda and Ms. Riley. Irrespective of the plausibility of this theory, it is not the theory the State argued at trial. At trial, the State presented the assaults as distinct and separate from each other. The State's characterization of the evidence at trial forecloses it from arguing continuous course of conduct on appeal.

The State began the assault portion of its closing argument by discussing the assaults on Faranda and the alternate ways of committing second degree assault set forth in the jury instructions. See CP 70 (the three alternate prongs were assault with a deadly weapon, the

reckless infliction of substantial bodily harm, and assault with the intent of committing a felony). In this regard, the State argued that one assault on Faranda satisfied one prong of the jury instruction, another assault satisfied another prong, and both satisfied the third prong:

In this case the Defendant intentionally assaulted Mr. Faranda. He comes in there and puts the gun to him, tells him to get on his knees, or Ms. Arnestad tells him to get on his knees and put his hands behind his head, he puts the gun to his head, he has committed an assault, period, right there, because he has placed him in fear. . . . **That is a second degree assault just by having him do that, holding him at gunpoint.**

In this case, because Mr. Faranda decides to fight back . . . but if the Defendant strikes Mr. Faranda first with the firearm once they engage and start their physical confrontation, he is assaulting him with a weapon, and he has committed, or he has inflicted, recklessly inflicted the substantial harm, temporary but substantial injury. . . .

Mr. Faranda has every legal right to defend himself, self defense, that's when he gets hurt in that struggle in the manner that he did. The stitches, the broken nose, the lacerations that he received. The Defendant's responsible for that. **He has committed an assault in the second degree under that prong as well.**

The G [sic, likely B] part of this was assault with a deadly weapon. The C is he has assaulted with intent of committing a

felony. Now, when he came in to commit either a robbery or a burglary with this firearm, he has committed a felony. So the assault occurs in the process of committing a felony crime. That also is defined as assault in the second degree. So under all three of these prongs, the Defendant is guilty at least of assault in the second degree.

RP at 1021-1022 (emphases added).

Notably, after explaining how the two different assaults satisfied the three separate prongs, the State offered its own caution on jury unanimity:

So that needs to be clear. 12 people will decide this case, 12 people have to agree on A, B, or C. You can agree on all three, but before you can convict you have to agree on at least one of those prongs if you are going to find guilty of assault in the second degree.

RP at 1023. Thus, at trial, the State was clear that it was offering different assaults to prove the different prongs of the second degree assault statute.¹

¹ However, because Mr. Rudner was ultimately convicted of first degree assault, a crime which does not provide for alternate means of commission, this is also not an "alternative means" case. See *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991).

However, the State did not stop at second degree assault. The State primarily sought convictions for assaults in the first degree. In that regard, prior to its argument on the second degree assault instruction, the State had told the jury that the difference between the two degrees of crimes was Mr. Rudner's state of mind: "[A]bove all else, the main difference between assault in the first degree and second degree is what is going on inside Mr. Rudner's head. . . . Keep that in mind, because when you look at the elements, you will discover that everything else is very close to the same. That will be what the difference really is." RP at 1018-19. Then, following its argument as to second degree assault, the State contended that the assaults were actually in the first degree because of Mr. Rudner's state of mind: "he went in there with the intent of using the weapon, inflicting great bodily harm." RP at 1023. The State continued in this vein, arguing that the evidence established the requisite intent for the crime of assault in the first degree. RP at 1023-1028.

In its argument on intent, the State no longer discussed the assaults separately, arguing instead about Mr. Rudner's intent throughout the incident. In addition, in this argument as to first degree assault, the State focused primarily on the assault in which Mr. Rudner pointed the gun at Faranda and allegedly pulled the trigger. RP at 1023-1028. However, it never negated the two points previously made to the jury: 1) two separate assaults on Faranda satisfied separate prongs of the second degree assault statute and 2) the only difference between first and second degree assault is in the state of mind of the perpetrator. Thus, the State's unequivocal message to the jury was that either of the assaults available for the second degree charge was also available for the first degree charge, provided that Mr. Rudner had the requisite intent. Accordingly, the State's presentation of the case ensured that this was a multiple incidents case, not a continuous course of conduct case.

A similar conclusion is compelled with regard to the assault on Ms. Riley. As it did with regard to the

assaults on Faranda, the State argued in its closing that different assaults satisfied different prongs of the second degree assault statute and that the only difference between first and second degree assaults was in Mr. Rudner's state of mind:

Now, certainly him holding the gun to her as I have stated is the second degree assault right there. The substantial bodily harm that Ms. Arnestad inflicted on her is also attributed to him, so he is guilty of committing that prong as well. He [sic] was assaulted while they in unison were committing a felony, so they are both guilty of assault in the second degree on Ms. Riley as well. But how is this Defendant to be held accountable for Ms. Riley's assault at a first degree level? And the answer is that they are both - his intent on one is the same as on the other. He is not just holding Mr. Faranda at gunpoint when he is on his knees. The proximity of Ms. Riley and her inability to do anything, she is also in the same situation. She just doesn't have a gun pointed at her at that time. He is not going to shoot Mr. Faranda and let Ms. Riley walk away. He intends on shooting both of them and doesn't. That's the difficult task that you have is to determine the Defendant's state of mind.

RP at 1028-29. Thus, as with its analysis of the assaults on Faranda, and contrary to its argument on appeal, the State plainly presented the assaults on Riley as multiple, distinct acts.

Whether criminal conduct is one continuing course of conduct must be evaluated by using common sense. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citation omitted). Common sense dictates that, because the right at stake here is Mr. Rudner's right to a unanimous jury, it is the jury's understanding of the matter that controls the analysis. When the State enumerated for the jury the separate assaults and explained that any of them could be viewed as assaults in the second or first degree, depending on Mr. Rudner's intent, the jury reasonably understood this to be a case in which it should determine whether any of multiple incidents satisfied the elements of the charged crimes.

Further, regardless of whether the assaults in this case occurred over a relatively brief period of time and in the same location, a continuing offense must be distinguished from several distinct acts, each of which could be the basis for a criminal charge. *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984); see *State v. Gooden*, 51 Wn. App. 615, 754 P.2d

1000 (1988) (noting that promoting prostitution can be an ongoing crime, distinguishing it from crimes such as child molestation, which are distinct acts).

Here, each of the separate assaults enumerated by the State could have been charged as a separate crime because each was a distinct act. To determine whether more than one crime may be charged arising from a particular incident, courts look at the unit of prosecution. *State v. Tili*, 108 Wn. App. 289, 29 P.3d 1285 (2001). The unit of prosecution for assault in the first degree is, in relevant part, assault with a firearm or by force or means likely to produce great bodily harm, with the intent to inflict great bodily harm. See RCW 9A.36.011. Thus, each assault with a firearm or arguably sufficient force in this case -- pointing the gun at Faranda and Riley at the beginning of the incident, pointing the gun at Faranda while he knelt on the ground, striking Faranda in the face with the gun, striking Riley in the face with a be-ringed hand -- could have been charged as a separate first degree assault, even if the State could not have

prevailed on all such charges. See, e.g., *State v. Tvedt*, 153 Wn.2d 705, 107 P.2d 728 (2005) (given unit of prosecution for robbery, no violation of double jeopardy for defendant to be convicted of four counts of robbery arising from two incidents); *Tili*, 108 Wn. App. 289 (multiple acts of penetration of single victim during two-minute time frame could be charged as separate crimes).

Moreover, the unobjected-to definition of assault given in the jury instructions explained that assault is a distinct act, not an ongoing enterprise. The jury instructions define assault as "an intentional touching or striking" or "an act" done with a particular intention. CP 60. Assault is not "conduct" or "behavior" or even "actions;" assault is "an act." (Even in Amended Brief of Respondent, where the State argues a continuous course of conduct theory, the State must describe the assaults as a "series of assaults," not one assault. Amended Brief of Respondent at 18.) For these reasons, despite the relatively brief time

frame, the assaults in this case must be viewed as separate and distinct acts.

The cases the State cites in Amended Brief of Respondent do not alter this analysis as they are factually distinct. In none of those cases did the State argue that alternate incidents in evidence could have proven the charged crime. In *State v. Love*, 80 Wn. App. 357, 360-61, 908 P.2d 395 (1996), the State introduced evidence that the defendant, charged with possession with the intent to distribute, possessed two separate stashes of drugs. However, the court held that the State argued the defendant was a drug trafficker engaged in the continuous course of drug dealing. Thus, unlike the State's argument in the instant case, in *Love* it did not argue that either stash, separately, could prove the charged crime. 80 Wn. App. at 360.

Similarly, in *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991), the State introduced evidence of two separate assaults, in addition to evidence of an unspecified assault that caused a child's death. The

Court held that no unanimity instruction was required as to the murder charge because the State had neither introduced evidence of multiple assaults which could have caused the death nor had it argued that multiple assaults could have caused the death. *Crane*, 116 Wn.2d at 324, 328 & 329. Thus, *Crane* is different from the instant case both because of the State's arguments to the jury and the evidence presented.

State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989), is similarly distinct from the instant case because of the State's argument. There, the defendant raised a unanimity issue because the State did not elect which of two assaults committed within a building was relied upon for the first degree burglary charge. The Court held that both assaults were part of a continuing course of conduct. However, in *Handran*, unlike the instant case, the State apparently did not argue that either assault could independently provide the requisite foundation. Moreover, in *Handran*, the Court found that sufficient evidence as to both assaults existed, making any *Petrich* error harmless.

That conclusion is not possible here. See Appellant's Brief at 32-37.

Under these circumstances, and for the reasons set forth in Appellant's Brief, Mr. Rudner was prejudiced by the lack of a unanimity instruction in this case, and this Court should reverse his two first degree assault convictions.

Point II: When the State Failed to Prove that Mr. Rudner or his Accomplice Intended to Cause Great Bodily Injury in the Assaults Against Riley and Faranda, it Failed to Prove the Charged Crimes and This Court Should Reverse the Convictions

The State's main problem with proving first degree assault on Riley is that it cannot show that Mr. Rudner or his accomplice committed an act against Riley with both the intent to inflict great bodily harm and with the requisite force. As an initial matter, it should be noted that the State relies solely on Mr. Rudner's intent when he was pointing the gun at Faranda to derive the requisite intent toward Riley. It does not argue that Arnestad's altercation with Riley involved sufficient intent or that such intent was present when Mr. Rudner pointed the gun at the two victims at the

beginning of the incident. See Amended Brief of Respondent at 15-17. Thus, the State has elected to rely solely on a kind of transferred intent theory.

In that regard, the State first argues that the jury's verdict shows it believed Mr. Rudner tried to kill Faranda and Riley. Amended Brief of Respondent at 16. This argument is plainly without merit. Any time insufficiency is raised, a court necessarily lifts the jury's veil to determine if the evidence actually supports the verdict. Thus, to argue that intent must have been proven because the jury found it to be so is a circular argument. (The State makes a similarly circular argument with regard to the assault against Faranda. Amended Brief of Respondent at 14).

Next, the State argues for intent against Riley via intent against Faranda. It does not seem to contend that pointing the gun at Faranda and allegedly pulling the trigger was actually an assault on Riley, as the law, facts and jury instructions do not allow such an argument. CP 65; Appellant's Brief at 20-22. Instead, it argues something like an interrupted

assault on Riley. The argument goes that after assaulting Faranda, *the jury could have believed* that Mr. Rudner would have assaulted Riley, if Riley had not attacked first. Riley's belief that Mr. Rudner wanted to kill her and Faranda is used to support this argument. Amended Brief of Respondent at 16-17.

This argument is faulty on several grounds. First, the evidence simply does not support this supposition. There was absolutely no evidence introduced as to what Mr. Rudner intended to do next, if anything. Moreover, the argument requires an inference that whatever intent Mr. Rudner had against Faranda was actually against Riley as well. Most problematically, first degree assault requires, most basically, an assault. When Mr. Rudner did nothing toward Riley that could even remotely be considered first degree assault, all the State is doing is speculating on what intent he might have had had he actually assaulted her.

For all of these reasons, the State failed to prove first degree assault against Riley, and this

Court should reverse Mr. Rudner's conviction in that regard.

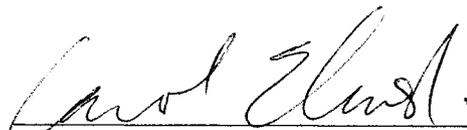
For the reasons set forth in Appellant's Brief, the State also failed to prove first degree assault against Faranda. In arguing the requisite intent in this regard, the State makes much of the fact that Mr. Rudner was swearing and aggressive during the incident. Amended Brief of Respondent at 13-14. But Mr. Rudner was admittedly in the apartment to commit a crime, not on a social visit. His rudeness and aggression cannot prove intent to inflict great bodily harm.

CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Robert Richard Rudner, Jr., respectfully requests this Court to reverse his two convictions for assault in the first degree.

Dated this 6th day of July, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 6th day of July, 2007, I served the original and one copy of the attached brief by U.S. mail, postage prepaid, to:

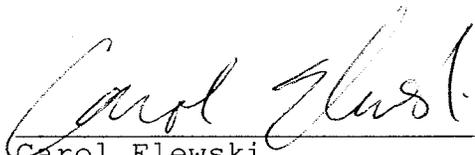
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