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Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN ADAM BOLLINGER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00693-9

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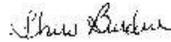
BRIEF OF RESPONDENT

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<b>SERVICE</b>	<p>Joel Morris Penoyar Po Box 425 South Bend, Wa 98586-0425 Email: penoyarlawyer@gmail.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED April 2, 2018, Port Orchard, WA </p> <p><b>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</b></p>
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether regardless of whether Bollinger's motion in limine to prohibit the State from referring to the alleged assault victim as a "victim" was meritorious, his claim is frivolous where the State never used the term "victim" in front of the jury?

2. Whether the evidence was sufficient to convict Bollinger of third-degree assault where Deputy Russell testified that Bollinger threw punches at him while they were attempting to arrest him on a felony warrant and where Deputy Linder also testified that Bollinger ripped a towel bar off the wall and would have struck Russell with it had Linder not attempted to place Bollinger in a choke hold?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

John Adam Bollinger was charged by information filed in Kitsap County Superior Court with the third-degree assault of Kitsap County Sheriff's Deputy Stephen Russell. CP 1. A jury found Bollinger guilty as charged. CP 53. The trial court entered judgment accordingly. CP 54.

### **B. FACTS**

Kitsap County Sheriff's Deputies Stephen Russell, Drew Linder and Michael Mezen when to serve felony forgery warrants on Bollinger. 2RP 54-55. Russell and Mezen knocked on the front door while Linder went to

the back door. 2RP 55. Bollinger's mother answered the door and gave them permission to look for Bollinger inside. 2RP 55.

The doors to the bathroom and Bollinger's bedroom were both locked. 2RP 56. They unlocked the bedroom door and found Bollinger's girlfriend hiding in the closet. 2RP 56. Bollinger was not there. 2RP 56.

They knocked on the bathroom door numerous times, but there was no response. 2RP 57. Bollinger's father gave them a screwdriver and they unlocked the bathroom door. 2RP 56. Bollinger was hiding between a small closet and the door, and his leg was visible. 2RP 57, 62. Russell identified himself and told Bollinger he had a warrant and he needed to come out. 2RP 57. Bollinger did not respond. 2RP 57.

Upon entering the bathroom, Russell could see that Bollinger had something dark in his right hand that he was holding near his waist.<sup>1</sup> 2RP 62. Concerned it could be a weapon, Russell grabbed Bollinger's left arm and again told him that he was the police and he was under arrest based on the warrant. 2RP 62. Russell instructed Bollinger to turn around and put his hands behind his back. 2RP 62.

Russell then grabbed the hand that had the object in it. 2RP 62. Bollinger did not obey Russell's commands. 2RP 63. Instead, he started

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<sup>1</sup> The object was later determined to be a cell phone. 2RP 69.

yelling profanities and struggling. 2RP 63. In the struggle, the door slammed shut leaving the other two deputies in the hall. 2RP 63. Russell continued trying to handcuff Bollinger. 2RP 63. Bollinger continued “amping up” and becoming more angry and frustrated. 2RP 63.

Russell still only had Bollinger’s right arm and was trying to turn Bollinger away from him so he could get him under control. 2RP 63-64. Bollinger was pushing against the door, and the other deputies were trying to push it open from outside. 2RP 64. Eventually they were able to open the door and joined them in the bathroom, closing the door behind them. 2RP 64. With four men in the small bathroom, it was very crowded. 2RP 64.

Bollinger continued to resist. 2RP 65. Bollinger threw punches at him. 2RP 65. Although he did not make contact, he claim very close. 2RP 67. Linder had Bollinger’s left arm. 2RP 74. Linder was trying to limit the punching. 2RP 75. Bollinger was punching straight and across his body, coming within six inches of Russell. 2RP 75. Russell was leaning backward over the tub. 2RP 75.

Mezen had Bollinger’s left arm when Linder entered the bathroom. 2RP 84. Linder grabbed his right arm. 2RP 84. Bollinger continued to struggle. 2RP 84. His left hand came free and Bollinger grabbed the towel rack with it. 2RP 84. He pulled it off the wall and raised it above his head. 2RP 84. He began to swing it down toward Russell. 2RP 85. Linder grabbed

the top of Bollinger's head and unsuccessfully tried to put a neck hold him. 2RP 87-88. But Bollinger dropped the towel bar and grabbed Linder's arm to try to stop the neck hold. 2RP 88. Mezen saw the towel rod come off the wall. 2RP 107.

Linder let go of Bollinger's right arm when he went to grab Bollinger's head. 2RP 91. Linder was not sure what Russell was doing because he was focused on controlling the right side of Bollinger's body. 2RP 93. Linder did not recall Bollinger throwing any punches. 2RP 94. He did not recall Bollinger's feet being off the floor, but again he was focused on the right side of Bollinger's body. 2RP 95.

After he was subdued, Mezen transported Bollinger to the jail. On the way, Mezen asked why he did not just come out of the bathroom. 2RP 103. Bollinger replied, "Come on, Mezen. You know I'm not going to go easy." 2RP 105.

### III. ARGUMENT

**A. REGARDLESS OF WHETHER BOLLINGER'S MOTION IN LIMINE TO PROHIBIT THE STATE FROM REFERRING TO THE ALLEGED ASSAULT VICTIM AS A "VICTIM" WAS MERITORIOUS, HIS CLAIM IS FRIVOLOUS WHERE THE STATE NEVER USED THE TERM "VICTIM" IN FRONT OF THE JURY.**

Bollinger argues that the trial court's denial of his motion in limine

to prohibit the State from referring to the alleged assault victim as a “victim” requires that he be granted a new trial. This claim is frivolous because regardless of the merits of the motion in limine, neither the State nor any witness used the term “victim” in front of the jury.

Before trial Bollinger filed the following motion in limine:

9. Defense requests that the Court instruct the State to prevent any reference to the complaining witness as "The Victim."

CP 19. After hearing argument by the parties, the trial court denied the motion. RP (6/26) 7-9. Nevertheless, the jury heard the word “victim” only twice during the trial. Both instances were uttered by defense counsel during closing argument, and both were preceded by the word “alleged.” 2RP 134, 140.

Regardless of the merits of Bollinger’s motion in limine, or the trial court’s ruling, the State complied with the motion. Any purported error in the court’s ruling would thus be absolutely harmless. This claim should be denied.

**B. THE EVIDENCE WAS SUFFICIENT TO CONVICT BOLLINGER OF THIRD-DEGREE ASSAULT WHERE DEPUTY RUSSELL TESTIFIED THAT BOLLINGER THREW PUNCHES AT HIM WHILE THEY WERE ATTEMPTING TO ARREST HIM ON A FELONY WARRANT AND WHERE DEPUTY LINDER ALSO TESTIFIED THAT BOLLINGER RIPPED A TOWEL BAR OFF THE WALL AND WOULD HAVE STRUCK RUSSELL WITH IT HAD LINDER NOT ATTEMPTED TO PLACE BOLLINGER IN A CHOKE HOLD.**

Bollinger next claims that the evidence is insufficient to support his conviction for third-degree assault. This claim is without merit where Deputy Russell testified that Bollinger threw punches at him while they were attempting to arrest him on a felony warrant and where Deputy Linder also testified that Bollinger ripped a towel bar off the wall and would have struck Russell with it if Linder had not attempted to place Bollinger in a choke hold.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Although Bollinger recites the correct standard of review, he then essentially asks this Court to reweigh the evidence. He first argues that Russell only testified that Bollinger "was trying" to throw punches, not that any were actually throw." Brief of Appellant, at 7. This contention is belied by the record:

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

2RP 65. Russell clarified his statement, 2RP 66, that Bollinger "was trying

to throw punches in [his] direction.” Essentially, he was throwing punches, but was just unable to connect:

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. And Deputy Mezen had some rapport with him in the past. And so he was doing a very good job of trying to de-escalate the situation and trying to talk to him.

So there was -- it was quite a long time. We were probably in the bathroom for a span of about five minutes struggling with him. And there was times where we were just trying to hold him in position to give him a moment to calm down with the heightened emotions and everything that was going on. But then he would just jack himself back up.

Q. Did Mr. Bollinger make contact with you when he was throwing the punches?

A. He didn't. He was coming very close, though.

Q. How were you able to avoid being hit?

A. When I went down to grab his legs, somehow -- I don't know how, Deputy Linder was able to do it. But all of his -- all of John's punches came with his right hand. And Deputy Linder was able to get ahold of his left hand somehow.

He had it kind of holding his arm kind of up around his right shoulder. He had had a good hold on [2RP 67] his arm. So he's throwing across his body. And so he was (indicating) -- as far as his reach could go, but he still -- I was able to escape just far enough back. I would say, maybe, three or four punches.

Q. Okay. So Deputy Linder, by restricting his left arm, was able to limit his range of motion to the degree

that it didn't actually come into contact with you?

A. Right. Yes, ma'am.

2RP 66-68. He further clarified on cross-examination that Bollinger was punching straight and across his body, coming within six inches of Russell.

2RP 75. Russell was leaning backward over the tub. 2RP 75. Russell thought they "looked like they would have been pretty good punches." 2RP

76. Clearly the jury could have concluded from this testimony that Bollinger attempted to punch Russell.

Linder also testified that Bollinger pulled the towel bar off the wall and raised it to strike Russell. 2RP 84-85. However, Linder attempted to put Bollinger into a choke hold and he dropped the bar. 2RP 87-88.

As noted, Bollinger misperceives the standard of review and argues that no reasonable jury could not have found him guilty because the deputies supposedly contradicted each other. This is essentially a credibility argument and should be disregarded.

Nevertheless, while neither Linder nor Mezen recalled seeing punches thrown, they both emphasized that they were very focused on trying to subdue Bollinger. 2RP 95, 99. And Mezen did see Bollinger rip the towel rod from the wall. 2RP 107. Moreover, the struggle involved four men in a very small space who were focused on bringing a very belligerent individual under control without themselves or Bollinger being seriously

injured. 2RP 64, 66, 84, 90, 98. A juror could reasonably concluded that under the circumstances it was not implausible that all the deputies may not have seen Bollinger's assaults on Russell. This claim should be rejected.

#### IV. CONCLUSION

For the foregoing reasons, Bollinger's conviction and sentence should be affirmed.

DATED April 2, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'TR' followed by a long horizontal stroke.

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**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

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