No. 48050-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON

v.

TIANA BOLDEN

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# BRIEF OF APPELLANT

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A. Assignment of Error

Assignment of Error

The trial court erred by giving an incomplete and erroneous instruction defining assault.

Issue Pertaining to Assignment of Error

Was the trial court's definitional jury instruction defining assault, which omitted several key phrases, incomplete, misleading, and erroneous?

B. Statement of Facts

Tiana Bolden was charged by Information with one count of Second Degree Assault. CP, 1. The alleged victim was Markliann Bartlett. CP, 1. Ms. Bolden and Ms. Bartlett were in a three year romantic relationship that ended in April of 2015. RP, 64.

Beginning in early 2015, Ms. Bartlett was having physical issues that made it difficult to work or lift heavy objects. RP, 104. She was diagnosed with tendinitis in her arms which caused her severe pain. RP, 79. As a result, she was placed on restricted lifting duty at work and moved from a stocker to a cashier. RP, 104. Her stepbrother, Robert Lucy, knew Ms. Bartlett had tendinitis and frequently experienced pain. RP, 123.

Starting in the fall of 2014, Ms. Bolden, Ms Bartlett, and a married couple, Elizabeth and Jacob Crouch all shared an apartment in Bremerton, Washington. RP, 67. At some point after moving in together, Ms. Bolden and Ms. Bartlett's relationship started getting stressed RP, 69.

On Sunday April 12, 2015, Ms. Bolden and Ms. Bartlett got into a heated argument. RP, 73. Ms. Bartlett had been experiencing pain all day prior to the argument. RP, 77. At one point, Ms. Bolden asked Ms. Bartlett to leave because she was "going to start throwing stuff" RP, 75. Ms. Bartlett responded, "You would do that, because you're that immature," and turned around to leave RP, 75. Ms Bartlett then felt a "force" behind her, like someone was grabbing her clothes. RP, 75 According to Ms. Bartlett, Ms. Bolden then threw her down, straddled her stomach, and started hitting her with closed fists around ten times. RP, 76. She then fell forward, flattened herself on top of her, and wrapped her arms around her shoulders. RP, 77 After about a minute, Ms. Bolden got off of her and started pacing the room. RP, 77. She then came back at Ms. Bartlett, pushed her down, and started hitting her again. RP, 79. This lasted for a "few minutes" RP, 79. After it was over, Ms. Bartlett stood up and went to her room where she stayed the rest of the evening. RP, 80.

Elizabeth Scarberry-Crouch and Jacob Crouch both testified on behalf of the defense. They both testified they were at the house most of

April 12 and did not notice anything unusual. RP, 143. 157. Ms. Scarberry-Crouch testified she did not hear any raised voices or arguments. RP, 145. The next day, Ms. Bartlett's physical condition appeared unchanged from before the incident. RP, 146, 157 Mr Crouch testified the next morning she had no strange movements, she was able to get in and out of a vehicle and carry and laptop bag over her shoulder RP, 160-61 Ms. Scarberry-Crouch testified the next day "everything seemed fine." RP, 150.

The next day, Ms. Bartlett and Ms. Bolden's day started like normal. Ms. Bartlett drove Ms. Bolden to the ferry so she could attend school. RP, 82 Later that night, Ms. Bartlett got a phone call from her stepbrother, Robert Lucy, asking for some help in moving boxes and furniture. RP, 84. Ms Bartlett called Ms. Bolden and asked if Ms. Bolden was willing to help RP, 85. The two women rode the ferry together to Seattle and went to Mr. Lucy's house RP, 85. Mr Lucy knew "they were going through some things," but nothing seemed "out of the regular " RP, 122-23. Ms. Bartlett testified she was unable to move heavy objects because she was in pain RP, 86. Mr Lucy testified, however, that Ms. Bartlett was climbing up and down a ladder and carrying items to the U-Haul. RP, 125. The only complaint she made about pain was she was

difficulty raising her arms and having a hard time stretching. RP, 121. But Ms. Bartlett had had this complaint for some time. RP, 123

On Tuesday April 14, Ms. Bartlett went to work like normal. RP, 88. After work and after talking to a friend, she decided to go to the emergency room. RP, 89. The doctor encouraged her to make a police report. RP, 90. As a result of this incident, Ms. Bartlett broke up with Ms. Bolden. RP, 92.

Dr. Mark Hoertkorn was the primary emergency room physician who attended to Mr. Bartlett. RP, 182. At trial he could not recall the contact, however, and relied entirely on his notes. RP, 188. Ms. Bartlett told him she had been punched multiple times over her right chest. RP, 182-83. He did not observe any bruising or marks in the area, however. RP, 183. Dr. Hoertkorn ordered x-rays done. RP, 184. Dr. Richard Satre, a radiologist, examined the x-rays of Ms. Bartlett and determined she had four fractured ribs. RP, 113. After reviewing all the facts, Dr. Hoertkorn was "suspicious that these punches potentially caused these rib fractures." RP, 186

Bremerton Police Officer Jeffrey Inklebarger interviewed Ms. Bartlett on April 17, 2015, five days after the incident. RP, 55, 62. Later that same day, he went to Ms. Bolden's apartment to contact her. RP, 59, 62. He knocked on her door and Ms. Bolden answered wearing

"nighttime clothing." RP, 57, 61. She said, "I was expecting the police to show up." RP, 57. Officer Inklebarger then read Ms. Bolden her *Miranda* warnings, which Ms. Bolden waived. RP, 57. Ms. Bolden said she had been very emotional and had grabbed Ms. Bartlett, but then she had blacked out and could not recall what happened next. RP, 58. Officer Inklebarger then placed her under arrest and escorted her to his patrol vehicle. RP, 59.

On June 2, Ms. Bolden was interviewed by Chris Mace, an investigator employed by the defense. RP, 134. Ms. Bolden told Mr. Mace that things had been going well until they got into a bit of an argument. RP, 135. Sometime during the argument, Ms. Bartlett indicated she wanted to leave. RP, 135. Ms. Bolden became distraught and upset and lunged towards her because she did not want her to leave. RP, 135. Ms. Bolden could not remember what happened after that. RP, 135. Ms. Bolden did not describe any further physical confrontation. RP, 136.

The Court instructed the jury on second degree assault. The Court adopted States Proposed Instruction #9, which was later renumbered as Instruction #10. RP, 195. It reads: "An assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person." CP, 49. Ms. Bolden objected to this instruction, saying, "There's a number of variations that

can be used in the instruction and Counsel has selected this one. I'm just concerned about how it tells the jury that simply touching is an assault and concerned that they will think that's all that's required in this case." RP, 192-93. The Court overruled the objection. RP, 193.

While the jury was deliberating, they asked to review a transcript of Dr. Hoertkorn's testimony. RP, 246. The Court declined to provide the transcript. RP, 247.

The jury returned a verdict of guilty. RP, 248. At sentencing, the Court imposed a standard range sentence of 4 months in jail. CP, 61. Ms. Bolden filed a timely notice of appeal. CP, 72.

C. Argument

Ms. Bolden was convicted of second degree assault. Because chapter 9A.36 RCW does not define the term "assault," Courts have relied on the three common law definitions: common law battery, common law attempted battery, and common law assault. *State v. Russell*, 69 Wn.App. 237, 246-47, 848 P.2d 743, *review denied*, 122 Wn.2d 1003 (1993). All three alternatives require an intentional act. *Russell* at 247. These three definitions have been assimilated into the criminal law from the law of torts. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995), quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972).

WPIC 35.50 was written with the three common law definitions in mind. Paragraph one defines a common law battery, paragraph two defines a common law attempted battery, and paragraph three defines a common law assault. In Ms. Bolden's case, the State relied solely on a theory that she committed a common law battery and submitted a proposed jury instruction loosely modeled on paragraph one of WPIC 35.50. "An assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person." The State's proposed instruction, however, was incomplete as it failed to include the requirement that the touching be "with unlawful force." It also failed to advise the jury that a "touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive." Ms. Bolden objected to this instruction at trial.

In order for an offensive touching to be a criminal assault in Washington, the touching must be objectively offensive. "A bodily contact is offensive if it offends a reasonable sense of personal dignity." *Sutton v. Tacoma School District*, 180 Wn.App. 859, 865, 324 P.3d 763 (2014), quoting the Restatement (Second) of Torts §19 (1965). The comment to WPIC 35.50 reads:

> In order that a contact be offensive to a reasonable sense of personal dignity, it must be one that would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Comment to WPIC 35.50, quoting Restatement (Second) of Torts §19 It is legally insufficient, therefore, for a touching that subjectively offends a person to be an assault. The offensive touching must be objectively reasonable.

The jury instruction used in Ms. Bolden's does not make clear that an offensive touching must be objectively offensive and done with unlawful force. The jury was, therefore, left to speculate on the nature of an offensive touching. The jury heard testimony from Ms Bartlett that she considered Ms. Bolden's attitude during the incident to be "immature," that Ms. Bolden grabbed her clothes, and that she broke up with Ms. Bolden soon after. Further, Ms. Bolden admitted to two witnesses to being emotional and distraught and "lung[ing]" at Ms. Bartlett when she tried to leave It is possible the jury concluded that an assault occurred because Ms Bartlett was subjectively offended by the touching and not because the touching was objectively offensive.

In *State v Daniels*, 87 Wn App. 149, 940 P 2d 690 (1997) the defendant argued for the first time on appeal that the failure to define a

common law battery was error The trial court had instructed the jury that a person commits second degree assault when he or she "intentionally assaults another and thereby recklessly inflicts substantial bodily harm," but did not define an assault The Court of Appeals held that paragraph one of WPIC 35.50 defines a common law battery, but does not set forth the elements of the crime. A failure to define common law battery is not manifest constitutional error and may not be raised for the first time on appeal. The Court further held, under the facts of that case, that there was little chance the jury would understand an assault to be anything other than a hitting. The Court allowed, however, that in "some cases, when a definitional instruction is requested to avoid confusion, it may be error to refuse to give the instruction " *Daniels* at 156.

*Daniels* is distinguishable from Ms Bolden's case for three reasons First, Ms Bolden made a timely objection to the instruction. Second, the prosecutor in *Daniels* was relying solely on a hitting to establish the assault, while the prosecutor in Ms. Bolden's case elected to go on the alternative theories of a "harmful or offensive" touching. Third, Ms. Bolden's assignment of error is not that the trial court failed to instruct on common law battery at all, as occurred in *Daniels*, but that the definition was incomplete, misleading, and erroneous. Having endeavored

to define the term assault, it was incumbent for the Court to define the term accurately.

Having concluded that the jury was erroneously instructed, the remaining issue is whether the erroneous instruction requires reversal or is harmless. In this case, although Ms. Bolden elected not to testify, the jury heard her side of the story through two witnesses, Officer Inklebarger and Mr. Mace. In her account, she admitted there was an emotional argument and she lunged at Ms. Bartlett, something a person might feel subjectively offended by. Ms. Bolden claimed to have no further memory of the incident. Because the jury was not properly instructed, they may have concluded this was sufficient to establish an assault without finding that the offense felt was objectively reasonable.

The medical testimony in this case was ambiguous and contradictory. On the one hand, Ms. Bartlett testified she suffered injuries and pain as a result of being punched multiple times, as evidenced by four fractured ribs. On the other hand, there was significant reason to question the veracity of this testimony. The two roommates both testified Ms. Bartlett appeared to function normal the next day, moving in and out of cars effortlessly and carrying a laptop bag over her shoulder. Ms. Bartlett's stepbrother testified she was able to climb up and down a ladder and move lightweight items to a U-Haul truck. Although he testified she

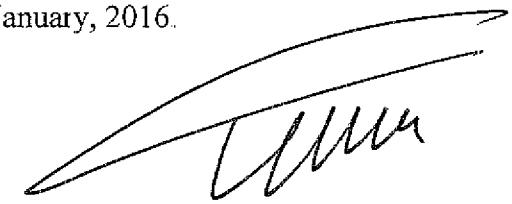
complained about pain, he also testified she had been complaining of similar pain prior to the alleged incident. Although Ms. Bartlett had four fractured ribs, she was not seen for two days following the incident and she did not have any bruising or marks in the area of the alleged punches. The most Dr. Hoertkorn could testify was that he was "*suspicious* that these punches *potentially* caused these rib fractures." RP, 186 (emphasis added). The jury was apparently confused enough by the contradictory medical evidence that they asked during deliberations to read Dr. Hoertkorn's testimony, a request that was denied.

At trial the State was not required to prove Ms. Bolden intentionally injured Ms. Bartlett. They were required to prove she injured her recklessly. Given the contradictory evidence about the nature of the injuries, the jury could have concluded Ms. Bolden was upset and distraught that Ms. Bartlett was leaving and grabbed at her, recklessly knocking her down and injuring her. The erroneous jury instruction was not harmless and reversal is required.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED this 4th day of January, 2016.



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

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|---|---|---|
| STATE OF WASHINGTON,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>TIANA BOLDEN,<br><br>Defendant/Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Court of Appeals No.: 48050-6-II<br><br>DECLARATION OF SERVICE |

STATE OF WASHINGTON )
)
COUNTY OF KITSAP )

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On January 5, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system.

On January 5, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

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

DATED: January 5, 2016, at Bremerton, Washington

Alisha Freeman



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