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Court of Appeals
Division II
State of Washington

NO. 50023-0-II

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

STATE OF WASHINGTON
v.
S.C.

ON APPEAL FROM
THE SUPERIOR COURT FOR CLARK COUNTY
STATE OF WASHINGTON

The Honorable Daniel L. Stahnke, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. S.C. assigns error to finding of fact 1.

2. S.C. assigns error to finding of fact 3.

3. S.C. assigns error to conclusion of law 2.

4. S.C. assigns error to conclusion of law 3.

5. S.C. assigns error to conclusion of law 4.

6. S.C. assigns error to conclusion of law 5.

7. The state failed to prove assault in the third degree.

8. S.C. was denied his right to effective assistance of counsel where his attorney conceded a critical element in the crime of assault in the third degree.

Issues Presented on Appeal

1. Did the state fail to prove that S.C. committed assault when he was hit by a bus, reacted with verbal frustration and touched the bus driver's hand when the bus driver stuck out his hand into S.C.'s chest?

2. Was S.C. denied his right to effective assistance of counsel where his attorney conceded that S.C. committed assault in the fourth degree, which established the critical element in the crime of assault in the third degree?

3. Did the state fail to prove that S.C. intended to create fear in the bus driver?

4. Did the state fail to prove that S.C. acted with unlawful force when his chest made contact with the bus driver's outstretched hand?

B. STATEMENT OF THE CASE

The state charged S.C. with third degree assault when S.C. entered a bus after he felt he was hit by the bus while on his skateboard. CP 20; RP 17. S.C. was convicted as charged. CP 23, 27, 28. S.C. was upset and yelled at the bus driver Don Norvell. RP 8-9, 17. Norvell denied hitting S.C. with the bus, believing S.C. hit the bus when Norvell heard a very loud thud. Concerned, Norvell stopped his bus to check on S.C. RP 8-9, 13, 15.

Norvell testified that he put up his hand to keep S.C. at a distance and that he was afraid that S.C. would hit him with his skateboard. RP 10. S.C. did not hit Norvell or use his skateboard in a threatening manner: he was just holding it. RP 15. S.C. felt Norvell put his hand up and touched him in the chest. RP 17, 19-20. S.C. left the bus when Norvell called security. RP 15.

The following findings and conclusions are disputed and set forth in relevant part following the bench trial:

> 1. He was pulling the bus into a regular stop when the Respondent, who was a C-TRAN bus driver….
>
> 3. Don Norvell raised his hands to protect his face, and the Respondent pushed his body into Don Norvell's hands saying, "touch me, I swear to God I'll fucking…" and "I'm gonna give you something to really hit mother fucker"... He was still holding his skateboard in his hands.
>
> CONCLUSIONS OF LAW
>
> 2. All of the above facts have been proved by the State beyond a reasonable doubt.
>
> 3. On or about September 26, 2016, the Respondent assaulted Don Norvell….
>
> 4. The Respondent intentionally touched Don Norvell with unlawful force, in a manner that would offend an ordinary person who is not unduly sensitive.
>
> 5. The Respondent also did an act with intent to create in Don Norvell apprehension and fear of bodily injury, and which in fact created in Don Norvell a reasonable and imminent fear of bodily injury.

CP 27.

Defense counsel argued that if the court determined that S.C. was just out of control, the court should find that S.C. committed assault in the fourth degree. RP 25.

This timely appeal follows. CP 32.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE THAT S.C. COMMITTED ASSAULT IN THE THIRD DEGREE.

The state failed to prove that S.C. committed assault in the third degree.

The state argued that S.C. committed assault in the third degree by intending to cause the bus driver fear and having succeeded in causing that fear. RP 23-25. The prosecutor also argued that threatening someone constituted an assault. RP 23. After arguing the elements of assault in the second degree, the prosecutor concluded by arguing that S.C. was trying to extort money from Norvell and S.C. was just really mad but the combination of being mad and standing in Norvell's face constituted an assault—a simple assault.

The court entered conclusion of law 4 that S.C. intentionally touched Norvell, and conclusion of law 5 that S.C. intended to create fear in Norvell and did create fear. CP 20.

a. Standard of Review

In every criminal prosecution, due process requires that the state prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Houston-Sconiers*, 188 Wn.2d 1, 15, 391 P.3d 409 (2017) (*citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

All reasonable inferences from the evidence are drawn in favor of the state and interpreted "most strongly" against the defendant. *Houston-Sconiers*, 188 Wn.2d at 15; *Salinas*, 119 Wn.2d at 201.

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (*citing State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011),

aff'd, 174 Wn.2d 909, 281 P.3d 305 (2012) (*citing State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)); see also RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court ... failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" Id.

b. Findings and Conclusions.

In reviewing a juvenile court adjudication, this 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. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). This Court reviews conclusions of law de novo. Id. This Court treats unchallenged findings of fact as verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

c. Insufficient Evidence of Intent to Cause Fear

To find S.C. guilty of assault in the third degree, the state had to prove the following elements:

> (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:
>
> …
>
> (b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

RCW 9A.36.031.

The term assault itself is not statutorily defined so Washington courts apply the common law definition. Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *Clark v. Baines,* 150 Wn.2d 905, 909 n. 3, 84 P.3d 245 (2004); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

For the purposes of this case, the state argued that S.C. committed assault by intending to cause fear and by an unlawful touching. RP 23-25. The state did not present any evidence that S.C. intended to cause fear. The entirety of the state's case consisted of Norvell testifying that he was afraid that S.C. was going to cause him bodily harm using his skateboard as a weapon. RP 10.

But S.C., never threatened to strike Norvell, rather he yelled profanities because the bus hit him and he was very upset. RP 8-9. Norvell even testified that when S.C. boarded the bus he said he was angry because the bus struck him. Id The prosecutor too, in closing, argued that S.C. was angry because the bus struck him. RP 23-25.

Even though Norvell was frightened by S.C.'s yelling profanities within close proximity while holding a skateboard that Norvell believed to be a weapon, this does not establish that S.C. intended to cause fear, rather than S.C. venting his frustration. Without sufficient evidence that S.C. intended to cause fear in Norvell, the Court's conclusion of law 5 must be vacated. CP 20.

d. Insufficient Evidence of Intentional Touching.

S.C. explained that when Norvell put his hand up to keep S.C. away, he touched S.C.'s chest. RP 20. Norvell testified that he put up his hand and S.C. touched his hand. RP 10, 15. This incident was not described as a slow motion event, rather both parties were elevated. S.C. was very upset and Norvell was afraid. RP 8-9, 17.

This evidence when viewed in the light most favorable to the state does not establish beyond a reasonable doubt by direct or reasonable inference that S.C. unlawfully made physical contact with Norvell. The state failed to prove the crime of assault in the third degree under either prong. Accordingly, this Court must reverse and remand for dismissal with prejudice.

e. Findings and Conclusions Not Supported

The court's findings that S.C. intentionally assaulted Norvell by intending to cause fear is not supported by substantial evidence in the record and must be vacated. *B.J.S.*, 140 Wn. App. at 97. Similarly, the court's finding that S.C. intended to cause fear is also

not supported by substantial evidence in the record and must be vacated. *B.J.S*., 140 Wn. App. at 97. The findings do not support the conclusions of law finding S.C. committed an assault. Accordingly, these conclusions of law must also be vacated and the conviction reversed and remanded for dismissal with prejudice.

2. DEFENSE COUNSEL COMMITTED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY ARGUING IN CLOSING THAT S.C. COMMITTED SIMPLE ASSAULT.

Defense counsel committed prejudicial ineffective assistance of counsel by arguing in closing that S.C. committed assault in the fourth degree because assault in the fourth degree against a bus driver is a felony. RCW 9A.36.031. Assault in the fourth degree is not a lesser included offense to assault of a bus driver. Id.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court

reviews ineffective assistance of counsel claims de novo. *State v. Wooten,* 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation prejudiced him. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33. (*quoting State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

To show prejudice, S.C. must show a reasonable possibility that, but for counsel's deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The state is required to prove the charge beyond a reasonable doubt. When counsel erroneously concedes guilt to a charge mistakenly believed to be a lesser included offense, this cannot be considered a sound tactical decision because it essentially relieves the state of proving the crime charged.

A concession to a lesser count **can** be a sound trial tactic when the evidence on that count is overwhelming and when the count is a "lesser count" that if convicted, would benefit the defendant. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477, *review denied,* 145 Wn.2d 1012 (2012); *see also State v. Hermann,* 138 Wn. App. 596, 605, 158 P.3d 96 (2007) (Division Two case applying *Silva).*

Conceding to assault in the fourth degree could not help S.C. because this was both an essential element of assault in the third degree and the disputed issue. Here, the evidence of the assault in the fourth degree could not be a lesser included offense because as defined, assault of a bus driver includes a simple assault. RCW 9A.36.031.

Under *Silva* and *Hermann,* counsel's concession was not a reasonable tactical decision. There was no jury and the bench was fully aware that if S.C. was guilty of assault in the fourth degree, then he was guilty of assault in the third degree against a bus driver.

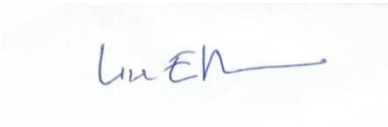
Under *Strickland*, S.C. was prejudiced by his attorney's concession to assault in the fourth degree. Accordingly this Court must reverse and remand for a new trial. *Strickland*, 466 U.S. at 687; *Reichenbach*, 153 Wn.2d at 126, 130

D. <u>CONCLUSION</u>

S.C. respectfully requests this Court reverse and remand the assault charge for dismissal with prejudice or in the alternative remand for a new trial.

DATED this 20th day of July 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955

Attorney for Petitioner

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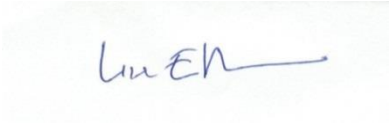

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