

COA No. 34153-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LANCE THEOPOLIS SMITH,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support a finding of guilt.

Issue Pertaining to Assignment of Error

A. Was the State's evidence insufficient to prove guilt beyond a reasonable doubt? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Lance Theopolis Smith was charged by information with one count of third degree assault involving a law enforcement officer. (CP 1). After several competency examinations with mixed results, Mr. Smith was finally determined to be competent to stand trial. (CP 17, 22, 28, 53, 117, 120, 129). He further waived a CrR 3.5 hearing and agreed that his statements to law enforcement were admissible. (9/17/15 RP 7-8). The case proceeded to jury trial.

Darryl Smith, Lance's father, reported his car was stolen on July 16, 2014. (2/1/16 RP 46). Later that day in the early afternoon, the car showed up after his son had driven it. (*Id.*) Lance left and Mr. Smith figured he was probably going to his house. (*Id.* at 47-48). The father contacted police when the car was stolen and when it was returned. (*Id.* at 48). There was a third

contact with police after Lance was arrested. (*Id.* at 51). He was acting strangely and aggressively, alarming his mother. (*Id.* at 53).

Richland Police Officer Joe Brazeau was on duty July 16, 2014. (2/1/16 RP 56). He responded to a disturbance involving a vehicle stolen earlier, but was returned. (*Id.*). Dispatch advised the officer that Lance Smith had left his father's house and was walking westbound on Columbia Park Trail. (*Id.* at 57). He located the suspect, who confirmed he was Mr. Smith, in the parking of Kimo's restaurant. (*Id.*).

Officer Brazeau asked him questions about his father's vehicle and the disturbance at the house. (2/1/16 RP 58). Mr. Smith appeared agitated and upset, exhibiting aggressive behavior. (*Id.* at 59). The officer detained him. (*Id.*). After Kennewick Police Officers Jones and Sullivan arrived, Mr. Smith's behavior got progressively worse. (*Id.* at 60). He was placed under arrest. (*Id.*). Officer Brazeau grabbed his wrist to take him into custody, but Mr. Smith started to spin in an attempt to break contact. At that point, he was physically taken to the ground by all three officers. (*Id.*). Mr. Smith was fighting and swinging to get away. (*Id.* at 61). Officer Brazeau gave him several knee strikes to gain compliance. (*Id.* at 62).

After Mr. Smith was cuffed, Officer Brazeau broke contact. (2/1/16 RP 63). Other police officers patted him down for weapons. (*Id.*). While Officer Crouch was doing the pat-down, Mr. Smith leaped up, swung his head, and struck Officer Florence in the face. (*Id.* at 64). Mr. Smith was taken from the scene around 2:30 p.m. (*Id.*). He was in restraints and was taken to Kadlec Medical Center for medical clearance. (*Id.* at 65).

Kennewick Police Officer Rebecca Jones responded to Kimo's parking lot where Officer Brazeau was with Mr. Smith, who was also a suspect in a disturbance call at a store that wanted him trespassed. (2/1/16 RP 78). Officer Jones saw the altercation between Mr. Smith and Officers Brazeau and Sullivan. (*Id.* at 82). She grabbed Mr. Smith's leg to help take him down. (*Id.* at 83). They later stood him up. (*Id.* at 86). Officer Jones saw him abruptly thrust his upper body into the air in a backwards motion, but she did not see contact with any other person. (*Id.* at 84).

Kennewick Police Officer Josh Sullivan responded to Kimo's parking lot on July 16, 2014. (2/1/16 RP 93). Mr. Smith was agitated and yelling while talking to Officer Brazeau. (*Id.* at 93-94). Under arrest, Mr. Smith tensed up when Officer Sullivan got ahold of his arm to physically detain him. (*Id.* at 95). They got Mr.

Smith on the ground, but he was actively resisting. (*Id.* at 96).

Back up, he tensed and jumped. (*Id.* at 98). Officer Sullivan did not see Mr. Smith strike anyone. (*Id.*).

Richland Police Officer Jason Crouch arrived at Kimo's parking lot after Officers Brazeau, Jones, and Sullivan had Mr. Smith on the ground and in cuffs. (2/1/16 RP 108-09). Incident to the arrest, Officer Crouch started searching him on the right side of his body. (*Id.* at 110). Officer Florence came in to help when Mr. Smith head-butted him in the face. (*Id.* at 110, 118, 121). Officer Crouch grabbed him by the hair, put him on the patrol car hood, and eventually on the ground as the hood was too hot. (*Id.* at 111). Mr. Smith was yelling, screaming, and calling himself the Joker and the cops pussies. (*Id.*). Officer Crouch contacted Mr. Smith's father. (*Id.* at 112). He took photos of Officer Florence's face after Mr. Smith head-butted him. (*Id.*).

Richland Police Officer Drew Florence responded to Kimo's on July 16, 2014. (2/1/16 RP 127-28). He saw a male subject detained and stood up off the ground. (*Id.* at 128). He walked over to help Officer Crouch search Mr. Smith. (*Id.* at 129). When three feet away, the officer stepped toward him and Mr. Smith reared his head up in a swinging motion and hit him underneath the eye with

his forehead. (*Id.* at 130). Officer Florence's face swelled up a little bit and was red for a while, but nothing permanent. (*Id.*). After being transported to Kadlec, the officer testified he heard Mr. Smith tell the doctor he had head-butted an officer and he probably should not have. (*Id.* at 132).

Mr. Smith testified in his own defense. On July 16, 2014, he took his parents' car and went to the Blue Mountains with his guitar. (2/2/16 RP 148). He returned about 2 p.m., threw the keys to his mother, and took off. (*Id.* at 150). Mr. Smith testified he bumped an officer in the eye when he got spooked. (*Id.* at 154). He was not going to head-butt anyone; it was just an accident. (*Id.*). Mr. Smith never yelled at the police and was completely peaceful. (*Id.* at 156). At Kadlec, he told a doctor that some cop told him he head-butted an officer, but he did not do it. *Id.* at 158). Mr. Smith insisted he did not intentionally head-butt the officer. (*Id.* at 159).

There were no objections or exceptions to the court's jury instructions. (2/2/16 RP 167). The jury found Mr. Smith guilty of third degree assault. (*Id.* at 210). The court sentenced Mr. Smith to 3 months, but he had long since served his time. (*Id.* at 213; 2/11/16 RP 216). Only mandatory LFOs were imposed because of

Mr. Smith's present financial circumstances, which were not likely to change in the future. (*Id.* at 217-220). This appeal follows.

III. ARGUMENT

A. The State's evidence was insufficient to support guilt beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). To-convict instruction 5 provided:

To convict the defendant of the crime of Assault in the Third Degree, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about July 16, 2014, the defendant assaulted Drew Florence;

(2) That at the time of the assault Drew Florence was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 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. (CP 180).

The definition of assault was provided in instruction 6:

An assault is an intentional touching or striking of another person, with unlawful force, 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. (CP 181).

Instruction 7 stated that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” (CP 182). The only issue was whether Mr. Smith acted with intent. (See 2/2/16 RP 195).

The State must establish beyond a reasonable doubt that Mr. Smith assaulted Officer Florence. Assault is an intentional act. *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000), *review denied*, 143 Wn.2d 1023 (2001). Assault is not defined by statute and is defined by common law. *State v. Aumick*, 126 Wn.2d 422, 426 fn.12, 894 P.2d 1325 (1995). It requires the specific intent to assault another. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994); *Hall, supra*.

Viewed in a light most favorable to the State, the evidence was that Mr. Smith lunged and his head struck Officer Florence in the face. *Green, supra*. Mr. Smith was agitated and yelling and screaming, but nothing shows he intended to strike another person. Mr. Smith testified the contact was accidental and he had not head-butted the officer intentionally. (2/2/16 RP 158-59). At Kadlec, he purportedly said he head-butted an officer and should not have done that. (2/1/16 RP 132). Even so, it only shows there was a striking – not that it was intentional. And that was the defense.

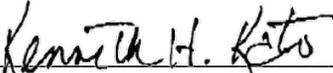
Although credibility is the sole province of the jury, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). To find Mr. Smith acted with intent, the jury did not rely on facts or inferences from them, but rather speculated that he so acted. Since this element was not proven beyond a reasonable doubt, the conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smith respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this 14th day of December, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on December 14, 2016, I served a copy of the Brief of Appellant by USPS on Lance Smith at his last-known address, 1645 Columbia Park Trail, Richland, WA 99352; and by email, as agreed, on Andrew K. Miller at prosecuting@co.benton.wa.us.

