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NO. 50991-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN A. BOLLINGER,

Appellant.

Appeal from Kitsap County Superior Court
Honorable Sally F. Olsen
No. 16-1-00693-9

APPELLANT'S BRIEF

Edward Penoyar, WSBA #42919
Joel Penoyar, WSBA #6407
Attorneys for Defendant/Appellant

Post Office Box 425
South Bend, Washington 98586
(360) 875-5321

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I. INTRODUCTION

Defendant was convicted of one count of Assault 3rd Degree for attempting to assault Kitsap County Sheriff's Deputy, Steven Russell, who was trying to arrest him. The deputy was never physically struck. Another deputy present did not witness any attempted assault. Throughout the proceedings, the deputy was impermissibly referred to as the "victim" rather than the "alleged victim" despite defense's motion to the contrary. This violated Defendant's right to a presumption of innocence and assured the verdict before it was even rendered. The matter should be vacated for insufficiency of the evidence or remanded for retrial granting defense's motion in limine regarding the use of the term "alleged victim."

II. ASSIGNMENTS OF ERROR

The trial court erred in refusing defense's request to refer to Deputy Russell as "alleged victim" rather than "victim."

Insufficient evidence supported a conviction for Assault 3rd Degree because the deputies' testimony was inconsistent.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court's refusal to have a purported victim of assault referred to as the "alleged victim" rather than "victim" during jury trial violated Defendant's right to a presumption of innocence.

Whether any rational trier of fact could have found Defendant guilty of assault when one of the other observing deputies present in a tiny bathroom did not witness any assault and the "victim" deputy testified that Defendant was "trying to throw punches at me".

IV. STATEMENT OF CASE

Defendant was convicted of one count of Assault 3rd Degree in Kitsap Superior Court on June 29, 2017. The grounds for the conviction was an attempted assault upon Deputy Russell who, with two other officers, was struggling to apprehend the resisting Defendant in the confines of a small bathroom. Law enforcement arrived at the home of the defendant on May 23, 2016. VRP 96. They announced that they were there to pick up Defendant for outstanding warrants, and Defendant's mother let the deputies in. VRP 55. Defendant could not be located, until it was discovered the bathroom door was locked. VRP 56. The deputies announced their presence in front of the locked door then broke into the bathroom to apprehended Defendant. VRP 57. Deputy Russell was never physically hit by Defendant, but he testified that Defendant attempted to strike him:

Q. Okay. And at some point did you see Mr. Bollinger throw any punches at you?

A. Yes.

See, VRP 65.

WITNESS: So I let go of his legs. And when I stood back up, that's when he was trying to throw punches in my direction.

Q. I'll stop you there. Was it clear to you that he was throwing the punches at you? Or was he throwing them just trying to make contact with anyone? Or how did you perceive that?

A. The whole time he was directing his aggression at me.

See, VRP 68.

However, the other deputy present, Deputy Mezen, testified that he did not see any punches being thrown at Deputy Russell:

Q. Did you see Mr. Bollinger throw any punches at Deputy Russell?

A. I don't recall him throwing punches. It was – I mean, we were trying to get his hands, and we had him pinned up against the wall. And I don't remember punches being thrown. I mean, the arms were flailing, but we were just trying to gain control.

See VRP 99.

Q. And you answered this question essentially. But did you see any -- no towel bar, but hand punches thrown by Mr. Bollinger at any point during this?

A. I did not. Like I said, arms were flailing, but I didn't see any actual punches thrown.

See VRP 106.

The third officer present, Deputy Linder, did not witness the attempted assault testified to by Deputy Russell; however, he did testify that he stopped Defendant from swinging a towel rack (bar) onto Deputy Russell. VRP 87-88.

It is noteworthy that the defendant expressed his hostility towards Deputy Russell, in particular because he was a “rookie” (VRP 25), whilst testifying that the other officers, whom he had contact before, were “cool” (VRP 33).

After the conclusion of testimony, the jury returned a verdict of guilty. VRP 154.

Before the commencement of trial, defense counsel timely moved for an order in limine prohibiting the state from referring to Deputy Russell

as the “victim,” requesting that the term “alleged victim” be used on constitutional grounds:

I think the issue generally of that, Your Honor -- I did not provide the citation. Ms. Dennis is correct. It undermines the presumption of innocence to some extent when we refer to an individual as a victim over and over when we're here to determine whether or not, in fact, they are legally a victim.

Different courts have come down on that in different ways. But the basis of Mr. Bollinger's motion in limine is the constitutional amendment granting him the presumption of innocence. That's why we think the "victim" term used throughout the trial is too prejudicial to be included in that context.

See VRP 7-9.

The court denied the request, stating:

THE COURT: Frankly, Mr. Kiewik, that's how I've seen defense handle it before. You can refer to the officer as officer so-and-so, the alleged victim. And I think that makes a point to -- because the jury knows that the State's position is that the complaining witness is a victim. And you're able to refer to that person as "alleged victim" or not use the term "victim" at all. I think it makes it clear to the jury that is what we're trying to prove.

Anyway, for those reasons, your motion is denied.

See VRP 9.

V. ARGUMENT

A. **The Trial Court Erred in Refusing Defense’s Request to Refer to Deputy Russell as “Alleged Victim” Rather Than “Victim.”**

1. LAW

Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial. *Estelle*

v. *Williams*, 425 U.S. 501, 506; 96 S.Ct. 1691 (1976); *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987); *United States v. Ferguson*, 758 F.2d 843, 854 (2d Cir.1985).

As the Washington Supreme Court stated:

The presumption of innocence, although not articulated in the Constitution, “is a basic component of a fair trial under our system of criminal justice.” *Estelle*, 425 U.S. at 503, 96 S.Ct. 1691.

‘The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.’

Estelle, 425 U.S. at 503, 96 S.Ct. 1691 (quoting *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895)); see also *Taylor v. Kentucky*, 436 U.S. 478, 483, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

Courts have recognized that the accused is thus entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man. *Kennedy*, 487 F.2d at 104; *Samuel*, 431 F.2d at 614; *Eddy v. People*, 115 Colo. 488, 492, 174 P.2d 717 (1946).

2. ANALYSIS

Here, the State was authorized to refer to Deputy Russell as the “victim.” This was an unconstitutional prejudiced the defendant by painting him as guilty and essentially extinguished his presumption of innocence. There cannot be a “victim” if there is no crime, and when an allegedly assaulted party is described as such, the jury is impermissibly invited to consider Defendant the perpetrator from the outset.

It would not have been difficult to have granted the defense's motion for the use of the term "alleged victim" in this case; it adds only a single word to the lexicon of the proceedings. The trial court abridged Defendant's rights and the matter should be remanded for re-trial.

B. Insufficient Evidence Supported a Conviction for Assault 3rd Degree Because the Deputy's Testimony Was Both Insufficient and Inconsistent.

1. LAW

RCW 9a.36.031 defines Assault in the Third Degree (in relevant part):

(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:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; [...]

Attempted assault constitutes assault, as stated by the Supreme Court in *State v. Elmi*, 166 Wash.2d 209, 215; 207 P.3d 439, 443 (2009):

Because assault is not defined in the criminal code, courts have turned to the common law for its definition. Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) **an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it** (attempted battery); and (3) putting another in apprehension of harm. [emphasis added]

An appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt; rather it must determine only whether substantial evidence supports the jury's verdict. *State v. Potts*, 93 Wn.App. 82, 86, 969 P.2d 494 (1998).

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105; 330 P.3d 182 (2014); *State v. Engel*, 166 Wn.2d 572, 576; 210 P.3d 1007 (2009). In a sufficiency of the evidence challenge, a defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan* at 106. Appellate courts do not review credibility determinations. *State v. Miller*, 179 Wn. App. 91, 105; 316 P.3d 1143 (2014). The appellate court considers circumstantial and direct evidence as equally reliable. *Miller* at 105.

2. ANALYSIS

Here, no reasonable juror could have found the defendant guilty of attempted Assault Third Degree. First, the "victim" deputy testified only that Defendant "was trying" to throw punches, not that any were actually thrown. This is actually only constant with the second and third deputies' testimony if Defendant was "flailing around". Deputy Russell stated that he dodged punches, yet Deputy Menzen did not witness any attempted assaults; Deputy Linder stated he saw Defendant try to hit Deputy Russell with a towel bar, neither of the other officers witnessed it. No juror could have been convinced beyond a reasonable doubt that the crime was committed when three equally reliable deputies testified contrary to each other.

VI. CONCLUSION

The judgment and sentenced should be reversed.

Respectfully submitted this 12th day of February, 2018.

/s/ Edward Penoyar _____
EDWARD PENOYAR, WSBA #42919
edwardpenoyar@gmail.com
Counsel for Appellant
P.O Box 425
South Bend, WA 9858
(360) 875-5321

CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

Randall Sutton, Prosecutor
Kitsap County Prosecutor's Office
rsutton@co.kitsap.wa.us

and mailed postage prepared to Defendant:

John A. Bollinger
5424 Mustang Lane
Bremerton, WA 98312

DATED this 12th day of February, 2018, South Bend, Washington.

/s/ Tamron Clevenger
TAMRON CLEVINGER, Paralegal
to Joel Penoyar & Edward Penoyar
Attorneys at Law
PO Box 425
South Bend, WA 98586
(360) 875-5321
tamron_penoyarlaw@comcast.net

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