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Court of Appeals
Division III
State of Washington
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No. 35030-4

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

STATE OF WASHINGTON, Respondent

v.

DANNY TRICE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JUDGE MARYANN C. MORENO

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The evidence was insufficient to sustain a conviction for assault fourth-degree.
- B. The evidence was insufficient to sustain a conviction for assault in the second degree as an accomplice.
- C. The convictions for second and fourth-degree assault violates Mr. Trice's right against double jeopardy.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- C. Did the State fail to prove beyond a reasonable doubt the absence of self-defense requiring reversal of the assault fourth-degree conviction?
- D. Did the State fail to prove beyond a reasonable doubt that Mr. Trice acted as an accomplice to assault in the second degree?
- E. The Double Jeopardy Clause prohibits multiple convictions for the same offense. Where convictions for assault were based on acts committed against the same person during a single uninterrupted episode, was Mr. Trice convicted twice for the same offense, in violation of the Double Jeopardy Clause?

II. STATEMENT OF FACTS

Prosecutors charged Danny Trice (“Trice”) by amended information with two counts of assault in the second degree based on events that occurred the morning of July 25, 2016. (RCW 9A.36.021(1)(c)-(f). CP 33.

Jack Radke (“Radke”) owned an apartment building and leased one of the apartments to Kevin Richard (“Richard”) through the Spokane Housing Authority. Vol. 1RP 87,90. At some point, during the leasing period, Richard fell behind in his portion of the rent and Radke served him with a ‘pay or quit’ notice. Vol. 1RP 91.

In May 2016, Trice became acquainted with Richard, who invited him to stay as a guest at the apartment. Vol. 1RP 185-186. Trice had recently started receiving disability social security benefits but was homeless, and agreed to stay at the apartment. Vol. 1RP 186. About two weeks later Richard was jailed. Vol. 1RP 186. He asked Trice to keep the apartment for him. Vol. 1RP 187. Richard told Trice that he was on ‘veteran's housing’ and paid the rent through July. Vol. 1RP 191,200; Vol. 2RP 242.

Trice hoped that if Richard did not return, he could take over the apartment lease. Vol. 1RP 191,199. Over the course of the next few

months, Trice gave money to Richard and put the power bill in his name. Vol. 1RP 189.

After Richard was jailed, Radke came to the apartment. Vol. 1RP 193. Trice testified that Radke pounded on the door and yelled, “What the hell are you doing here?” Vol. 1RP 194.

On June 10th, Radke went to the court to obtain an eviction. He learned that because the apartment building was part of a family trust he needed an attorney to complete the eviction process. Vol. 1RP 92, 123,127. He did not take further legal action; instead, he showed up at the apartment building every morning between the middle of June and the end of July. Vol. 1RP 128-29. Radke’s contacts became increasingly louder and more threatening. Vol. 1RP 197.

Trice always spoke to Radke through either a closed door or window. Radke told him he did not want him in the apartment. Vol. 1RP 100. Each time Trice responded that he was watching Richard's possessions and Radke could not cross the threshold of the apartment. Vol. 1RP 100. Radke called the police three or four times, but they did not remove Trice. Vol. 1RP 100.

On Sunday, July 24, 2016, Trice suffered a mild heart attack. Vol. 1RP 201-202. He had suffered two heart attacks earlier that month. Vol. 2RP 208. He went to the hospital and remained there for about four hours.

Vol. 2RP 202. The hospital released him with instructions to rest and stay off of his feet. Vol. 2RP 202, 209. With the assistance of a walking stick, he made it to a bus stop and eventually to the apartment to rest. Vol. 2RP 209.

The following morning, the sound of someone pounding on the apartment door awakened him. Vol. 2RP 210-211. Inside the apartment with him were his friends Willy Banderman ("Banderman") and Trisha. Vol. 2RP 211. Trice removed the metal pipe/bar that he used as a door lock and opened the door about 12-18 inches. Vol. 2RP 212. Radke began yelling and screaming, "Where's your car at?" Vol. 2RP 212. Trice told him it was none of his business and shut the door. Vol. 2RP 212. He had the metal pipe in his hand, intending to fasten the door closed with it. Vol. 2RP 212. Radke pounded on the door again, and this time the door sprung open. Vol. 2RP 213. It startled Trice, and he feared he was going to have another heart attack because it felt like someone "had a belt around my chest and was just tightening it..." Vol. 2RP 213-214.

As Trice stepped forward, Radke yanked on the metal pipe and pulled him into the hallway. Vol. 2RP 214. Both men kept hold of the pipe. Trice said he was afraid, as Radke was a large man, weighing about 350 pounds. Vol. 2RP 216. He thought they struggled for about 30

seconds and said he was "going down" because he could not breathe. Vol. 2RP 214.

Trice managed to scream for help. Vol. 2RP 217. Banderman came out of the apartment. Trice saw Banderman swing something three or four times, one time almost striking Mr. Trice. Vol. 2RP 218. He remembered yelling, "Don't hit me. Don't hit me in the head." Vol. 2RP 218.

Banderman struck Radke several times with a hammer, causing Radke to let go of the pipe. Vol. 2RP 219. Trice and Banderman ran back into the apartment and locked the door. Vol. 2RP 220. Trice collapsed on the floor and then called 9-1-1. Vol. 2RP 220.

Banderman testified on that morning he heard Radke "yelling and screaming and pounding on our door." Vol. 2RP 277. He saw Trice open the door, close it, and try to lock it. Vol. 2RP 278-79. He said Radke then kicked in the door and grabbed Trice. He saw them grappling and heard Trice call for help. Vol. 2RP 279.

Banderman grabbed a hammer from the toolbox next to the front door and "I started hitting Jack [Radke] until he let go. As soon as he let go of Danny I stopped." Vol. 2RP 279. He knew he hit Radke three times on the shoulder. Vol. 2RP 280,281. He testified Trice did *not* tell him to hit Radke in the head with the hammer. Vol. 2RP 281. Banderman was

arrested and later entered an *Alford* plea to a lesser charge of attempted second-degree assault. Vol. 2RP 284-85.

Radke's testimony differed from that of Trice and Banderman. He testified that on the morning of July 25th, he came by the apartment building and noticed that Trice's car was not there. Vol. 1RP 101. He knocked on the door and "we had a conversation about he wasn't gone." Vol. 1RP 101. Other tenants described Radke loudly yelling and screaming at Trice. Vol. 1RP 37,46.

Radke testified "And – and then I was thinking about when is he going to be gone? So, I knocked on the door again, and that's when he came out and had – had the pipe and tried to spear me with the pipe." Vol. 1RP 101. Radke admitted to "not being very nice" when he spoke with Trice. Vol. 1RP 101, 133.

Radke said he saw the pipe, grabbed it and ended up pulling Trice out into the hallway. Vol. 1RP 134. He reported that Trice did *not* try and swing the pipe at him, but instead, "speared" it at him. Vol. 1RP 135.

Radke testified that Banderman came out of the apartment and "started whacking me across the shoulders and the back with the hammer." Vol. 1RP 104. He said, "most of the stuff he was throwing was glancing off of my shoulders or off of my back or off my face." Vol. 1RP 137. He did not feel any direct strikes. Vol. 1RP 137. He said he heard

Trice say, "Hit him in the head, hit him in the head." So he [Banderman] kept hitting me -- in the shoulder." Vol. 1RP 104.

The court gave jury instruction number 15:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP 52.

The court gave Jury Instruction No. 21:

It is a defense to a charge of assault that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using, attempting, or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 58.

Instruction No. 22

A person is entitled to act on appearances in defending himself if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 59.

Instruction No. 23

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

CP 60.

The jury found Trice *not* guilty of second-degree assault, but the lesser included offense of assault fourth degree for Count 1. CP 63-64. It found him guilty of assault second degree for Count 2. CP 65.

At sentencing, the court found the fact of Radke's hot-headed demeanor and behavior, coupled with his failure to avail himself of the simple eviction solution remarkable. CP 91. The court relied on RCW 9.94A.535(1) and found the evidence showed the incident was impacted by Radke's demeanor and failure to avail himself of the legal remedies a mitigating factor, justifying a sentence below the standard range. CP 90-92. Rather than imposing a sentence within the standard range, of 63-84 months, the court imposed a 30-month sentence. CP 96, 98. Mr. Trice makes this timely appeal. CP 115. The State has filed a cross-appeal for the exceptional downward sentence. CP 131-140.

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain A Conviction For Assault Fourth Degree and Second Degree Assault.

“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)(citing to 4 W. Blackstone, Commentaries on the Laws of England 182 (reprint 1992). Under Washington law, self-defense is an affirmative defense to a charge of assault. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

Where the issue of self-defense is raised, the absence of self-defense becomes an element of the charged offense. *State v. Felipe*

Zeferino-Lopez, 179 Wn.App. 592, 615-616, 319 P.3d 94 (2014). Due process requires the state to prove every element of a crime beyond a reasonable doubt. *Id.* at 599. Failure to prove every element of a crime requires dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

RCW 9A.16.020(3) provides in pertinent part that the use, attempt, or offer to use force upon another is not unlawful whenever *used by a party about to be injured, or by another lawfully aiding him*, in preventing or attempting to prevent an offense against his person. A person's right to use the force is dependent on what a reasonably cautious and prudent person in similar circumstances would have done, and whether he *reasonably believed* he was in danger of bodily harm. Actual danger need not be present. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980)(emphasis added).

Here, the State did not prove beyond a reasonable doubt the absence of self-defense. The record demonstrated that Radke went to the apartment on a daily basis for approximately six weeks. He yelled and threatened tenants on a regular basis. He asked the police three or four times to remove Mr. Trice. 11/28/16 RP 100. He was angry that law enforcement would not remove Mr. Trice from the apartment, stating, "I just couldn't get through that in my mind." 11/28/16 RP 97.

On July 25th, Radke again showed up at the apartment. This time because he did not see Mr. Trice's car, he had hopes that Mr. Trice had moved. Vol. 1RP 101. He knocked on the door, and when he saw Mr. Trice he yelled, "Where's your car?" Vol. 2RP 212. Mr. Trice was weakened from his heart attack and aware Radke had no right to enter the apartment. Mr. Trice was not looking for a confrontation or a physical fight. Mr. Trice closed the door to end the conversation. He then picked up the metal pipe to lock the door. Vol. 2RP 213.

Radke escalated the encounter. He stated he "got to thinking about when is he going to go" and "I was going to ask him how long he was going to be there. That was about it." Vol. 1RP 101,110. The record showed an angry, loud, and confrontational Radke knocked, kicked, or pushed open the closed apartment door. His action startled and frightened Mr. Trice. Vol. 1RP 104; Vol. 2RP 213-14.

Mr. Trice rightly feared that Radke was going to "barge into the apartment." Vol. 2RP 213. Radke acknowledged that his presence might have created a sense of threat for Mr. Trice. Vol. 1RP 110. Mr. Trice stepped forward and looked into the hallway, still holding the pipe he used to lock the door. Vol. 2RP 213-14. Radke said, "I seen the pipe coming out the door" and "I grabbed the pipe." Vol. 1RP 134. Mr. Trice agreed that Radke reached in and yanked on the pipe. Vol. 2RP 212, 214. Radke

and Mr. Trice both agreed that Radke pulled him out into the hallway. Vol. 2RP 214; Vol. 1RP 134. Mr. Trice was surprised at the turn of events “because it was the first physical contact that was ever initiated.” Vol. 2RP 214.

Radke testified Mr. Trice “speared” the metal pipe at him, but did not swing it or raise it to hit Radke. Vol. 1RP 135-136; Vol. 2RP 215. If Radke were believed, Mr. Trice used the pipe to get Radke to back off.

The test for lawful self-defense is what a reasonably cautious and prudent person in similar circumstances would have done, and whether he *reasonably believed* he was in danger of bodily harm. *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). Here, Radke was the aggressor. He pounded on the door and yelled. When Mr. Trice had ended the conversation, Radke *opened* the door to the apartment. He admitted that Mr. Trice might have felt threatened by him. Even assuming Radke’s testimony that Mr. Trice “speared” at him with the metal pipe, such use of force was not unlawful because the force was innocuous and certainly not more than was necessary. RCW 9A.16.020(3). A reasonable fact finder, standing in the shoes of Mr. Trice, knowing what he knew, and experiencing what he experienced, must conclude that he had a reasonable, subjective fear of imminent harm.

Accomplice Liability

In an odd twist, Mr. Trice was charged with and convicted of second-degree assault based on the actions of Banderman, who acted to prevent injury to Mr. Trice. In reviewing a claim for insufficient evidence, courts consider "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." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from those inferences. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Accomplice liability is predicated upon giving aid to another in the commission of the crime and that the defendant was ready to assist." *State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993). Here, the evidence is insufficient for a conviction for second degree assault for two reasons: first, Banderman justifiably defended Mr. Trice. Second, Mr. Trice was in no position to aid or assist Banderman; he called for help, he did not promote, solicit, command, encourage, request, aid or agree to aid in the commission of a crime.

Banderman testified he was awakened on July 25th by Radke yelling, screaming and pounding on the apartment door. Vol. 2RP 278. He saw Mr. Trice open the door and "just kind of dismissed Jack [Radke]

because Jack's just yelling. And so he shut the door and was trying to lock it back up when Jack kicked it in." Vol. 2RP 279.

Banderman saw Radke come through the door and grab Mr. Trice. He jumped out of bed and ran towards the door. He heard Mr. Trice call for help. He was concerned both because of the size of Radke, and the fact that Mr. Trice had had a heart attack the previous day. He grabbed the hammer and "I started hitting Jack until he let go. *As soon as he let go of Danny I stopped.*" Vol. 2RP 280. He delivered "glancing blows" to Radke in an effort to get him to release Mr. Trice¹. Vol. 2RP 281.

RCW 9A.16.020(3) provides that the use, attempt, or offer to use force upon another is *not* unlawful whenever *used by another lawfully* aiding, in preventing or attempting to prevent an offense against his person. Under Washington law, "an individual who acts in defense of another, *reasonably believing him to be the innocent party and in danger*, is justified in using force necessary to protect that person *even if, in fact, the party whom he is defending was the aggressor.*" *State v. Bernardy*, 25 Wn.App. 146, 148, 605 P.2d 791 (1980). (emphasis added). Radke

¹ Banderman testified Mr. Trice did not tell him to hit Radke in the head. 11/29/16 RP 281. However, Banderman himself was hit in the head in the scuffle. 11/29/16 RP 282.

provoked the confrontation. Banderman's actions, for which Mr. Trice was held accountable, were a legitimate use of force.

Similarly, to pass constitutional muster, the state was required to prove that Mr. Trice had actual knowledge he was promoting or facilitating the crime when he called out for help. RCW 9A.08.020(3)(a); *State v Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015). "Knowledge" means a person is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or he has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b)(9)(i)(ii).

Here, the evidence does not show the required element of knowledge. Radke opened the door. Radke grabbed the metal pipe and pulled Mr. Trice into the hallway. Mr. Trice was clearly the weaker of the two men. Mr. Trice called out for help. Banderman grabbed the first thing he could find and went to aid Mr. Trice, from what both feared was an event that could either cause Mr. Trice another heart event or some other physical injury. Even if the jury were to believe that Mr. Trice told Banderman to hit Radke in the head, the state did not produce evidence that Mr. Trice knew that another defending him was a crime or that he was aiding in or soliciting a crime.

The reality of the events that day was that Radke was angry. He did not like having ‘squatters’ in the apartment. He did not pursue the legal remedies that he knew were available to him. Instead, in his angry and threatening demeanor, he forced and then escalated a confrontation with Mr. Trice. This Court should reverse the convictions and remand with instructions for the dismissal of both charges with prejudice.

B. Mr. Trice Was Punished Twice For The Same Offense In Violation Of The Double Jeopardy Clause.

Without conceding that Mr. Trice’s convictions should be reversed for insufficient evidence, he proposes the following alternative argument.

Claims of double jeopardy are questions of law, reviewed *de novo*. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017). The Double Jeopardy Clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. The Washington Constitution mirrors the federal guarantee. Const. Art. I § 9. “Double jeopardy principles protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime.” *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014).

In *Villanueva-Gonzalez*, the defendant was charged with two counts of second-degree assault. He head-butted his girlfriend, breaking her nose, and then grabbed her neck and held her against a piece of furniture. *Id.* at 978. For the headbutting act, the jury convicted Villanueva of second-degree assault. For the neck grabbing, the jury convicted him of the lesser degree offense of fourth-degree assault. *Id.* at 979. On appeal, Villanueva argued that his actions constituted but one assault, and the two convictions violated double jeopardy. *Id.*

In its analysis, the Supreme Court reasoned that the “unit of prosecution” test was the appropriate test, rather than the “same evidence” test because “[I]f there were enough evidence to convict a person of second degree assault, no additional proof would be needed to instead convict the person of the lesser included charge of fourth degree assault.” *Id.* at fn. 3.

The Court noted that the common law of definition of assault “is *at best* ambiguous” as to whether it applies to individual actions or a course of conduct. *Id.* at 985. As a result, the Court held that assault should be treated as a *course of conduct* crime until and unless the legislature indicated otherwise. *Id.* at 985. The Court reasoned, “Interpreting assault as a course of conduct crime also helps to avoid the risk of a defendant

being ‘convicted for every punch thrown in a fistfight.’” *Id.* (quoting *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999)).

Acknowledging there is no bright-line for when multiple assaultive acts constitute a single course of conduct, the Court pointed to five factors for consideration², along with a totality of the circumstances perspective:

- (1) The length of time over which the assault acts took place,
- (2) Whether the assaultive acts took place in the same location,
- (3) The defendant’s intent or motivation for the different assaultive acts
- (4) Whether the acts were uninterrupted or whether there were any intervening acts or events, and
- (5) Whether there was an opportunity for the defendant to reconsider his actions.

Id. at 985.

Here, Radke pushed or kicked open the door to the apartment, startling the occupants. Radke reported that Mr. Trice “speared” at him with the metal pipe, presumably to either keep Radke out of the apartment or to protect himself from an enraged Radke. Radke reached out, grabbed the metal pipe and pulled Mr. Trice into the hallway. Radke hung on to the pipe, struggling with Mr. Trice. Mr. Trice had suffered a heart attack the day before and was out of breath. Fearing he would collapse and be overpowered by the larger Radke, Mr. Trice called out for help.

² The Court stated it found the factors useful, but no one factor dispositive, and the ultimate determination should depend on the totality of the circumstances. *Villanueva-Gonzalez*, 180 Wn.2d at 985.

Banderman responded and delivered "glancing blows" to Radke, who reported he did not feel anything. As soon as Radke let go of the pipe, Banderman stopped.

All of the acts took place in the hallway of the apartment complex in a little over 30 seconds. Mr. Trice does *not* concede that he intended to assault Radke, or even knew Banderman would assault Radke, but the motivation for the acts was the same: to safely get away from Radke. The acts were part of one continuous event: Mr. Trice holding the metal pipe for fear of being harmed, and Banderman using the hammer to free Mr. Trice. There was no opportunity for Mr. Trice to reconsider his action of calling for help.

Based on the record, this Court should conclude that Mr. Trice's actions constituted a single course of conduct and hold that the two assault convictions violated double jeopardy.

IV. CONCLUSION

Based on the facts and authorities, Mr. Trice respectfully asks this Court to reverse his convictions and dismiss all charges with prejudice. In the alternative, he asks this Court to find the two convictions comprised a single course of conduct and remand for resentencing.

Dated this 11th day of December 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Danny Trice, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on December 11, 2017 to:

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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Spokane County Prosecuting Attorney (at SCPAAppeals@spokanecounty.org).

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