

NO. 37566-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
JAMES M. MAROHL,
Appellant,

FILED
COURT OF APPEALS
DIVISION II
OCT 13 AM 8:39
STATE OF WASHINGTON
BY *DM*
DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 07-1-00315-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence.
02. The trial court erred in failing to instruct the jury that a bare hand or arm is not “a weapon or other instrument or thing” for purposes of RCW 9A.36.031(d).
03. The trial court erred in permitting Marohl to be represented by counsel who provided ineffective assistance by failing to object that the jury was improperly instructed for failure of the trial court to instruct that a bare hand or arm is not “a weapon or other instrument or thing” for purposes of third degree assault under RCW 9A.36.031(d).
04. The trial court erred in permitting Marohl to be represented by counsel who provided ineffective assistance by failing to propose an instruction that a bare hand or arm is not “a weapon or other instrument or thing” for purposes of third degree assault under RCW 9A.36.031(d).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Marohl caused bodily harm to Peterson by means of a weapon or other instrument or thing?
[Assignment of Error No. 1].

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02. Whether the trial court's failure to instruct the jury that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of RCW 9A.36.031(d) deprived Marohl of his right to due process requiring reversal under the facts of this case? [Assignment of Error No. 2].
03. Whether Marohl was prejudiced as a result of his counsel's failure to object that the jury was improperly instructed for failure of the trial court to instruct that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of third degree assault under RCW 9A.36.031(d) or by failing to propose such an instruction? [Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

James M. Marohl (Marohl) was charged by amended information filed in Mason County Superior Court on January 29, 2008, with assault in the second degree, count I, or, in the alternative, assault in the third degree, count II, contrary to RCWs 9A.36.021(1)(a) and 9A.36.031(1)(d). [CP 54-55].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial to a jury commenced on January 29, the Honorable James B. Sawyer II presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 426]. The jury returned verdicts of not guilty of count I but guilty of count II, assault in

the third degree. [CP [CP 27-28]. Marohl was sentenced within his standard range and timely notice of this appeal followed. [CP 3-21].

02. Substantive Facts

On June 27, 2007, at approximately 10:35 p.m., Mason County Deputy Sheriffs Heilman and Castillo were dispatched to a local casino because of a reported “disturbance in the bar(.)” [RP 13-15, 140]. They arrived within 10 to 15 minutes to find that Marohl, who was cooperative but slightly slurring his speech, had been detained. [RP 15, 140, 144, 147]. The alleged victim of the incident, Joseph Peterson, “exhibited signs of intoxication such as slurred speech, repetitive speech.” [RP 21]. “He was fumbling. He couldn’t grab his wallet, couldn’t find his ID.” [RP 142]. He did not require medical assistance. [RP 27].

Peterson was described as being drunk. [RP 50, 60-61]. The bartender at the casino had cut him off from having any additional alcohol about 20 minutes before the incident, partly because he was staggering. [RP 322-23, 342, 344]. He couldn’t remember what had happened. [RP 54].

Earlier that evening, Jesse Kollman had seen Marohl with his arm around Peterson’s neck before he drove him to the ground. [RP 77-78, 86,

91-92]. It all “happened in seconds(.)” [RP 78]. The side of Peterson’s face was skinned up and his prosthetic arm “was busted off at the elbow joint.” [RP 80].

Peterson remembered leaving his table and going to the bar to get a glass of water when he was interrupted by one of Marohl’s friends about knocking over a chair. [RP 99, 117, 121]. “I put my arm around him and apologized.” [RP 99]. “I don’t know what he said.” [RP 122]. Peterson remembered being choked and his arm being grabbed and twisted before he was pushed to the ground. [RP 111, 124]. “(F)rom that point on, I don’t really know exactly what happened for the next minute or two.” [RP 99]. The next thing he remembered was talking to the security guards. [RP 100]. He acknowledged that his condition was somewhere between not being able to drive and crawling. [RP 119].

Matthew Noblett saw Peterson sitting up and noticed Marohl standing about five feet away. [RP 164, 166]. “He (Marohl) looked like he was pretty calm and wasn’t irate or anything like that – aggressive or nothin.” [RP 164]. Kara Martin, a bartender at another establishment, also saw Peterson, whom she described as drunk, knock over a chair. [RP 170-72]. When he had come to her table about 10 minutes before the incident, he leaned against her. “He was aggressive. He was very – what’s the word – in your face. Very, you know, up front, in your face.”

[RP 173]. After Peterson knocked over the chair, Martin saw him talking to a person later identified as Sean McFadden. When McFadden removed Peterson's hand from his shoulder for the third time, "Mr. Marohl stood up to get in between them." [RP 175, 182]. Peterson waived him off. [RP 175]. "I believed that Mr. Peterson should not have been in the establishment in the condition he was in." [RP 176]. Martin saw Marohl step behind Peterson and put his arm around him and walk him toward the casino doors. [RP 176].

In the process of Mr. Marohl walking him out, it – there did not appear to be any distress from Mr. Peterson – I saw where Mr. Peterson went down. And I did not see that, honestly, until the video. He went down. He hit – he went face first into the floor. I saw him – I saw Mr. Marohl go down with him and let him go, and once Mr. Peterson landed in the floor, he took a step back.

[RP 177].

She then saw Marohl approach Peterson "(t)o help him up." [RP 177].

McFadden, Marohl's employer, described how Peterson knocked a stool over that almost hit McFadden's wife. [RP 280-82]. "I asked him to be more careful because he almost hit my wife with the chair." [RP 283]. The bartender at the casino said she heard McFadden say something to the effect that Peterson had tried to throw a chair at him. [RP 330]. After McFadden told Peterson to take his arm off of him a couple of time,

Marohl stepped between the two and said knock it off. [RP 286]. He then restrained Peterson before they both fell down. [RP 285, 288].

Jesse Fieldsend, a friend of Marohl's, saw McFadden push Peterson's hand from his shoulder several times before Marohl stepped between the two. [RP 200-01]. He saw Marohl "take Mr. Peterson's arm and try and push it back and get Mr. Peterson to back away from the situation." [RP 202]. When Peterson started to fall, Marohl tried to hold him up from hitting the floor. [RP 203].

Steve Flores testified that after Marohl stepped between McFadden and Peterson in an apparent attempt to diffuse the situation, Peterson continued to be aggressive. [RP 262-63]. Marohl then restrained him and started to walk him to the door when they both fell. [RP 265].

Dennis Hallman, Marohl's martial arts instructor, described the differences between a blood choke and an air choke, which is based on the length of one's arm over an opponent's neck, noting that the former results in an opponent passing out quickly while the latter involves a much longer period. [RP 251-52]. After viewing the video of the incident, he determined that the hold Marohl placed on Peterson "was a modified air choke, but he didn't – the technique wasn't properly applied." [RP 252].

Deputy Travis Adams, who holds a black belt in Tae Kwon karate and has received training in other martial arts, testified for the State in

rebuttal and acknowledged that after reviewing the case with Hallman, there was no significant disagreement between the two. [RP 419].

D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT MAROHL CAUSED BODILY HARM TO PETERSON BY MEANS OF A WEAPON OR OTHER INSTRUMENT OR THING.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

As charged and instructed in this case, a conviction for assault in the third degree requires proof that Marohl caused bodily harm to Peterson

by means of a weapon or other instrument or thing. RCW 9A.36.031(d). [CP 45, 48, 55]. During closing, the prosecutor argued that the “instrument or thing here, obviously, is a combination of the arm lock, the choke lock, and taking him into the ground and slamming him into the floor.” [RP 449]. That is a weak argument, even when taking the evidence in the light most favorable to the State. Bottom line: Marohl, at worst, only placed his arm around Peterson’s neck in some type of choke hold before the two went to the ground — and never employed any weapon or other instrument or thing.

In State v. Cohen, 143 Wash. 464, 255 P. 910 (1927), our Supreme Court expressed its understanding of the meaning of the language “weapon or instrument likely to produce bodily harm” as the language was used in the then-existing Washington criminal statutes (at that time the language described an element in the second degree assault statute):

In State v. Donofrio (Wash.) 250 P. 951, the defendant was charged with making an assault “with a weapon or instrument likely to produce bodily harm, the exact nature or character of said instrument being unknown to the prosecuting attorney other than an iron instrument.” This was a charge of the felony of assault in the second degree under section 2414, Rem. Comp. Stat., and included a charge of the gross misdemeanor of assault in the third degree under section 2415, Rem. Comp. Stat.; that is, assault not with a weapon or instrument likely to produce bodily harm. The testimony of the prosecuting witness was, in substance, that the assault was with some blunt instrument held in defendant’s right hand. Because of the

semidarkness upon the street where the incident occurred, the prosecuting witness did not clearly see the instrument, but was positive that it was an instrument capable of producing bodily harm. The assault caused bruises resulting in one eye being considerably blackened and the other slightly blackened. The defendant denied making any assault. We there held that the refusal of the court to submit to the jury the question of the defendant's guilt or innocence of assault in the third degree was erroneous, upon the theory that, while there was no affirmative evidence contradicting the testimony of the prosecuting witness as to the nature of the alleged instrument, the jury were not bound to believe that the assault was with any instrument, and might have found the prosecuting witness to have been assaulted by the defendant only with his bare hand or fist, and thus found him guilty of assault in the third degree only, had that question been submitted to their consideration. That was not a question of whether there was affirmative evidence reducing the assault to the lesser degree, but was simply a question of the jury having the right to find that the prosecution had failed to prove the greater degree beyond a reasonable doubt....

State v. Cohen, 143 Wash. at 474-75 (discussing State v. Donofrio, 141 Wash. 132, 250 P. 951 (1926)). Since Donofrio and Cohen, the Washington criminal assault statutes have been recodified and now comprise different definitions of the various degrees of assault. However, no case has explicitly held that the enacted statutory language "weapon or instrument likely to produce bodily harm" means anything beyond the apparent limitations of Donofrio and Cohen, namely that the phrase does not include the assailant's unarmed hands or fists or arms. Furthermore, the addition of the word "thing" to the current statute does not bring a bare

hand or arm within the definition of the crime under RCW 9A.36.031(d). The American Heritage Dictionary of the English Language (Houghton Mifflin, 3rd Ed. 1992), defines “thing” as an “entity” or “inanimate object.” And this meaning of the word “thing” may be used to determine the plain meaning of the word in RCW 9A.36.031(d), since a statutory term undefined by the statute, as here, is given its plain and ordinary meaning as may be ascertained from a standard dictionary. State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001).

To convict Marohl of assault in the third degree under RCW 9A.36.031(d), the State was required to prove that he assaulted Peterson with something other than his bare hand or arm.¹ The State did not carry this burden.

02. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT A BARE HAND OR ARM IS NOT “A WEAPON OR OTHER INSTRUMENT OR THING” FOR PURPOSES OF THIRD DEGREE ASSAULT UNDER RCW 9A.36.031(d).

Jury instructions must accurately inform the jury of the applicable law, Gammon v. Clark Equipment Co., 104 Wn.2d 613, 707 P.2d 685 (1985), and must be readily understood and not misleading to the ordinary mind. State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968).

A criminal defendant has the right to have the jury base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). The due process clause requires the State to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). This burden extends to every element included within the definition of the crime. Sullivan v. Louisiana, 508 U.S. 275, 277-78, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); Patterson v. New York, 432 U.S. 197, 210, 53 L. Ed. 2d 281, 97 S. Ct. 2339 (1977). In certain circumstances, it is the trial court's duty to act of its own accord to protect a criminal defendant's due process right to a fair trial by a jury that is properly informed of the governing law. See State v. Tyler, 47 Wn. App. 648, 653, 736 P.2d 1090 (1987). Plainly, imposing such a sua sponte duty on the court nurtures due process where jury miscomprehension is possible.

Marohl was convicted of assault in the third degree under RCW 9A.36.031(d), which, as previously indicated, provides that a person is guilty of third degree assault if he or she, with criminal negligence, causes

¹ Cf. RCW 9A.36.041 (A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another).

bodily harm to another person by means of “a weapon or other instrument or thing likely to produce bodily harm....”

Instruction 14 defined assault in the third degree as follows:

A person commits the crime of assault in the third degree when he or she, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

[CP 45; Court’s Instruction No. 6].

Instruction 17 stated in pertinent part:

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 27th day of June, 2007, the defendant caused bodily harm to Joseph Peterson;
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm....

[CP 48; Court’s Instruction No. 17].

Since, as set forth in the previous section, the evidence did not demonstrate that Marohl assaulted Peterson with any weapon or instrument in his hand, the court’s failure to instruct that Peterson’s bare hand or arm is not a weapon or other instrument or thing for purposes of third degree assault under RCW 9A.36.031(d) constitutes a manifest

violation of Marohl's due process right to a fair trial under the United States and Washington Constitutions. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 21, 22. This is an error of constitutional magnitude that may be raised for the first time on appeal. Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

The trial court should have instructed the jury that, as a matter of law, a bare hand or arm is not a "weapon or other instrument or thing" within the meaning of the charged offense, and its failure to do so violated the rule that jury instructions must accurately inform the jury of the applicable law, in addition to violating Marohl's due process right to a fair trial.

An instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Since the jury was not instructed that a bare hand or arm is not a "weapon or other instrument or thing" within the meaning of the charged offense, the court's failure to properly instruct in this regard had the effect of relieving the State of its burden to prove every element of the offense.

A constitutional error in a criminal trial is presumed to be prejudicial. It requires reversal unless the reviewing court is convinced

beyond a reasonable doubt that the trier of fact would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); cert. denied, 475 U.S. 1020 (1986). An instructional error is harmless only if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” (Italics omitted.) State v. Stewart, 35 Wn. App. 552, 555, 667 P.2d 1139 (1983) (quoting State v. Wanrow, 88 Wn.2d at 237).

The error alleged here is not harmless. The failure to properly instruct the jury as set forth above was not trivial nor merely an academic matter, and resulted in a finding of guilt where the evidence did not establish, by any standard, that Peterson was assaulted with a “weapon or other instrument or thing” within the meaning of the charged offense. Simply, Marohl would have been acquitted of assault in the third degree if the court had instructed as argued herein, and the court’s failure to do so “affected the right of (Marohl) to have the jury base its decision on an accurate statement of the law applied to the facts of the case.” State v. Miller, 131 Wn.2d at 90-91.

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03. MAROHL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO OBJECT THAT THE JURY WAS IMPROPERLY INSTRUCTED FOR FAILURE OF THE TRIAL COURT TO INSTRUCT THAT A BARE HAND OR ARM IS NOT "A WEAPON OR OTHER INSTRUMENT OR THING" FOR PURPOSES OF THIRD DEGREE ASSAULT UNDER RCW 9A.36.031(d) OR BY FAILING TO PROPOSE SUCH AN INSTRUCTION.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court find that trial counsel waived the issue relating to the court's failure to instruct the jury that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of third degree assault under RCW 9A.36.031(d) by either failing to object that the jury was improperly instructed in this regard or by affirmatively assenting to the instructions given by the court or by failing to propose such an instruction, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object that the jury was improperly instructed for failure of the trial court to instruct that a bare hand or arm is not "a weapon or other instrument or thing" for purposes of third degree assault under RCW 9A.36.031(d) or to propose such an instruction. For

the reasons and under the law set forth in the preceding sections of this brief, had counsel done so, the trial court would have so instructed.

The prejudice here is self-evident. Again, as set forth in the preceding sections of this brief, as the evidence at trial indicated that Marohl assaulted Peterson with any weapon or instrument or thing in his hand—the failure of the court to instruct as argued herein resulted in a finding of guilt where the evidence did not establish, by any standard, that Peterson was assaulted with a “weapon or other instrument or thing” within the meaning of the charged offense. Marohl would have been acquitted of assault in the third degree if the court had been instructed as argued herein.

Counsel’s performance was deficient for the reasons previously set forth, which was highly prejudicial to Marohl, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for assault in the third degree.

E. CONCLUSION

Based on the above, Marohl respectfully requests this court to reverse and dismiss his conviction for assault in the third degree.

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DATED this 10th day of October 2008.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 10th day of October 2008.

Thomas E. Doyle
THOMAS E. DOYLE
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