

No. 42726-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

KATHY ELAINE GLEN,
Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

POINT I: The State Failed to Prove the Charged Assault When It Failed to Prove Ms. Glen Acted with Criminal Negligence and This Court Should Reverse Ms. Glen's Conviction

The State failed to prove Ms. Glen committed the charged crime when it failed to prove she acted negligently. See Appellant's Brief at 11-17. Ms. Glen was charged with assault in the third degree under RCW 9A.36.031(d). CP 1. A person is guilty of such assault if she "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(d); CP 1.

The State argues it did not have to prove a negligent act: "The statute does not define whether [sic] the act is done intentionally, volitionally or simpl [sic] with criminal negligence." Brief of Respondent at 2. Even if the statute does not require the act be done with criminal negligence, an argument for which the State cites no relevant authority,¹ the

1. The case the State cites in support of its argument is inapposite. Brief of Respondent at 3, citing, State

"to convict" jury instruction in this case plainly required the State to prove a negligent act.

The court charged the jury that in order to convict Ms. Glen, it must find she acted with negligence:

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:

. . .

(3) that the defendant acted with criminal negligence.

CP 21 (Jury Instruction No. 7). In addition, the jury instruction defining "criminal negligence" defined it with regard to the act, not the injury:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a

v. Hayward, 152 Wn. App. 632, P.3d 354 (2009). In Hayward, this Court considered the second degree assault statute, not the third degree assault statute. Cf. RCW 9A.36.021(a) & RCW 9A.36.031(d). That statute required the State to prove the defendant intentionally assaulted the victim and recklessly inflicted substantial bodily harm. Hayward, 152 Wn. App. 632, 640; RCW 9A.36.021(a). By contrast, the statute at issue in this case does not require one mental state for the act and another mental state for the injury. It only requires that the person, "[w]ith criminal negligence, causes bodily harm." RCW 9A.36.031(d). Thus, Hayward is not relevant in this context.

wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

CP 21 (Jury Instruction No. 9) (emphasis added); see RCW 9A.08.010(1)(d) (substantively identical).

It is well-settled that the State was required to prove the crime as charged to the jury. "Right or wrong, an instruction becomes the law of the case and is binding upon the jury . . . as well as on the court and counsel." 75A Am. Jur. 2d Trial § 1251. In Washington, law of the case doctrine has "roots reaching back to the earliest days of statehood." State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998). See Appellant's Brief at 14-15.

Accordingly, the State's interpretation of the third degree assault statute does not resolve this case. Instead, it is resolved by the "to convict" instruction, which required the State to prove Ms. Glen "acted with criminal negligence." CP 21 (Jury Instruction No. 7). When the State failed to prove this element beyond a reasonable doubt, Ms. Glen's conviction should be reversed.

Notably, this case presents no factual dispute. The State apparently agrees its witness testified to an intentional act and Ms. Glen testified to a mere accident. Brief of Respondent at 4 (arguing Court need not resolve case based on either Ms. Glen's or the State's witness's version of events). While the Court is not bound by the parties' theories of the case, with a record devoid of evidence Ms. Glen negligently closed the car door on the victim's head, this Court must reverse her conviction.

For these reasons and the reasons set forth in Appellant's Brief at 11-21, the State failed to prove the charged crime and this Court should reverse her conviction.

Point II: The Trial Court Erred in Failing to Give the Requested Lesser Degree Offense Instruction When the Victim's Testimony Established Fourth Degree Assault by Actual Battery

A defendant "is entitled to an instruction on a lesser" offense if the conditions for giving such an instruction are met. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (discussing lesser included, not lesser degree offenses), *superseded by*

statute on other grounds by State v. Adlington-Kelly, 95 Wn.2d 917, 631 P.2d 954 (1981); see also State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (discussing "test for determining if a party is entitled to an instruction on an inferior degree offense"). Because a defendant is "entitled" to a lesser degree offense instruction, the trial court has no discretion to refuse to give such an instruction once it is found to be warranted. Cf. Brief of Respondent at 5 (arguing trial court denied lesser degree offense instruction because of extent of injury to victim even though extent of injury was not element of either third or fourth degree assault).

The trial court is concerned with only three things in its ruling on a request for a lesser degree offense instruction, whether:

(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000), *citing*, State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). All three prongs of the test were satisfied in this case. Appellant's Brief at 22-27.

In this case, the trial court erred when it confused the tests for lesser degree and lesser included offense jury instructions, finding the legal test for a lesser included offense jury instruction was not met. VRP 128-29 ("I don't believe this falls in as a lesser included offense because of the way the elements line up in the third degree assault of this nature"); VRP 129 ("I don't think it can possibly be a lesser included offense because there's no intent in the information charged"). See Appellant's Brief at 22-24.

In addition, the trial court abused its discretion when it found Ms. Glen presented no evidence she committed only the inferior degree offense, ignoring the evidence of the State's witness supporting the lesser charge. VRP 130 (court did not believe Ms. Glen

presented "a factual situation where the jury can conclude, yes, she intentionally assaulted with the door"). See Appellant's Brief at 24-27.

Finally, as these quoted passages reveal, the State's brief mischaracterizes the trial court's ruling on the requested lesser degree offense instruction. See Brief of Respondent at 6.²

Because the trial court erred in its legal analysis and incorrectly ruled on the factual prong of the lesser degree jury instruction test, this Court should reverse Ms. Glen's conviction.

* * * * *

Ms. Glen relies on Appellant's Brief for the remainder of her arguments.

II. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief, Kathy Elaine Glen respectfully requests this Court to reverse her conviction.

2. In addition, the State's brief erroneously provides the test for a lesser included offense jury instruction, rather than a lesser degree offense jury instruction. Brief of Respondent at 4.

Dated this 20th day of August, 2012.

Respectfully submitted,

/s/ Carol Elewski
Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 20th day of August, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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/s/ Carol Elewski
Carol Elewski

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August 20, 2012 - 4:32 PM

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