

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

STATE OF WASHINGTON,

Respondent,

v.

QUDAFFI A. HOWELL,

Appellant.

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DIVISION TWO
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas P. Larkin

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HOWELL ASSAULTED CHARLES FANIEL.

The state argues that “a sufficiency of the evidence claim pertains to *elements* of a crime, and not to *definitions* of elements,” mistakenly relying on State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2005). Brief of Respondent (BOR) at 5. In Smith, a jury convicted Smith of three counts of second degree assault with a deadly weapon for firing a shot from a handgun that shattered the window of a car. Three people were in the car but no one was seriously injured. Id. at 780-81. Smith appealed, arguing that the jury was given a separate instruction setting forth the common law definitions of assault but the state failed to present substantial evidence as to each definition of assault for each of the three victims. Smith argued that her constitutional right to jury unanimity was therefore compromised. Id. at 781-83. Our Supreme Court held that the common law definitions of assault, when submitted as a separate jury instruction, do not constitute alternative means of committing the crime; Smith’s case was not an alternative means case; and Smith’s right to a unanimous jury verdict was neither implicated nor compromised. Id. at 790-93. Smith did not address

the issue of insufficient evidence and clearly has no application to this case.

The state argues further that overwhelming evidence supports the element that it is required to prove, that Howell assaulted Faniel with a deadly weapon. BOR at 5-6. To the contrary, the state's citations of the record fail to show that Howell intended to inflict bodily injury or intended to create apprehension and fear of bodily injury and in fact created a reasonable apprehension and imminent fear of bodily injury. Notably, the state argues that "Faniel was in the doorway of the residence when defendant fired at Pelt, missing them, but hitting the house." BOR at 6. If Howell fired at Christopher Pelt, as the state asserts, Howell did not intend to injure Faniel.

Reversal and dismissal is required because there was insufficient evidence that Howell assaulted Faniel. See Brief of Appellant (BOA) at 13-17.

2. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT HOWELL INTIMIDATED CHRISTOPHER PELT, A PROSPECTIVE WITNESS.

The state argues that "there was ample evidence of intimidation of a witness," mistakenly relying on an incident alleged by Pelt at trial. BOR at 7-8. Pelt claimed that he saw Howell before the day of the shooting,

and Howell called him a “snitch” and threatened to kill him. 17RP 215. The state charged Howell with intimidation of a witness and felony harassment for the alleged incident but the court acquitted Howell of the charges. CP 58. The state does not dispute that Howell made no threat on the day of the shooting but argues that reasonable inferences drawn from Pelt’s allegations sufficiently prove that Howell intimidated a witness. BOR at 7-8.

To prove that Howell intimidated Pelt, as alleged in Count VI, the state must prove beyond a reasonable doubt that Howell, “on or about the 4th day of June, 2005, did unlawfully and feloniously by use of a threat directed to Christopher Pelt, a current or prospective witness, the defendant attempted to induce Christopher Pelt to absent himself from such proceeding, contrary to RCW 9A.72.110(1)(c).” CP 108. The record substantiates that Howell made no threat directed at Pelt to prevent him from testifying and consequently the state’s argument fails. See BOA at 17-19.

Reversal and dismissal is required because even when all reasonable inferences are drawn in favor of the state, there was insufficient evidence to prove beyond a reasonable doubt that Howell used a threat to induce Pelt to absent himself from the proceedings.

3. IF THIS COURT CONCLUDES THAT THERE WAS SUFFICIENT EVIDENCE TO FIND HOWELL GUILTY OF INTIMIDATING A WITNESS, REMAND FOR RESENTENCING IS REQUIRED BECAUSE INTIMIDATING A WITNESS AND SECOND DEGREE ASSAULT OF PELT CONSTITUTE SAME CRIMINAL CONDUCT.

The state argues that the offenses are not the same criminal conduct because “intimidating a witness requires the intent to induce the witness to absent himself or herself from the proceedings” and “second degree assault as charged herein requires the intent to harm or scare another.” BOR at 9-10. Citing State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000), the state argues that the “furtherance test” is limited in cases such as the present case. BOR at 9.

The state misapprehends the holding in Haddock, where the State Supreme Court concluded that there is no requirement that offenses must further each other to constitute same criminal conduct. Id. at 113-14. On appeal, Haddock argued that the trial court erroneously ruled that his conviction for possession of stolen property and possession of stolen firearms did not encompass the same criminal conduct. The Court of Appeals affirmed the trial court, reasoning that neither crime furthered the other. Id. at 113. The Supreme Court reversed, concluding that the “furtherance test” is only part of the analysis of same criminal conduct. Id. at 113-14.

The Supreme Court held that Haddock's convictions for possession of stolen property and possession of stolen firearms constitute same criminal conduct because they involved the same victim, were possessed at the same time and place, and Haddock's criminal intent did not change from one crime to the next, citing State v. Porter, 133 Wn.2d 177, 942 P. 2d 974 (1997). Haddock, at 113. Porter pled guilty to three counts of delivery of controlled substances and two of the counts arose from a single incident in which Porter sold two different controlled substances, almost simultaneously, to an undercover officer. Id. The Supreme Court held that those two counts encompassed the same criminal conduct because Porter's criminal intent could not be segregated into distinct present and future intents to commit criminal activity. Id.

As in Haddock and Porter, here, the intimidating a witness and second degree assault offenses involved the same victim, occurred at the same time and place, and involved the same criminal intent of scaring Pelt out of testifying. Howell's criminal intent did not change and cannot be segregated into distinct present and future intents to commit criminal activity.

Accordingly, a remand for resentencing is required because the convictions constitute same criminal conduct and count as one point toward Howell's offender score.

4. REVERSAL IS REQUIRED BECAUSE HOWELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The state does not dispute that defense counsel failed to conduct a reasonable investigation to determine whether Howell was properly advised of his Miranda rights, but argues instead that counsel's performance was not deficient because Howell's statements were admissible based on McColeman's testimony. BOR at 14. The state's conclusory argument is wholly without merit. The mere fact that McColeman claimed at trial that he advised Howell of his Miranda rights does not validate counsel's decision not to conduct a reasonable investigation and simply stipulate to the admissibility of Howell's statements in lieu of a CrR 3.5 hearing. Furthermore, the state misstates the record, asserting that Martin "testified that he did not advise defendant of his *Miranda* rights, but that Detective McColeman did." BOR at 12. The record reflects that Martin stated, "I did not advise him. I believe Detective McColeman advised him." 16RP 130. When asked if he was present, Martin replied, "No, I was not." 16RP 130.

The state argues that Howell was not prejudiced because "[b]ased on the record made in this case during Detective McColeman's testimony, the trial court would not have suppressed defendant's statements." BOR at 15. The record in its entirety, however, proves otherwise. Martin, the

arresting officer, testified that he did not advise Howell of his Miranda rights and could not explain why his name was on the advisement of rights form. 16RP 130-31. Officer Travis testified that Martin said Howell was advised of his Miranda rights but Travis did not know who advised him. 16RP 156. Despite the numerous officers who were at the scene of the arrest, no one was present when McColeman purportedly advised Howell of his rights. Defense counsel informed the court that the police reports indicated that Martin advised Howell of his rights. 16RP 153. In light of the contradictory evidence, there is a reasonable probability that if counsel had properly moved for a CrR 3.5 hearing, the court would have suppressed Howell's statements.

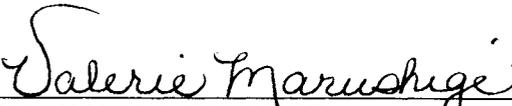
Under Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), reversal is required because defense counsel's performance was deficient, and but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. See BOA at 21-28.

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Mr. Howell's convictions.

DATED this 3rd day of October, 2007.

Respectfully submitted,



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Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to P. Grace Kingman, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of October, 2007 in Des Moines, Washington.



Valerie Marushige
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