

NO. 50023-0-II

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

STATE OF WASHINGTON, Respondent

v.

S.E.C., Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-8-00514-0

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The Trial Court's findings of fact are supported by substantial evidence in the record and are therefore not error.**
- II. **The Trial Court's conclusions of law are supported by its findings of fact and are therefore not error.**
- III. **S.E.C.'s challenge to the sufficiency of the evidence fails because the evidence in this case establishes that Defendant committed an Assault in the Third Degree.**
- IV. **S.E.C.'s claim that he was denied effective assistance of counsel because his trial attorney conceded the case fails because his trial attorney did not concede the facts of the case and Defendant cannot show prejudice.**

STATEMENT OF THE CASE

On September 26, 2016, Don Norvell was on duty operating a public transit bus in Clark County Washington near Clark College. RP 8-9. As he was coming to a bus stop, S.E.C. was riding his skateboard on the sidewalk near the bus stop. RP 8-9. S.E.C. attempted to do a trick while riding his skateboard and in the process left the sidewalk and came into contact with the bus. RP 8-9. Norvell stopped and secured the bus to go check on S.E.C.. RP 8-9. Before Norvell could get off of the bus, S.E.C. came through the open door and began yelling at Norvell demanding money and coming within approximately an inch of Norvell's face. RP 9. Norvell put his hand up in an attempt to create some distance from S.E.C.

as he called his supervisor. RP 10. Norvell testified that he felt “uncomfortable and frightened, like, things were going to get physical” and that he had fear that S.E.C. would cause him bodily injury. RP 10. Norvell also testified that he had fear the skateboard S.E.C. was holding during this interaction could be used against him as a weapon.

During Norvell’s testimony, video was admitted and published which captured the events. RP 13. The video footage is captured by several different cameras and microphones all simultaneously recording at five different vantage points on the bus.¹ The video exhibit depicts a time stamp beginning on September 26, 2016 at 13:10:16. The footage from camera 1, a forward facing vantage from the front of the bus, beginning at approximately 13:12:46 depicts S.E.C. riding his skateboard on the sidewalk as the bus approaches the stop. The footage from camera 5, a forward facing vantage from the passenger side of the bus, depicts S.E.C. bending his knees to initiate his skateboard trick at about 13:12:50. This same vantage depicts S.E.C. travelling off of the sidewalk and running into the bus as he jumps his skateboard at approximately 13:12:51. The vantage of camera 2 shows Norvell at the steering wheel, and depicts S.E.C. coming aboard the bus at about 13:12:59. The footage from camera

¹ Respondent has moved to designate and transmit the exhibit to the Court on appeal. At the time of filing this response, the exhibit has not yet been transmitted.

2 captured the verbal and physical interaction between Norvell and S.E.C.

S.E.C. states,

“Dude, you just fucking hit me”

Norvell replies, *“Dude, I’m coming..”*

S.E.C. *“I’m on the fucking sidewalk.”*

Norvell responds, *“You’re the one doing jumps...”*

S.E.C. states, *“Yeah, on the fucking sidewalk, you fucking dick.”*

Norvell replies, *“Sorry.”*

S.E.C. states, *“No, you owe me something bro you just fucking hit me. I could sue your ass and get paid. Do you know what that means, I’m on the fucking sidewalk and you hit me. So, yeah, make a call.”*

Norvell picks up a phone from his seated position behind the wheel and says, *“Believe me”*

S.E.C. states, *“Yeah, get to callin’ fool, I want my fucking money.”*

Norvell replied, *“You aint gonna get it from me”*

S.E.C. responds, *“I’m getting it from whoever you work for fool, cuz you just fucking hit me...on the sidewalk.”*

As Norvell is on the phone, S.E.C. interrupts him and positions his body closer to Norvell and continues to lean in and shout over Norvell as he is speaking on the phone. S.E.C., exclaims,

“Sidewalk...and he fucking hit me, with his fucking vehicle, and I want fucking ... no I did not end up on the side of his bus, he fucking pulled up and fucking hit me, while I was on the fucking...”

At approximately 13:12:55 Norvell raises his left hand with an open palm in between himself and S.E.C. and leans away from S.E.C. as he holds on to the phone with his right hand. Norvell does not make contact with S.E.C. S.E.C. continues to lean into Norvell and says,

“Touch me, I swear to god, I’ll fucking(guttural noise-mmm) I wish you would touch me motherfucker.”

Norvell puts his hand down. As Norvell continues to speak on the phone S.E.C continues to interrupt. S.E.C. leans over Norvell again exclaiming,

“on the sidewalk and he ...”

S.E.C. continues to lean further over Norvell and he again raises an open palm with his left hand. On this occasion, the video shows contact is made between S.E.C. and Norvell. S.E.C. screams,

“touch me again, touch me a-fucking-gain.”

The video then depicts S.E.C. leaning into Norvell repeatedly as Norvell keeps his hand up. At approximately 13:14:06, the video depicts S.E.C. coming behind Norvell, completely obscuring Norvell from the vantage of the camera and leaning in over Norvell. S.E.C. is shown raising his right arm as Norvell states,

“Excuse me”

S.E.C. screams, *“What”*

Norvell repeats, *“Excuse me”*

S.E.C. replies, *“No, excuse you motherfucker.”*

Norvell, attempting to create some space between himself and S.E.C. says, *“Will you please get back?”*

S.E.C. *“You like hitting kids? I’m going to give you something to really hit motherfucker.”*

Norvell, on the phone, states, *“I need a supervisor of security here.”*

At approximately 13:14:26, S.E.C. turns around and walks down the stairs off of the bus stating, *“Hey, y’all tell this motherfucker I say what’s up.”*

ARGUMENT

I. There is sufficient evidence in the record to support the Trial Court’s adjudication that S.E.C. committed an Assault in the Third Degree.

S.E.C. contends that there is insufficient evidence to sustain his adjudication of guilt of Assault in the Third Degree because the trial court’s findings and conclusions are unsupported. S.E.C. contends that there is insufficient evidence to support an intentional touching, and insufficient evidence to find S.E.C. acted with the requisite intent. In reviewing a juvenile court adjudication, the 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 Wn. App. 215, 220, 19 P.3d 485 (2001).

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to prove criminal intent to commit an Assault, the State must show that S.E.C. acted “with the objective or purpose to accomplish a result which constitutes a crime.” *State v. K H-H*, 188 Wash. App. 413, 418, 353 P.3d 661, 664 (2015), *review granted sub nom. State v. K.H.-H.*,

184 Wash. 2d 1010, 360 P.3d 817 (2015), and *aff'd sub nom. State v. K.H.-H.*, 185 Wash. 2d 745, 374 P.3d 1141 (2016) (citing RCW 9A.08.010(a)). “Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability.” *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991), citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate court’s role does not include substituting its judgment for the jury’s by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). “It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.” *United States v. Enriquez-Estrada*, 999 F.2d 1358 (9th Cir. 1993), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

S.E.C. committed an Assault on Norvell by intentionally touching him in an offensive manner and by creating a reasonable apprehension of imminent harm. RCW 9A.36.031(1)(b) states that an Assault in the Third Degree is committed when one “[a]ssaults a person employed as a transit operator or driver....” “The term assault is not statutorily defined, so Washington courts apply the common law definition to the crime. *State v. Aumick*, 126 Wash.2d 422, 426 n. 12, 894 P.2d 1325 (1995). Washington

recognizes three 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.” *Id.* (quoting *State v. Walden*, 67 Wash.App. 891, 893–94, 841 P.2d 81 (1992)).” *Clark v. Baines*, 150 Wash. 2d 905, 908, 84 P.3d 245, 247 (2004) (note 3). There is ample evidence demonstrating that S.E.C. intentionally assaulted Norvell, a transit operator or driver in the course of his duties on September 26, 2016. In this case, the record shows that the Judge relied upon the testimony of Norvell, S.E.C., and the video footage admitted into evidence. Norvell’s testimony clearly established that he was put in fear by S.E.C.’s conduct, and that contact was made. The exhibit admitted into evidence clearly depicts S.E.C.’s actions to intimidate Norvell and place him in fear. Further, the video shows S.E.C. pushing his body into Norvell on multiple occasions. The video and the testimony establish that there was an unprivileged touching that was harmful or offensive and that Norvell did not consent to the touching. As a result, the trial court’s finding that S.E.C. committed an Assault in the Third Degree is supported by substantial evidence in this case. The conclusions that S.E.C. had the requisite criminal intent and committed an unlawful

touching are also supported as these inferences are supported by the record in this case.

II. S.E.C.'s claim of ineffective assistance fails because his trial counsel did not concede guilt and also because S.E.C. cannot demonstrate prejudice.

A. COUNSEL DID NOT "CONCEDE" THE FACTUAL ISSUES IN THE CASE AND THEREBY DEPRIVE S.E.C. OF AN ADVERSARIAL PROCESS.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said

that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

S.E.C. asserts that counsel conceded his guilt in closing arguments and was therefore ineffective. However, in this case, counsel did not concede the factual issues in the case. Instead, counsel argued that the Defendant did not intentionally cause any fear in the victim, nor did he intentionally touch the victim. RP 24-25. On appeal, S.E.C. takes issue with trial counsel's remark,

If the Court does find that there was a point maybe where he could maybe had more control over, you know, what he was saying, then we would ask for the lesser-included assault in the fourth degree.

RP 25. When viewed in the context of trial counsel's full closing statement, this statement does not amount to a concession. The statement comes after counsel had just finished arguing that S.E.C. lacked criminal intent to cause fear, and arguing that S.E.C. did not intentionally touch Norvell. RP 24. S.E.C.'s argument on appeal seemingly invokes the *Cronic* exception to the second prong of the *Strickland* test and avoids discussion

demonstrating prejudice to a fair trial. In *Cronic*, the United States Supreme Court stated,

If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984). Following the decision in *Cronic*, the Ninth Circuit in *Swanson* found that counsel had “betrayed” his client by completely conceding the factual issues in the case and as a result created an unfair trial by lessening the government’s burden. *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). The *Swanson* court made a limited holding pertaining to counsel’s “concession in his argument to the jury that there was no reasonable doubt concerning the element of intimidation, and whether Swanson was the perpetrator of the bank robbery” the safeguards of the adversarial proceeding could not be presumed. *Id.* However, this case is distinguishable from *Swanson* and *Cronic* because trial counsel did not concede the factual issues of the case.

Here, trial counsel argued the factual issues of the case to much the same effect as appellate counsel without conceding to the State’s theory of the case. On appeal, S.E.C. seeks to make trial counsel’s request “in the alternative” to find him guilty of a lesser included offense into an error of

constitutional proportion. While the argument for a lesser included offense at trial may not have been sound, without conceding the facts of the case, S.E.C. must still demonstrate how the argument prejudiced him. In this case, S.E.C. cannot meet this burden.

B. S.E.C. CANNOT SHOW PREJUDICE.

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

When reviewing the evidence presented by the State in this case, S.E.C. cannot demonstrate there was a reasonable probability that the result of the trial would have been different absent the argument presented by defense counsel. It is important to note that S.E.C.'s trial was a bench

trial. In a bench trial, the Court is presumed to ignore inadmissible evidence when making a determination of guilt. *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). Just as the trial court must make credibility determinations and ignore inadmissible evidence in a bench trial, a Judge presiding over a bench trial can be expected to place unpersuasive closing arguments in proper context. In this case, the State presented evidence documenting this incident on video. RP 11-13. The Court reviewed this evidence and presumably placed great weight on establishing the factual issues in the case. S.E.C. cannot demonstrate that an argument presented by counsel would have created a reasonable probability that there would have been a different outcome in the case because the facts of the case are documented on a video admitted into evidence. The trial court was in possession of all the evidence needed to make a determination of guilt, the arguments of counsel are not evidence, and it is difficult to see how a different closing argument would have led to a different outcome at trial.

CONCLUSION

S.E.C. has failed to show how the evidence in this case does not support the trial court's findings of fact and conclusions of law. Further, he has not met his dual burden to prove that his counsel's performance was deficient,

and that this deficiency affected the outcome of the trial. The video of the incident along with the testimony at trial clearly established all of the factual issues in the case. The record in this case shows that sufficient evidence supports the adjudication of guilt. S.E.C.'s claims fail.

DATED this 13 day of September, 2017.

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