

FILED
COURT OF APPEALS
DIVISION II

08 DEC 29 AM 11:50

STATE OF WASHINGTON
BY JW
DEPUTY

NO. 37671-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
CLARK COUNTY CAUSE NO. 08-8-00141-1
DIVISION II, COURT OF APPEALS NO. 37671-7-II

STATE OF WASHINGTON,

RESPONDENT,

vs.

KETSON B. TOMMY

APPELLANT.

BRIEF OF RESPONDENT

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

JULIE C. CARMENA, WSBA 25796
Deputy Prosecuting Attorney
1013 Franklin Street
P.O. Box 5000
Vancouver WA 98668-5000
360-397-2261, ext. 4048

Lisa E. Tabbut
Attorney for Appellant
PO Box 1396
Longview WA 98632
360-425-8155

011 12-26-08

TABLE OF CONTENTS

I.	STATEMENT OF THE ISSUES.....	1
II.	RESPONSE TO ASSIGNMENT OF ERROR.....	1
III.	CONCLUSION.....	22

TABLE OF CASES:

<u>State v. Alvarez</u> , 128 Wn.2d 1, 16-17, 904 P.2d 754 (1995).....	12, 13
<u>State v. Alvarez</u> , 105 Wa. App. 215, 220, 19 P.3d 485 (2001)	7
<u>State v. Blair</u> , 117 Wn.2d 479, 487, 816 P.2d 718 (1991)	19
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	9
<u>State v. Carlson</u> , 65 Wn. App. 153, 160, 828 P.2d 30 (1992).....	8
<u>State v. Fowler</u> , 114 Wn. 2d 59, 67, 785 P.2d 808 (1990).....	19
<u>State v. Gamble</u> , 137 Wn. App. 892, 905, 155 P.3d 962(2007).....	19
(citing <u>State v. Workman</u> , 90 Wn. 2d 443, 447-48, 584 P.2d 382(1978)).....	19
<u>State v. Goldberg</u> , 123 Wn. App. 848, 852, 99 P.3d 924 (2004).....	16
(quoting <u>State v. McNeal</u> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)).....	16
<u>State v. Gotcher</u> , 52 Wn. App. 350, 354, 759 P.2d 1216 (1988).....	8
<u>State v. Green</u> , 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980).....	6
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).....	16
<u>State v. Jones</u> , 93 Wn. App. 166, 176, 968 P.2d 888 (1998).....	7
<u>State v. Levy</u> , 156 Wn. 2d 709, 733, 132 P.3d 1076 (2006).....	7
(quoting <u>State v. Mendez</u> , 137 Wn. 2d 208, 214, 970 P.2d 722 (1999), which was overruled on other grounds).....	7
<u>State v. Lord</u> , 117 Wn. 2d 829, 883, 822 P.2d 177 (1991).....	16
<u>State v. MacFarland</u> , 127 Wn.2d 322, 337 (1995).....	17
<u>State v. Mathews</u> , 60 Wn. App. 761, 766, 807 P.2d 890 (1991).....	8
<u>State v. Peters</u> , 47 Wn. App. 854, 860, 737 P.2d 693.....	19
<u>State v. Royal</u> , 122 Wn. 2d 413, 425-26 (1993).....	12
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	6
<u>State v. Stephens</u> , 158 Wn. 2d 304, 311, 143 P.3d 817 (2006).....	9
<u>State v. Studd</u> , 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).....	16
<u>Strickland v. Washington</u> , 466 U.S. 668, 691, 104 S. Ct. 2052 (1984).....	16
<u>State v. Talmalini</u> , 134 Wn.2d 725, 729, 953 P.2d 450 (1998).....	19
<u>State v. Thomas</u> , 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).....	7
<u>State v. Varga</u> , 151 Wn. 2d 179, 201, 86 P.3d 139 (2004).....	7
<u>State v. White</u> , 80 Wn. App. 406, 410, 907 P.2d 310 (1995).....	16

STATUTES:

RCW 9A.36.021(1)(c).....	7
RCW 9A.04.110(6).....	8
RCW 9A.04.110(4)(b).....	8
JuCR 7.11(d).....	12, 13
RCW 13.04.021.....	17
JuCR 1.4(b).....	17
RCW 9.41.270(1).....	18
RCW 9A.36.021(1)(c).....	18

A. RESPONSE TO ISSUES PRESENTED BY THE APPELLANT

- 1. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER ONE: Evidence presented at trial was sufficient for the trial court to find that the Respondent was guilty of the crime of Assault in the Second Degree.**
- 2. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER TWO AND THREE: The trial strategy of respondent's attorney, did not deprive the respondent of effective assistance of counsel.**

B. STATEMENT OF THE CASE

1. STATEMENT OF THE FACTS

On February 7, 2008, during weightlifting class at Evergreen High School, in Clark County, Washington, Brandyn Austin heard Ketson Tommy challenge one of Austin's friends to a fight.(RP 7, 8, 9, 10, 11, 32) Because Austin's friend had his arm in a sling, Mr. Austin moved between the two boys, and asked the respondent to step back. (RP 11, 12-13) With that, Mr. Tommy began to threaten Austin. (RP 13, 15) Words were exchanged between the two boys, and then Tommy challenged Austin to a fight. (RP 15) Austin agreed to the fight, and followed Tommy outside. (RP 15)

Once the boys were outside, although Tommy repeatedly threatened Austin, Austin remained silent. (RP 18-19) Tommy then began to pick up softball-sized pieces of rocks and concrete, and threw them toward Austin. (RP 16) While Tommy threw the rocks and concrete at

Austin, he continued to threaten Austin, asking Austin if he wanted to die, and told Austin he would kill him. (RP 18)

When Austin moved to get away from the rocks and concrete that were being thrown at him, Tommy picked up a large metal pipe, which was similar in size and shape to a metal baseball bat, and aggressively approached Austin. (RP 19) As Tommy aggressively approached Austin, he held the pipe like a baseball bat, and again threatened Austin, telling him he would kill him. (RP 19, 21) While Tommy continued making these threats to Austin, and while holding the metal pipe like a baseball bat, Tommy came within an arm's distance from Austin. (RP 21) Fearful, Austin begged Tommy to calm down. (RP 21-22) Unfortunately, Tommy continued to threaten Austin with the pipe, told Austin he would kill him, asked Austin "if he wanted to die right now?" (RP 22) Even after Austin pleaded with Tommy to calm down, Tommy continued to threaten harm, and even death, to Austin. (RP 23-24)

Austin then attempted to escape from Tommy. (RP 23) Unfortunately, Tommy followed after Austin, and continued to threaten Austin with the pipe he was holding, telling Austin to turn around or he would hit him with the pipe. (RP 23)

Carolyn Harton, an employee of Evergreen High School, saw a portion of the conflict between Tommy and Austin. When she observed them, she noticed that Tommy appeared to be very agitated, and was holding what appeared to her to be a baseball bat due to its look and size. (RP 38, 39, 40) Horton also observed Tommy tapping the pipe in his

hands as he chased after Austin. (RP 40-41) Although Horton could not hear what Tommy was stating, she noticed that Tommy appeared very mad and was yelling at Austin. (RP41) From what Horton watched, it appeared to her that Tommy was attempting to get Austin to turn around. (RP 41). Also, she noted, that it was only after Austin was able to get away, and enter the field house/student center of the school, that Tommy finally dropped the heavy metal pipe. (RP 41)

After the state presented its case in chief, Mr. Tommy opted not to put forward any evidence on his behalf, and rested without calling any witnesses. (RP 61)

The Court after hearing the uncontroverted evidence, found Ketson Tommy guilty of the crime of Assault in the Second Degree. (RP 69-70) The trial court in making this ruling, made clear that he found Tommy guilty because, even after Austin attempted to walk away from Tommy after he threatened him with the pipe, Tommy was relentless, and continued to chase after Austin with the pipe, and continued to threaten to harm Austin. (RP 69-70) Furthermore, when the court discussed whether or not the pipe was a deadly weapon, it stated, "I find that the pipe is, in fact, a deadly weapon in the manner in which it was used". (RP 73)

Further, when the findings of fact and conclusions of law were entered by the court within a timely manner, the findings of fact and conclusions of law included:

I. Findings of Fact:

....

3. Ketson Tommy then began to challenge Austin. Words were exchanged between the two boys, and the two agreed to go outside to fight.
4. Once outside, Tommy repeatedly threatened Austin, telling him that he was going to "kick his ass". Austin remained silent. Tommy then began to pick up softball-sized pieces of rock and concrete, and threw them toward Austin. While Mr. Tommy threw these items, Tommy continued to threaten Austin.
5. When Austin moved to get away from the rocks and concrete that were being thrown, Tommy picked up a metal pipe, approached Austin, and threatened him with it.
6. Austin, fearful, urged Tommy to calm down, but Tommy continued threatening Austin with the pipe, and continued to tell Austin that he was going to kill him.
7. Austin walked away from Tommy. Tommy followed after Austin continuing to threaten him with the pipe he was still holding.
8. Carolyn Harton, an employee of Evergreen High School, saw a portion of the conflict between Tommy and Austin, and saw Tommy, who appeared to her to be very agitated, holding the metal pipe in his hand. She also observed him tapping the pipe in his hands and following after Austin.
9. Mr. Austin was in fact afraid that he would be hit with the pipe Mr. Tommy held in his hand.

....

12. The threatened use of the metal pipe by Ketson Tommy was not a reasonable response of force, and Mr. Austin's fear was reasonable under the circumstances.

II. Conclusions of Law:

....

2. All of the above facts have been proven by the State beyond a reasonable doubt.
3. On February 7, 2008, in Clark County, Washington, Ketson Tommy, did intentionally assault Brandyn Micheal Austin with a deadly weapon, to-wit a metal pipe, and is guilty of the crime of Assault in the Second Degree, as charged in Count 1. When Austin retreated in fear, Ketson Tommy was the aggressor. When Mr. Austin retreated, Mr. Tommy continued to follow and threatened Mr. Austin with the metal pipe. The use of the metal pipe was excessive, and the respondent did not act in self-defense.

(CP 9-11)

At the time the findings were entered by the court, no mention or objections were made that the evidence at trial did not support the court findings or conclusions that Mr. Tommy did intentionally assault Brandyn Micheal Austin, or that there was any question as to Mr. Tommy's intent to create in his victim any reasonable apprehension of harm.

2. PROCEDURAL HISTORY

On February 2, 2008, the State filed an information charging Ketson Tommy with the crime of Assault in the Second Degree. (CP 1) On March 12, 2008, Mr. Tommy was tried to the bench before the Clark County Superior Court, and was convicted of the crime of Assault in the Second Degree. (RP 70) Based upon the conviction, the trial court ordered a predisposition report, and the matter was set over for

disposition. (RP 71-73) On March 26, 2008, the court sentenced the respondent to a standard range sentence of 15-36 weeks in JRA.(RP 87) This timely appeal followed. (CP 5-8)

C. ARGUMENT

1. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER ONE: THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS AND CONCLUSIONS OF LAW THAT KETSON TOMMY COMMITTED THE CRIME OF ASSAULT IN THE SECOND DEGREE.

At trial there was overwhelming evidence to support the trial court's finding that Ketson Tommy was guilty of the crime of Assault in the Second Degree. In reviewing a challenge to the sufficiency of the evidence, what is to be examined by the appellate court, is whether, in viewing the evidence most favorable to the prosecution, a rational Trier of fact could find the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn. 2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing a juvenile court adjudication, the appellate court must decide whether substantial evidence supports the trial

court's findings of fact and, in turn, whether the findings support the conclusions of law. State v. Alvarez, 105 Wa. App. 215, 220, 19 P.3d 485 (2001). Additionally, the appellate court defers to the Trier of fact on issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Circumstantial evidence is treated as reliable direct evidence. State v. Varga, 151 Wn. 2d 179, 201, 86 P.3d 139 (2004). "In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." State v. Levy, 156 Wn. 2d 709, 733, 132 P.3d 1076 (2006)(quoting State v. Mendez, 137 Wn. 2d 208, 214, 970 P.2d 722 (1999), which was overruled on other grounds)

Appellant was charged and convicted of the crime of Assault in the Second Degree. A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree, assaults another with a deadly weapon. RCW 9A.36.021(1)(c). A weapon can be deadly per se or deadly because it is readily capable of causing

death or substantial bodily harm under the circumstances in which it is used, attempted to be used, or threatened to be used. RCW 9A.04.110(6). “Substantial bodily harm” means bodily injury involving temporary but substantial disfigurement or causing a temporary but substantial loss or impairment of a bodily part or organ function or a fracture of any bodily part. RCW 9A.04.110(4)(b). Prior to a knife or other weapon, other than any per se deadly weapon, being found to be a deadly weapon under RCW 9A.04.110(6), there must be some manifestation or willingness to use such weapon. State v. Gotcher, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988). Whether a weapon is deadly under the circumstances in which it was used, i.e., whether it was readily capable of causing substantial bodily harm is a question of fact. State v. Carlson, 65 Wn. App. 153, 160, 828 P.2d 30 (1992).

Furthermore, Washington courts generally recognize three definitions of assault. An assault is 1)an act, with unlawful force, done with intent to inflict bodily injury upon another, 2)an intentional touching or striking of the person or body of another, or 3)an intention act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury. State v. Mathews, 60 Wn. App. 761, 766, 807 P.2d 890 (1991) The third definition of assault was further clarified in State v.

Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995). State v. Byrd indicated that the State must only prove the defendant “acted with an intent to create in his or her victim’s mind a reasonable apprehension of harm.” Id., at 712-713. Whether the accused actually intends to harm the victim, as opposed to making the victim fear such harm, is immaterial. State v. Stephens, 158 Wn. 2d 304, 311, 143 P.3d 817 (2006).

Appellant claims that the evidence established at trial did not support the Court’s finding that Mr. Tommy was guilty of the crime of Assault in the Second Degree, claiming there was inadequate evidence to support that appellant acted with any intent to create reasonable fear and apprehension in Mr. Austin. However, upon a full review of the evidence, there was substantial evidence presented at trial which clearly established that appellant, by his words and conduct, intended to create in the victim, fear and apprehension of bodily injury.

As established at trial, even before the victim arrived in the weightlifting room, Mr. Tommy had challenged one of the victim’s injured friends. After the victim attempted to intervene on his friend’s behalf, Mr. Tommy was relentless, and then began to threaten Mr. Austin. Words were exchanged between the two, and Mr. Tommy challenged Mr. Austin to a fight. Both boys then left the weight room, and went outside.

After the boys went outside, Tommy continued with his belligerent behavior and conduct towards Mr. Austin. Although Mr. Austin remained silent, Tommy repeatedly threatened Austin. Tommy then began to pick up and throw rocks and pieces of concrete at Austin, and continued to threaten Austin telling Austin that he was going to die, and that Tommy would kill him. Austin remained silent. Tommy then picked up a metal pipe and aggressively approached Austin, who had been approximately 20-30 feet away, and came within arm's reach of Austin. As Tommy approached Austin with the metal pipe, holding it like a baseball bat, Tommy again told the victim, that he would kill him, and asked him if he wanted to die right then. Because of the actions of Tommy and the threats he was making, plus, due to the fact that he was holding the metal pipe like he was about to strike Austin, Austin was reasonably fearful of what Tommy would do. Austin begged Tommy to calm down, but his request fell on deaf ears. Mr. Tommy continued to threaten Austin with the pipe, and continued to tell Austin that he would kill him. When Austin attempted to walk away, Tommy did not back down. Tommy followed after Austin, and continued to threaten him with the pipe he held; telling Austin to turn around or he would hit him.

Carolyn Harton observed part of this incident. What she viewed corroborated the events that were described by Mr. Austin. Harton noticed that Tommy was very agitated, and was following after Austin. While Tommy was chasing after Austin, Harton noticed that Tommy was very angry and was yelling at Austin, and it appeared to Horton that Tommy was attempting to get Austin to turn around while he was carrying the metal pipe, tapping it in his hands.

Based upon these facts that were presented at trial, and were not disputed, there was no mistaking Tommy's intent to create fear and apprehension of harm in the mind of the victim. When examining the entire event, with Tommy holding the pipe in hand, aggressively approaching the victim, and threatening to kill the victim, it is obvious that Tommy's purpose throughout the event, was to scare Austin. As a result, based upon the facts presented, and how the events occurred, that the court did believe, and did find rightfully so, that Tommy was guilty of the crime of assault in the Second Degree.

1. If the appellate court finds that the Court's findings of guilt were appropriate, but that the trial court's findings and conclusions were incomplete, then the proper remedy is simply to send the matter back to the trial court for an opportunity to correct the findings and conclusions of law.

If the court finds that the findings and conclusions of law entered in this case were incomplete to support the finding of guilt of Mr. Tommy, the proper remedy is for remand, not dismissal.

JuCR 7.11(d) provides:

Written Findings and Conclusions on Appeal. The Court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the noticed of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

The purpose of JuCR 7.11(d) is to facilitate meaningful review of juvenile court trials on appeal. When a trial court prepares findings and conclusions in compliance with this rule, the appellate court can precisely identify the factual basis on which the case was decided and can thoroughly review the appellate issues. State v. Alvarez, 128 Wn.2d 1, 16-17, 904 P.2d 754 (1995). In State v. Alvarez, the Supreme Court decided that a remand would be appropriate where the evidence supported the trial court's conclusion that the juvenile

respondent was guilty of the crime charged, but that the findings and conclusion did not cover every element of the offense. In Alvarez, the court noted that, “the findings themselves need not be extensive. Findings must include a statement of ultimate facts as to each element of the crime, and the elements can be taken from the information where they must be set out. Findings need not include all the evidence in the record, but “only those which establish the existence or nonexistence of determinative factual matters”. Id. at 18, quoting State v. Royal, 122 Wn. 2d 413, 425-26 (1993).

In this case, the trial court judge at the time of the finding of guilt, orally stated that he found Tommy guilty because, even after Austin attempted to flee from Tommy after he was threatened with the pipe, Tommy did not back down, and continued to chase after Austin with the pipe, and continued to threaten to harm him. Furthermore, in the findings of facts and conclusions of law that were entered timely, as required by JuCr 7.11(d), it was made clear that the actions of the appellant were intentional, and that the appellant was acting with an intent to frighten the victim. The findings

repeatedly addressed the continued specific threats to harm and kill made by Tommy to Mr. Austin. These threats to harm made by Tommy, which began in the weight room, continued when Tommy picked up the metal pipe and aggressively approached Tommy, and did not end until Mr. Austin was able to flee. In examining both the oral ruling of the court, and the findings of fact and conclusions of law, there was no question in the court's mind as to the intent of Mr. Tommy in attempting to create fear and apprehension in the mind of the victim.

Although, neither the oral ruling of the court nor the findings of fact and conclusions of law specifically stated the phraseology that Mr. Tommy "acted with an intent to create in his or her victim's mind a reasonable apprehension of harm", there was no mistaking the court's finding and concluding that Mr. Tommy's acted with the specific intent to create fear and apprehension in the mind of the Austin throughout the incident.

However, if the appellate court finds that the court must specifically state and include in its findings of fact and conclusions of law the language, that Tommy "intended to cause fear and apprehension in the mind of the victim", as

indicated above in State v. Alvarez, the proper remedy would be to remand the matter back to the trial court to correct the findings and conclusions.

As established above, the evidence presented at trial clearly supported the court's finding that Ketson Tommy was guilty of the crime of Assault in the Second Degree. Additionally, any rational Trier of Fact would have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence presented in the light most favorable to the State. Taken as a whole, the evidence presented, with the court's findings of fact, conclusions of law, and oral rulings support the court's final conclusion that Tommy intentionally assaulted Austin with a deadly weapon. Thus, the trial court did not err in finding him guilty of the crime of assault in the second degree. However, even if the appellate court finds that the Findings of Fact and Conclusions of Law in this case are incomplete, the evidence at trial clearly supported the finding of guilt of Mr. Tommy, and as a result, the proper remedy is remand, not dismissal.

2. RESPONSE TO ISSUES PRESENTED BY ASSIGNMENT OF ERROR NUMBER TWO: KETSON TOMMY WAS PROVIDED WITH EFFECTIVE ASSISTANCE OF COUNSEL.

Ketson Tommy was provided with effective assistance of counsel. The trial strategy of the defense attorney, although not successful, does not amount to ineffective representation. A review of effective assistance of counsel is reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A trial counsel's representation is presumed to be effective. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Ineffective counsel claims must show both deficient performance and resulting prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004) (quoting State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Differences of opinion regarding trial strategy or tactics will not support a claim of ineffective assistance of counsel. State v. Lord, 117 Wn. 2d 829, 883, 822 P.2d 177 (1991). And the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052 (1984). Deficient performance is shown by conduct that is "below an objective standard of reasonableness." McNeal, 145 Wn.2d at 362. "To

establish prejudice, a defendant must show that but for counsel's performance, the result would have been different." Id. The respondent bears the burden of demonstrating the assistance of counsel was ineffective. State v. MacFarland, 127 Wn.2d 322, 337 (1995).

Although it is true that an adult defendant may have a right to have lesser included offenses presented to a jury, the state could find no similar provisions in the juvenile justice act addressing this specific issue. However, that is likely because juvenile adjudication hearings are generally tried by a judge, not a jury. (See RCW 13.04.021) Further, JuCR 1.4(b) provides that the Superior court Criminal rules shall apply in juvenile offense proceedings when not inconsistent with these rules and applicable statutes. Following this same reasoning then, if the same rules are to apply to juvenile adjudication hearings, then the mandates that apply for requesting lesser included offense instructions for adult cases, must likewise be met in juvenile matters.

Lesser included offense instructions are only permitted if 1) all the elements of the lesser offense are necessary elements of the charged offense(the legal prong), and 2) the evidence supports an inference that the lesser crime was committed (the factual prong). (State v. Stephens, 158 Wn. 2d 304, 310, 143 P.3rd 817 (2006)) To prove ineffective assistance

of counsel, Mr. Tommy must illustrate that trial counsel unreasonably and prejudicially pursued an “all or nothing” defense against the charged crime, rather than propose a lesser included instruction crime for which the evidence would have established, was all that he was guilty of. Mr. Tommy has simply failed to meet his burden.

Appellant argues that defense counsel should have argued that Mr. Tommy was guilty not of Assault in the Second Degree, but instead, simply guilty of the crime of Unlawful Display of a Weapon. A person is guilty of the crime of unlawful display of a weapon, if a person carries, exhibits, displays, or draws any weapon in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate or that warrants alarms for the safety of that other person. RCW 9A.41.270(1). The crime of assault in the second degree, as identified above, are circumstances not amounting to an assault in the first degree, were one assaults another with a deadly weapon. RCW 9A.36.021(1)(c).

Based upon the mandate established above regarding the requirement for which lesser included offenses may be offered to the fact-finder, the state concurs that unlawful display of a weapon can be found to be a lesser included offense of Assault in the Second Degree. (See State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004)) However, the

inquiry does not end there. As specified above, before a lesser included offense instruction can be presented, the defense must establish evidence which affirmatively established that only the lesser included offense was committed. State v. Gamble, 137 Wn. App. 892, 905, 155 P.3d 962(2007) (citing State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382(1978)) It is not sufficient that the fact-finder might simply disbelieve some of the State's evidence supporting the charged crime. State v. Fowler, 114 Wn. 2d 59, 67, 785 P.2d 808 (1990) disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 487, 816 P.2d 718 (1991). In other words, the evidence must support an inference that only the lesser offense was committed. State v. Peters, 47 Wn. App. 854, 860, 737 P.2d 693; see also State v. Talmalini, 134 Wn.2d 725, 729, 953 P.2d 450 (1998). Appellant cannot meet this burden.

At trial, the evidence was clear, that Mr. Tommy didn't just simply display a weapon to the victim. Instead the evidence clearly displayed that Mr. Tommy, after already threatening to kill Mr. Austin, and after throwing rocks and concrete at Mr. Austin, picked up a large metal pipe. But the incident did not end at that point either. After Mr. Tommy picked up the metal pipe, he then aggressively approached the victim, and again threatened to kill the victim. When Mr. Tommy approached the victim

and repeatedly threatened to kill him, he was within striking distance and held the metal pipe as if it were about to swing it at a baseball. But again, the incident did not end at this point. Instead, when the victim, who was fearful that he would be harmed by Mr. Tommy pleaded with Mr. Tommy to calm down, Mr. Tommy did not back down. Mr. Tommy still continued to threaten to kill the victim, and still held the metal pipe as if he were going to hit the victim. Again, the incident did not end at this point. When the victim attempted to flee, Mr. Tommy still did not back down. Instead, as the victim attempted to get away, Tommy followed after the victim and again threatened to hit him with the pipe if he did not turn around. Clearly this uncontroverted evidence illustrates that Mr. Tommy did not simply display the weapon, but instead appellant clearly intended to create apprehension of harm in the mind of the victim.

Furthermore, this evidence was not disputed at trial, and instead was supported by the testimony of Carolyn Harton. Although Ms. Harton only observed a small portion of the incident, she noted that Tommy appeared to be very agitated, and observed Tommy chase after the victim with the pipe. Ms. Harton noted that while Tommy followed the victim, he yelled at the victim, and it appeared to Ms. Harton that Tommy wanted the victim to turn around. Harton noted that Tommy only dropped the

metal pipe after the victim had fled into the student center. Thus, based upon the evidence presented at trial, there was no affirmative evidence in the record that would support an inference that Tommy did not have the intent to create an apprehension of harm in the victim, when the evidence made clear that he threatened to the victim multiple times, and chased after him while carrying the pipe.

Accordingly, in examining all of the evidence presented at trial, the facts clearly established this was a case not where a dangerous weapon was simply displayed, but instead, where appellant actively went after the victim and threatened to harm him with the pipe. Tommy effectively used the deadly weapon in a manner in which to create an apprehension in his victim, and followed through, by making threats not only harm, but to kill the victim. As a result, defense counsel's failure to argue to the court that respondent was only guilty of the lesser included crime, was a legitimate trial strategy and was clearly not unreasonable or prejudicial to Mr. Tommy. As such, appellant has failed to establish that his counsel's representation was deficient, and that his attorney's representation would have resulted in a different outcome.

D. CONCLUSION

The State respectfully requests that the Court affirm the conviction of the appellant for the crime of Assault in the Second Degree. The evidence presented at trial was sufficient to support the trial court's finding that Mr. Tommy was guilty of the crime of Assault in the Second Degree. The oral ruling of the court, and the Findings of Fact and Conclusions of Law supported that the respondent was guilty of Assault in the Second Degree, and established that appellant acted with the specific intent to create reasonable fear and apprehension of bodily injury in the victim. However, if the Appellate Court finds that the Findings of Fact and Conclusions of Law were incomplete in this case, the appropriate remedy is not dismissal, but instead to remand the matter back to the trial court for further consideration.

Furthermore, the State requests that the Court affirm the conviction of the appellant for the crime of Assault in the Second Degree, because the trial strategy of the respondent's attorney, although not successful, did not deprive the respondent of effective assistance of counsel. As indicated above, the evidence presented at trial did not establish that the appellant was only guilty of the crime of Unlawful Display of a Weapon, but instead clearly illustrated that the appellant was guilty of the crime of Assault in

the Second Degree. Based upon the foregoing arguments, the State respectfully requests that the appellate court affirm the conviction of Mr. Tommy for the crime of Assault in the Second Degree.

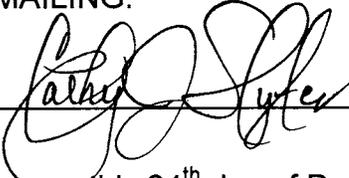
Respectfully submitted this 24th day of December, 2008.

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

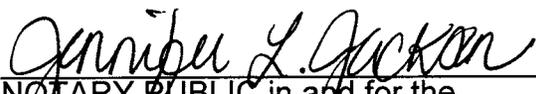


JULIE C. CARMENA, WSBA#25796
Deputy Prosecuting Attorney

Said envelopes containing a copy of this affidavit and the original and/or a copy of BRIEF OF RESPONDENT and AFFIDAVIT OF MAILING.



SUBSCRIBED AND SWORN to before me this 24th day of December, 2008.



NOTARY PUBLIC in and for the
State of Washington residing
At Vancouver, WA
MY COMMISSION EXPIRES: 5/29/2011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

RECEIVED

DEC 29 2008

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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

STATE OF WASHINGTON,)

NO. 37671-7-II

Respondent,)

vs.)

AFFIDAVIT OF MAILING

KETSON B. TOMMY,)

Appellant.)

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

I, CATHY J. SLYTER, being first duly sworn on oath deposes and says:

That your affiant is a citizen of the United States of America and of the State of Washington, living and residing in Clark County, Washington, in said State; that your affiant is over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 24TH day of December, 2008, affiant deposited in the mails of the United States of America property stamped and addressed envelopes directed to the following individuals, to-wit:

CLERK OF THE COURT OF APPEALS
Division II
Suite 300, 950 Broadway
Tacoma, WA 98402-4454

LISA E. TABBUT
Attorney at Law
PO Box 1396
Longview WA 98632

CLARK COUNTY PROSECUTING ATTORNEY

JUVENILE DIVISION

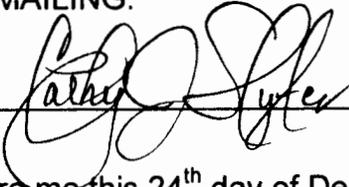
1013 FRANKLIN STREET

P.O. BOX 5000

VANCOUVER, WASHINGTON 98666-5000

(360) 699-2261

Said envelopes containing a copy of this affidavit and the original and/or a copy of BRIEF OF RESPONDENT and AFFIDAVIT OF MAILING.



SUBSCRIBED AND SWORN to before me this 24th day of December, 2008.



NOTARY PUBLIC in and for the
State of Washington residing
At Vancouver, WA
MY COMMISSION EXPIRES: 5/29/2011

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24