

FILED

FEB 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29928-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

KYLE J. STODDARD,

Defendant/Appellant.

APPELLANT'S BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Appellant
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Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of first degree assault.
2. The prosecuting attorney committed flagrant misconduct in closing argument which prejudiced Kyle J. Stoddard's constitutional right to a fair trial.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the evidence presented by the State establish intent to inflict great bodily harm with a deadly weapon, or only intent to inflict substantial bodily harm?
2. Was the knife, which was not a per se deadly weapon, used under circumstances establishing that it was a deadly weapon?
3. Did the prosecuting attorney's closing and rebuttal arguments impinge on Mr. Stoddard's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Const. art. I, §§ 3 & 22, when he asked the jury to
 - a). presume that Mr. Stoddard intended the natural consequences of his act; and/or
 - b). validate the actions of Officer Potter, hold Mr. Stoddard accountable for his actions and validate the

community's approval of the actions of all the officers involved in Mr. Stoddard's case?

STATEMENT OF CASE

Officer Potter of the Cle Elum Police Department was on duty at 4:00 a.m. in the morning on January 29, 2011. As he backed his patrol car out of the Kittitas County Corrections Center sally port he saw a man and woman in what appeared to be an argument. The man's hands were at waist level and flailing around. (RP 24, ll. 1-2; RP 27, ll. 16-18; RP 29, ll. 3-8; RP 30, ll. 2-11; RP 39, ll. 10-18; RP 40, ll. 2-6; ll. 12-19).

Officer Potter continued to back his patrol car out of the sally port. He then pulled up alongside the curb and stopped. He cleared his prior call before making contact with the two people. As he sat in his car the man and woman continued to argue. The man then broke away from the confrontation, flailed his arms and jumped onto the sidewalk. He started walking toward the patrol car. (RP 42, ll. 8-21; RP 43, l. 12 to RP 44, l. 3).

As the man approached the patrol car Officer Potter got out. He believed that a verbal domestic violence incident had occurred. He yelled "Hey, what's going on." The man responded "fuck off Po-po". He then gave the officer the finger. (RP 40, l. 24 to RP 41, l.8; RP 44, ll. 18-21).

The officer ordered the man to stop. He continued to walk away. The second time he was ordered to stop he turned around and put his

hands on his chest. The female, later identified as Kendra Gibson, then intervened and placed the man in a bear hug. Officer Potter called for backup. (RP 50, l. 24 to RP 51, l.7).

The man, who was later identified as Mr. Stoddard, continued his verbal barrage toward the officer. Officer Potter grabbed his arm and tried to get him to sit on a barrier wall. Mr. Stoddard spun away with Ms. Gibson still giving him a bear hug. (RP 51, ll. 12-24).

As Officer Potter put his right hand on Mr. Stoddard's left shoulder in an attempt to separate him and Ms. Gibson, Mr. Stoddard pushed her away, reached into his pocket and pulled a knife. He flipped it open and stated "I am going to cut right through you fucker." (RP 52, ll. 1-14).

Officer Potter backpedaled as Mr. Stoddard stepped toward him. He drew his gun. Mr. Stoddard took a second step and lunged at the officer. Officer Potter began to squeeze the trigger. Ms. Gibson again intervened. (RP 53, ll. 7-24).

Officer Potter yelled at Mr. Stoddard to drop the knife and get on the ground. Ms. Gibson continued to push Mr. Stoddard backwards. Mr. Stoddard pitched the knife to his left as Corporal Brunk approached. The two officers then grabbed Mr. Stoddard. (RP 54, ll. 11-19; RP 54, l. 23 to RP 55, l.7).

Deputy Green soon arrived. He took control of Ms. Gibson and later recovered the knife. It was a pocket knife with a blade less than 3 inches in length. It was neither spring-loaded nor a switchblade

knife. (RP 56, ll. 1-6; RP 63, ll. 1-3; ll. 21-22; RP 65, ll. 8-9; ll. 19-23; RP 197, ll. 1-10).

As the officers were trying to handcuff Mr. Stoddard he spit at Corporal Brunk and missed. He then fell forward toward the area where he had thrown the knife. The officers and Mr. Stoddard ended up in a heap on the ground. Corporal Brunk landed on his hands and knees. He cut his fingers. He has a scar on the palm of one hand. He experienced pain in both of his knees. (RP 105, ll. 11-12; RP 105, l. 23 to RP 106, l. 4; RP 106, ll. 8-12).

Officer Potter wrenched his shoulder when it was pinned between the ground and his holster. He suffered a torn rotator cuff. (RP 57, ll. 6-16; RP 58, ll. 5-16; RP 58, ll. 17-24; RP 68, ll. 17-21; RP 69, ll. 17-21; RP 101, l. 21 to RP 102, l. 6; RP 103, l. 22 to RP 104, l. 3).

Additional officers soon arrived including Correction Officer Holmes. During a patdown search, while he was on the ground, Mr. Stoddard spit in Correction Officer Holmes' face. (RP 59, ll. 5-8; RP 162, ll. 9-19; RP 163, ll. 8-14).

Mr. Stoddard continued his verbal abuse of the officers. (RP 67, ll. 9-18; RP 110, ll. 1-7). He threatened them even after he was handcuffed and surrounded. He made statements such as:

“Fuck you, you ain't shit, this badge won't
protect you.”

(RP 86, ll. 9-12);

“Fuck you, niggers.” “...I am going to cut
your fucking neck off.”

(RP 162, ll. 22-25; RP 196, ll. 17-25).

Mr. Stoddard smelled of alcohol. He was so angry he was foaming
at the mouth. (RP 86, ll. 5-7; RP 88, ll. 11-20).

An Information was filed on February 2, 2011. It charged Mr.
Stoddard with one count of first degree assault and two counts of third de-
gree assault. (CP 2).

An Amended Information was filed on March 14, 2011. It added a
third count of third degree assault. Counts One and Two involved Officer
Potter. The other two counts involved Corporal Brunk and Correction Of-
ficer Holmes. (CP 41).

Mr. Stoddard stipulated that his statements to the officers during
the confrontation were admissible. (CP 6).

Ms. Gibson is Mr. Stoddard’s former girlfriend. They are still
friends. She described how he always talks with his hands. (RP 231, ll.
12-20; RP 241, ll. 10-15).

Ms. Gibson acknowledged that Mr. Stoddard had a knife in his
hand, but that he dropped it when Officer Potter drew his gun. She denied
seeing Mr. Stoddard lunge at Officer Potter. She also denied that Mr.
Stoddard threatened Officer Potter. (RP 234, ll. 3-17; RP 235, ll. 5-21; RP
235, l. 25 to RP 236, l. 6; RP 237, ll. 2-7).

During his closing argument the prosecuting attorney stated:

...[T]he spit doesn't hit Officer Brunk so it's not an actual striking there but he certainly struck him when he goes down to the ground. Whether he hits his leg and got his hand all scratched up, it doesn't have to be his act of striking. **He was intending for reasonable consequences of his action** were for them to get hurt and they were.

(RP 267, ll. 18-24). (Emphasis supplied.)

In his rebuttal argument the prosecuting attorney made the following statement:

Officer Potter deserves validation for his action. We have action and safety. **The community deserves validation by all the officers** who's actions were involved to get Mr. Stoddard under control. **Mr. Stoddard deserves to be held accountable** for his actions as well.

(RP 284, ll. 10-15). (Emphasis supplied.)

A jury found Mr. Stoddard guilty of first degree assault under Count One and third degree assault under Counts Three and Four. (CP 104; CP 105; CP 106).

A pre-sentence investigation was ordered. It determined that Mr. Stoddard's offender score is 7. Both Mr. Stoddard and his attorney stipu-

lated to the offender score as being correct. (CP 108; RP 293, ll. 18-20; RP 293, l. 21 to RP 294, l. 4).

Judgment and Sentence was entered on May 23, 2011. Mr. Stoddard filed his Notice of Appeal the same date. (CP 161; CP 174).

SUMMARY OF ARGUMENT

The State failed to prove, beyond a reasonable doubt, that Mr. Stoddard intended to inflict great bodily harm on Officer Potter.

The facts and circumstances only support the commission of second degree assault.

Prosecutorial misconduct occurred in the closing and rebuttal arguments. Mr. Stoddard is entitled to a new trial as to Count One.

ARGUMENT

A. FIRST DEGREE ASSAULT

Count One of the Amended Information states, in part:

He, the said, KYLE J. STODDARD, in the State of Washington, on or about January 29, 2011, the aboved-named Defendant, with intent to inflict great bodily harm, did assault another person, to wit: Ryan Potter, with any deadly weapon... .

Instruction 6 states: “A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon.” (CP 83; Appendix “A”).

Instruction 7 is the to-convict instruction on first degree assault. It mirrors the definition of first degree assault contained in Instruction 6. (CP 84; Appendix “B”).

Instruction 8 contains the definition of “assault.” All three alternatives are included. (CP 85; Appendix “C”).

Instruction 11 provides the definition of “deadly weapon.” It states:

Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is use[d], attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.

(CP 88; Appendix “D”)

The trial court provided an instruction on “great bodily harm.” No instruction was given as to “substantial bodily harm.” (Instruction 10; CP 87; Appendix “E”).

Mr. Stoddard takes the position that the evidence introduced by the State is insufficient to prove, beyond a reasonable doubt, each and every element of the offense of first degree assault as set out in the Amended Information and as defined by the jury instructions.

“...[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 590 (1979).

State v. Green, 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980).

Officer Potter provided a vivid description of his fear and apprehension on the evening of January 29, 2011.

When he pushes the female back as soon as he does that and he breaks free his right hand drops to his pocket. I can't say whether his hand went in his pocket or the knife was deployed on the outside on a clip. At that time he grabbed that knife with a flick of the wrist he said, "I am going to cut right through you, fucker." With the flip of the wrist. He stepped forward. I noticed a knife. I can take as many steps backwards retreating. I get five, six paces away. I draw my firearm. I notice there is a knife in his hand. As I am drawing he is still approaching, takes another step and does one of this – he does a lunge as he's taking a step—this is now two towards me. In my mind I see this knife. I am drawing my gun. I am thinking that I am going to have to kill this man be-

cause he is so close. I am beginning – so my firearm comes up. My finger is on the trigger. I am going to squeeze. The female interjects pushing Mr. Stoddard. He goes backwards. My finger comes off the trigger, which I was expecting to go off any moment. He was that close. I was in my mind the only way this man is going to stop is if I pull this trigger. He had threatened that he was going to cut right through me. My life was in danger. I kept going if further back. I feared that I was going to hit this barrier if I tripped over that barrier I would be on my back. I can't gain anymore distance away from this individual. He's got a knife. [sic.]

(RP 53, l. 7 to RP 54, l. 8).

Initially, Mr. Stoddard contends that the knife does not qualify as a deadly weapon. RCW 9A.04.110(6) defines the phrase “deadly weapon” as follows:

...any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, ...which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

The definition of “deadly weapon” as set forth in RCW 9A.04.110(6) only references “substantial bodily harm.” It does not include “great bodily harm,” or “bodily injury,” or “physical injury” or “bodily harm.”

RCW 9A.04.110(4) contains various definitions pertaining to degrees of injury. The degrees of injury are significant insofar as they may be an element of a particular offense.

RCW 9A.04.110(4)(a) states: “‘bodily injury,’ ‘physical injury,’ or ‘bodily harm’ means physical pain or injury, illness, or an impairment of physical condition.”

RCW 9A.04.110(4)(b) provides:

“Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(c) states:

“Great bodily harm” means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

Thus, the critical aspect of the jury instructions and evidence pertains to whether or not Mr. Stoddard’s possession and use of the knife

amounted to an intent to inflict “great bodily harm” or “substantial bodily harm,” or only “bodily harm.”

...[W]hether there has been an assault in a particular case depends more on the apprehension created in the mind of the victim than upon the undisclosed intention of the assailant.

State v. James, 56 Wn. (2d) 43, 45, 351 P.(2d) 125 (1960).

As previously noted, Officer Potter’s fear and apprehension cannot be denied. Since there was no actual battery, the first alternative of the assault definition is inapplicable. Thus, under either of the last two alternatives the jury could find that an assault occurred.

As set out in *State v. Hall*, 104 Wn. App. 56, 65, 14 P.3d 884 (2000):

The second means of assault includes proof of an attempt to inflict bodily injury within its definition. ...When an attempt to commit a specified act is included within a crime definition, then the attempt constitutes the crime rather than the general crime of attempt as found in RCW 9A.28.020.

The criteria for evaluating whether or not a knife is a “deadly weapon” can be gleaned from *State v. Shilling*, 77 Wn. App. 166, 171, 889 P. 2d 948 (1995):

An item is a deadly weapon if, under the circumstances in which it is used, it is readily capable of causing death or substantial bodily harm. ...”Circumstances” include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and

the physical injuries inflicted.” *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P. 2d 233 (1972) (construing RCW 9.95.040)(quoting *People v. Fisher*, 234 Cal. App. 2d 189, 193, 44 Cal. Rptr. 302 (1965)). Ready capability is determined in relation to circumstances, with reference to potential substantial bodily harm.

Officer Potter believed that Mr. Stoddard intended to cut him. Mr. Stoddard stated his intent. He had the present ability to inflict bodily injury on Officer Potter.

What degree of “bodily harm” did Mr. Stoddard intend to inflict on Officer Potter? His anger and his actions on the evening of January 29, 2011 indicate intent; but what is missing, is the degree of harm that Mr. Stoddard intended.

Other than the actions described by Office Potter, the knife was never applied to any part of the officer’s body. The knife did not inflict any physical injury.

The State failed to introduce any evidence that the knife could cause death.

Moreover, the quality of the transcript calls into question the accuracy of the statement attributed to Mr. Stoddard. *i.e.*, “I’m going to cut through you.” The statement could just as well have been “I’m going to come through you.”

These significant defects in the State’s case preclude a finding of intent to inflict “great bodily harm.”

RCW 9A.36.021(1) provides, in part:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...

(c) Assaults another with a deadly weapon... .

Second degree assault, as defined in RCW 9A.36.021(1)(c), is the appropriate offense to be considered under the facts and circumstances and in light of the jury instructions.

B. PROSECUTORIAL MISCONDUCT

“In order to prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.” *State v. Binh Thach*, 126 Wn. App. 297, 316, 106 P. 3d 782 (2005).

Mr. Stoddard contends that prosecutorial misconduct occurred in both the closing argument and the rebuttal argument. Defense counsel did not object to these arguments.

Failing to object waives the objection unless the comment was so flagrant or ill intentioned that it causes an enduring prejudice that could not be cured by instruction. ...A new trial is not necessary if the trial court could have cured the misconduct by giving a curative instruction but the defendant did not request one.

State v. Binh Thach, supra.

Mr. Stoddard contends that the comments made by the prosecuting attorney during his respective arguments were flagrant and ill-intentioned.

The prosecutor was, in essence, asking the jurors to place themselves in the position of Officer Potter and the other officers, and thus validate their actions.

Furthermore, the prosecuting attorney was attempting to make a golden rule argument.

Typically, specific references by counsel to allusions, such as “urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position,” is an improper argument. *Adkins v. Aluminum Co. of Am.*, 110 Wn. 2d 128, 139, 750 P. 2d 1257, 756 P. 2d 142 (1988)(quoting JACOB A. STEIN, CLOSING ARGUMENT § 60, at 159 (1985)). Courts find such arguments improper because it encourages jurors to depart from neutrality and decide the case on the basis of personal interest rather than the evidence.

State v. Binh Thach, supra, 317.

Finally, as to the prosecuting attorney’s argument that Mr. Stoddard intended the natural consequences of his act, such an argument is impermissible and highly prejudicial.

“Decisions of the United States Supreme Court make it clear that the jury should not be instructed that the law presumes that a person intends the ordinary consequences of his or her own voluntary acts.” COMMENT to WPIC 6.25. *See also: Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1065, 85 L. Ed 2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

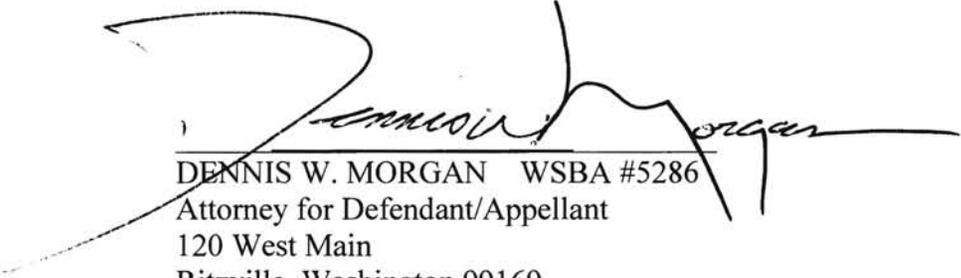
CONCLUSION

Mr. Stoddard is entitled to a new trial due to flagrant and ill-intentioned misconduct by the prosecuting attorney during his closing and rebuttal arguments.

Alternatively, Mr. Stoddard's conviction for first degree assault should be reversed and the case remanded for entry of judgment on second degree assault.

DATED this 8th day of February, 2012.

Respectfully submitted,



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APPENDIX "A"

INSTRUCTION NO 6

A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon.

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APPENDIX "B"

INSTRUCTION NO 7

To convict the defendant of the crime of Assault in the First Degree, as charged in Count One, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 29th day of January, 2011, the defendant assaulted Ryan Potter:

- (2) That the assault was committed with a deadly weapon
- (3) That the defendant acted with intent to inflict great bodily harm;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

INSTRUCTION NO. 8

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. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

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APPENDIX "D"

INSTRUCTION NO. 11

Deadly weapon means any weapon, device, instrument, substance or article which under the circumstances in which it is use, attempted to be used or threatened to be used, is readily capable of causing death or substantial bodily harm.

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APPENDIX "E"

INSTRUCTION NO. 10

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

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