

original

NO. 36675-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

KURTIS R. J. MATHIS,

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____
DEPUTY

BRIEF OF RESPONDENT

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A. ISSUES ON APPEAL

1. **RAP 2.2(B) PROVIDES A SPECIFIC, LIMITED LIST OF INSTANCES WHERE THE STATE CAN APPEAL A DECISION OF A SUPERIOR COURT JUDGE IN A CRIMINAL CASE. A DIRECTED VERDICT IS NOT ON THE LIST. HERE THE STATE IS APPEALING COWLITZ COUNTY SUPERIOR COURT JUDGE WARME'S DIRECTED VERDICT DISMISSING AN ASSAULT IN THE THIRD DEGREE AT THE END OF THE STATE'S CASE IN CHIEF. UNDER RAP 2.2(B), DOES THE STATE HAVE A RIGHT TO APPEAL THE COURT'S DIRECTED VERDICT?**

2. **RAP 2.2(B) LIMITS THE STATE'S RIGHT TO APPEAL IN CRIMINAL CASES TO SUPERIOR COURT DECISIONS ONLY IF THE APPEAL WILL NOT PLACE THE DEFENDANT IN DOUBLE JEOPARDY. JUDGE WARME'S DISMISSAL OF THE THIRD DEGREE ASSAULT AT THE CLOSE OF THE STATE'S CASE IN CHIEF WAS LEGALLY EQUIVALENT TO AN ACQUITTAL - EVEN IF THE DISMISSAL WAS ERRONEOUS. DOUBLE JEOPARDY PRECLUDES RETRIAL AFTER AN ACQUITTAL. AS JEOPARDY HAS ATTACHED AFTER MATHIS' ACQUITTAL, DOES THE STATE HAVE ANY RIGHT TO APPEAL MATHIS' ACQUITTAL?**

B. STATEMENT OF THE CASE

1. Procedural Facts.

On August 15-17, 2007¹, Kurtis Mathis was tried to a jury on an amended information charging him with assault in the second degree (dv)² or, in the alternative, assault in the third degree (dv). 1RP, 2RP, 3RP; CP 3-4. The amended information charged Mathis as follows:

¹ There are three volumes of verbatim, one for each day of trial. Hereafter, the verbatim shall be designated:
August 15, 2007 - 1RP;
August 16, 2007 - 2RP; and
August 17, 2007 - 3RP.

² domestic violence

ASSAULT IN THE SECOND DEGREE – DV

The defendant, in the County of Cowlitz, State of Washington, on or about May 11, 2007, did intentionally assault Shelly Davon, a family or household member, another person, and thereby recklessly inflicted substantial bodily harm, to wit: interfered with her ability to breath, upon such person; contrary to RCW 9A.36.021(1)(a) and RCW 10.99.020(3) and against the peace and dignity of the State of Washington.

OR IN THE ALTERNATIVE

ASSAULT IN THE THIRDS DEGREE – DV

The defendant, in the County of Cowlitz, State of Washington, on or about May 11, 2007, with criminal negligence, did cause bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering, to wit: interfered with the ability to breath upon Shelly Davon, a family or household member, contrary to RCW 9A.36.031(1)(f) and RCW 10.99.020(3) and against the peace and dignity of the State of Washington.

CP 3. Judge James Warne presided over the trial. 1RP, 2RP. 3RP. After the State rested its case in chief, Mathis moved for a dismissal of both the second degree assault and the third degree assault arguing insufficient evidence of either crime. 2RP 131-34. Independently, the court questioned the constitutional sufficiency of RCW 9A.36.030(1)(f), the third degree assault. 2RP 141. He felt that the terms "substantial " and "considerable suffering" were constitutionally vague as applied to Mathis' case. 2RP 136-41.

I think it can be argued that the loss of the ability to breathe is a substantial loss, even if it's temporary. On the other hand, the assault third requires, in addition to substantial pain, that it extend - extend for a period sufficient to cause considerable suffering.

I'm really struggling with the sufficiency of the statutes itself. Considerable suffering of some sort as a test.

I don't think that I can say - - this is my problem: I don't think I can say, as a matter of law, that the Legislature intended - assuming that this information, this fact, to be the case. That her throat hurt her for forty-five minutes, that she endured forty-five minutes of residual pain, that the Legislature meant if you assault someone and it hurts for forty-five minutes, that's a felony.

2RP 141. Both the State and Mathis acknowledged the above-statement as a dismissal of the third degree assault charge. 2RP 141-46. The defense rested without presenting any testimony. 2RP 144.

The next day, as it was finalizing jury instructions, the court mentioned an unrecorded discussion that had occurred in his chambers. 3RP 3. The court reiterated that it found the third degree assault charge unconstitutionally vague as applied to the facts in Mathis' case. 3RP 4-5.

The court instructed the jury on second degree assault and on the State's proposed lesser included offense of assault in the fourth degree. CP 27, 28, 50, 53. The jury found Mathis guilty only of fourth degree assault and, by special verdict, that it was a domestic violence offense. CP 57.

The State filed a notice of appeal thereafter challenging the trial court's dismissal of the assault in the third degree charge.³

2. Trial testimony.

On May 10, 2007, Mathis spent the night with his mother Shelly Davon in her duplex. 2RP 12-13. The next morning, they argued. Brian Jones, Davon's boyfriend, lives in the adjoining duplex. 2RP 6. After the argument, Davon hurriedly entered Jones' duplex without knocking, picked

³ The State has not designated its notice of appeal as a clerk's paper.

up the phone, dialed 911, put the phone down, and left. 2RP 6-7. While in the duplex, Davon told Jones that Mathis had choked her. 2RP 7. Jones observed that Davon seemed excited and had some red marks on her neck. 2RP 7.

Cowlitz County Sheriff's Deputy James Hanberry responded to the 911 call and arrived at the duplex within 14 minutes of Davon's call. 2RP 108. He met Davon in the duplex driveway and spoke with her. 2RP 109. Hanberry observed that Davon seemed to have been crying and also appeared fearful and nervous. 2RP 110. Davon told Hanberry that she had argued with her son, he had grabbed her throat with both hands and pinned her up against the wall. 2RP 113. During this scuffle, she had problems breathing and felt dizzy. 2RP 113. Afterwards, she had trouble swallowing, had some pain in her throat, and had a raspy voice. 2RP 113. Hanberry also observed some red marks on Davon's neck and a small mark on her back. 2RP 111, 114. Davon expressed fear that during the scuffle Mathis was going to kill her. 2RP 114. Davon declined medical assistance and Hanberry felt no need to call for medical assistance. 2RP 121-22. Hanberry concluded his investigation and left about 20 minutes later. 2RP 109. Davon was calm when he left. 2RP 115. There was no evidence that Hanberry or a victim's advocate visited with Davon over the next few days to see if Davon had any lasting discomfort or injuries.

Davon testified that she had been arguing with Mathis while packing up the contents of the duplex. 2RP 14, 31, 34-38. At some point,

she tripped on an item on the floor and fell backwards catching her fall on a doorknob. 2RP 34-38, 60. Mathis fell onto her with his hand around her throat which limited her ability to breathe and to swallow for a couple of seconds. 2RP 60, 88. She also experienced a little hoarseness. 2RP 88. While she had marks on her neck, they only lasted about two hours. 2RP 96. Davon did not feel that she had suffered substantial bodily harm. 2RP 96-98. And neither did she feel that she had suffered pain that extended for a period of time sufficient to cause considerable suffering. 2RP 96-98.

C. ARGUMENT

1. THE STATE HAS NO RIGHT TO APPEAL.

(a) RAP 2.2(b) dictates when the state can appeal a superior court decision in a criminal case.

The State's appellate remedies are very limited in criminal cases. Pursuant to RAP 2.2(b), "Except as provided in section (c)⁴, the State . . . may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information.

⁴(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that is below the standard range of disposition for the offense or that the state or local government believes involves a miscalculation of the standard range.

(6) Sentence in Criminal Case. A sentence in a criminal case that is outside the standard range for the offense or that the state or local government believes involves a miscalculation of the standard range.

(b) The state claims no right of appeal under RAP 2.2(b).

The State, in its Brief of Appellant, fails to argue a legal basis under RAP 2.2(b) for its right to appeal the trial court's directed verdict on the third degree assault charge. In fact, because of the State's limited appeal rights in criminal cases, the State has no actual right of appeal in Mathis' case.

(c) Even if this Court chose to reach the merits of the State's claim, the dismissal of criminal charges for insufficient evidence after the State has rested is tantamount to a judgment of acquittal and resurrection of the charge violates double jeopardy.

The constitutional prohibitions against double jeopardy protect against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3)

multiple punishments for the same offense. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007); U.S. Const. amend. 5; Const. Art I, § 9. In a jury trial, jeopardy attaches when a jury is empaneled and sworn. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Where a defendant successfully obtains dismissal of his initial prosecution for insufficient evidence at the close of the State's case, his retrial will violate the constitutional double jeopardy prohibition. *Martin Linen Supply Co.*, 430 U.S. at 571, 575; *State v. McReynolds*, 142 Wn. App. 941, 949, 176 P.3d 616 (2008) (citing *State v. Matuszewski*, 30 Wn. App. 714, 717-18, 637 P.2d 994 (1981)). This is so even if the trial court's ruling was clearly wrong.

When a trial court dismisses a criminal case for insufficient evidence at the close of the State's case, no matter how erroneous that ruling may be, retrial of the defendant is precluded by the rule that one may not be twice placed in jeopardy for the same offense.

Matuszewski, 30 Wn. App. at 717-18 (emphasis added). *Accord*, *Sanbria v. United States*, 437 U.S. 54, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978)

Here, Mathis moved to dismiss at the close of the State's case-in-chief on the basis that the State did not present sufficient evidence to establish the essential elements of assault in the second degree or third degree beyond a reasonable doubt. 3RP 131. After careful consideration of the motion, the court granted it with respect to the third degree assault only. The court also dismissed the third degree assault concluding that

the statute it was charged under, RCW 9A.36.030(1)(f),⁵ was void for vagueness as applied. The State is barred from resurrecting the dismissed charges because the court's ruling was equivalent to a judgment of acquittal. *Martin Linen Supply Co.*, 430 U.S. at 573-74; *McReynolds*, 142 Wn. App. at 949. Mathis cannot be twice prosecuted for the same offense after acquittal without violating double jeopardy.

Moreover, Mathis has already been convicted of this offense. The State did not charge the third degree assault as a separate offense, but rather as an alternative to the second degree assault. The State proposed, and asked that the jury be instructed, that Mathis could be convicted of the lesser crime of fourth degree assault.

When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

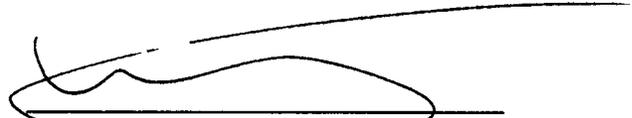
RCW 10.43.020. Mathis' fourth degree assault conviction bars retrial under both RCW 10.43.020 and under double jeopardy as he already been punished for the same offense albeit in a lesser degree.

⁵ (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering

D. CONCLUSION

The State's argument that this court can and should resurrect the third degree assault charge is completely without merit. This Court should dismiss the State's appeal.

Respectfully submitted this 14th day of April, 2008



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