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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

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Was the evidence sufficient for the jury to find Mr. Trice guilty of fourth degree assault where he poked the victim in the chest with a metal pipe, and guilty of second degree assault thereafter, where he requested his friend, Mr. Banderman, strike the victim in the head with a ball-peen hammer, a request that was honored?

II. STATEMENT OF THE CASE

Mr. Jack Radke (victim) owned rental property at 903 West Augusta in Spokane. RP 87. The building had eight rental units. RP 88. The defendant, Danny Trice, was a “squatter” in Apartment 1, an apartment that had been leased to Keith Richard. Exhibit P-10; RP 91, 99. After Mr. Richard became delinquent in paying rent, he left the apartment, informing Mr. Radke that the “squatters” had forced him out, and that he was afraid of them. RP 95-97. Thereafter, the defendant remained in the apartment with several other people. RP 89-91.

On June 10, 2016, Mr. Radke went to the court to obtain an eviction. Because the apartment building was part of a family trust, he needed an attorney to complete the eviction process. RP 92, 123, 127. He did not take further legal action; instead, he arrived at the apartment building every morning between the middle of June and the end of July. RP 128-29. There were seven or eight people exiting the apartment, which was a one-

bedroom. RP 93. The lease provided that guests could not reside in the apartment for more than 14 days in a six-month period without written approval of management. RP 93. Mr. Trice remained there for at least three months. RP 94. The lease had a provision that prevented subletting the apartment. RP 95.

Mr. Radke spoke with Mr. Trice three or four times; Mr. Trice would inform him that Mr. Radke, the owner, could not cross the threshold of the apartment. RP 100. During these visits, Mr. Radke was not receiving rent from Mr. Trice or anyone else. RP 98.

On July 25, the date he was assaulted, Mr. Radke went to the apartment and knocked on the door. RP 101, 152. He inquired as to why Mr. Trice was still present. RP 101. After leaving momentarily, Mr. Radke returned and knocked on the door again. *Id.* The defendant came out of the apartment and tried to spear Mr. Radke with a pipe. *Id.*¹ The pipe was about a half-inch in diameter. RP 102. Mr. Radke grabbed the pipe and pulled on it and the defendant refused to release the pipe, causing him to move further into the hallway. RP 103-04. Thereafter, a struggle ensued. RP 103-04. Mr. Trice called his friend, Mr. Banderman, to assist him; his friend exited

¹ Ms. Smith, a resident of one of the apartments at 903 West Augusta, was present on the day of the assaults and also described the events to have occurred in the manner as described by Mr. Radke. RP 68-72.

the apartment with a hammer and started whacking Mr. Radke across his shoulders, face, and back. RP 72, 104. Mr. Radke, still engaged with the pipe and defendant, tried to force him into a barrier position between himself and the hammer-bearing codefendant Banderman. RP 104. During the course of the struggle, the defendant continued to request his hammer-bearing codefendant to strike Mr. Radke in the head with the hammer. RP 104-05. Mr. Trice instructed his friend to “[h]it him in the head, hit him in the head” and his friend kept hitting Mr. Radke as instructed. RP 105-107. There were many hammer blows employed. RP 105. Mr. Radke received bruises to his back and damage to his nose from being hit with the hammer. Exhibits P-3 and P-11; RP 74-78.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND MR. TRICE GUILTY OF FOURTH DEGREE ASSAULT BY FORCIBLY POKING THE VICTIM IN THE CHEST WITH A PIPE, AND GUILTY OF SECOND DEGREE ASSAULT THEREAFTER, BY REQUESTING AND ENCOURAGING HIS FRIEND, MR. BANDERMAN, TO STRIKE MR. RADKE WITH A BALL PEEN HAMMER, INCLUDING REQUESTS TO HIT MR. RADKE IN THE HEAD, REQUESTS THAT WERE BOTH HONORED AND ACCOMPLISHED.

Mr. Trice challenges the sufficiency of the evidence supporting his convictions for fourth degree assault, accomplished when he poked the victim with a metal pipe, and for second degree assault, as an accomplice, accomplished by Mr. Trice’s request to his friend that he strike the victim

in the head with a ball-peen hammer. The evidence at trial supports both assaults.

“The test for determining the 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 guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id.*

Mr. Trice’s challenge to the sufficiency of the evidence admits all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

The essential elements of fourth degree assault are found in RCW 9A.36.041(1): “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” Intent is a court-implied element of assault in the fourth degree. *State v. Walden*, 67 Wn. App. 891, 894, 841 P.2d 81 (1992) (citing *State v. Davis*, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992)). The intentional unlawful touching of the body of another is an assault. *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993); *State v. Mathews*, 60 Wn. App. 761, 766, 807 P.2d 890 (1991), *review denied*, 118 Wn.2d 1030, 828 P.2d 563 (1992). All three divisions of Washington’s Court of Appeals agree that unlawful touching constitutes criminal assault based on the rights to privacy and to be free from bodily invasion. *See State v. Koch*, 157 Wn. App. 20, 34, 237 P.3d 287 (Div. I 2010); *State v. Stevens*, 127 Wn. App. 269, 277, 110 P.3d 1179 (Div. II 2005); *State v. Parker*, 81 Wn. App. 731, 736-37, 915 P.2d 1174 (Div. III 1996).

Poking someone in the chest with a metal pipe is sufficient to constitute a fourth-degree assault. Defendant does not argue otherwise. As

to defendant's claim that this poking was in self-defense, defendant argues disputed facts that the jury was free to consider and reject.²

Beating on someone on the shoulders and head with a ball-peen hammer constitutes second-degree assault. The defendant's encouragement and request that his friend, Mr. Banderman, beat Mr. Radke with a ball-peen hammer is enough to establish the defendant's complicity in the ensuing assault. The defendant does not argue otherwise. Again, defendant's argument that his version of the facts establishes self-defense and/or defense of himself by another was a factual argument that the jury was free to disregard, and find that Mr. Trice was an accomplice to the second-degree assault. People of our State have been killed with ball-peen hammers during arguments over rent.³ The defendant's argument that insufficient evidence

² The jury was correctly instructed on self-defense. CP 58 (Instruction No. 21). Also, the defendant received the benefit of instructions regarding a person is entitled to act on appearances, and that a person has a right to stand his ground and has no duty to retreat. CP 59, 60 (Instruction Nos. 22 and 23).

³ See *State v. Elledge*, 144 Wn.2d 62, 78, 26 P.3d 271 (2001), *as amended* (Sept. 4, 2001) ("In May, 1974, in Seattle, Washington, Elledge committed a murder and was convicted of first degree murder in April, 1975. He had killed 63-year-old Bertha M. Lush by hitting her with a ball-peen hammer. Ms. Lush was the night manager of the El Dorado Motel where Elledge was staying and the killing occurred in the course of an argument over the rent").

supported the convictions because the evidence established self-defense is without merit.

B. THE TWO CONVICTIONS ARE SEPARATE CRIMES AND EACH INVOLVE A SEPARATE COURSE OF CONDUCT.

Mr. Trice complains he was twice convicted for the same offense in violation of the constitutional prohibitions against double jeopardy. Double jeopardy prevents a person from being “twice put in jeopardy for the same offense.” WASH. CONST. ART. I, § 9. Courts review double jeopardy claims de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). While a defendant may face multiple charges arising from the same conduct, the double jeopardy prohibition forbids a trial court from entering multiple convictions for the same offense. *Freeman*, 153 Wn.2d at 770.

To determine whether a defendant’s multiple convictions for different degrees of assault are for the same offense, a reviewing court applies the unit of prosecution test. *State v. Villanueva–Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014). Because the two assaults arise from different degrees of assault, the unit of prosecution test applies in this case.

In applying the unit of prosecution test, courts determine whether multiple assaultive acts constitute one or more than one course of conduct. *Id.* at 985. In making this determination, consideration is given to: (1) the

length of time over which the assaultive 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 if there were any intervening acts or events; and (5) whether there was an opportunity for the defendant to reconsider his actions. *Id.* at 985. Importantly, no one factor is dispositive, and the ultimate determination of whether multiple assaultive acts constitute one course of conduct depends on the totality of the circumstances. *Id.* Here, the trial court specifically instructed the jury regarding the first count of assault as an assault occurring when Mr. Trice assaulted Mr. Radke with the metal pipe. CP 45 (Instruction No. 8).⁴ The trial court specifically charged the second count of assault as the attack on Mr. Radke with the hammer as either an actor or as an accomplice. CP 46 (Instruction No. 9). Moreover, the prosecutor did not commingle the two events in her closing argument to the jury, but clearly differentiated them; arguing that the first assault “charges that Mr. Trice, *acting on his own*, used the metal pipe as a deadly weapon,” (RP 332) while the second count of assault “charges that Mr. Trice, as an actor *or an accomplice*, assaulted Mr. Radke with a deadly weapon, the hammer. And you’ll get a definition of ‘accomplice.’”

⁴ Ultimately found by the jury to constitute a fourth-degree assault. CP 64.

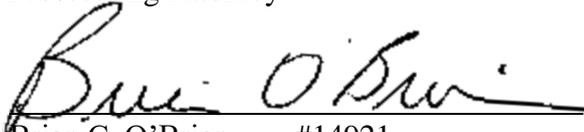
A superficial examination of the five factors could lead one to believe that the two separate assaults constitute one course of conduct. The assaults took place over a relatively short period of time and occurred at the same location. However, the first assault involved just two people, and mainly involved a poking of the victim with a metal pipe, a poking that had ended with Mr. Trice and Mr. Radke both struggling over their grip on the pipe. The second assault arose after the first. The second assault, at its genesis, involved engaging a third person, Mr. Banderman, in a separate and subsequent attack, adding the introduction of an additional and deadly weapon, a ball-peen hammer. The object of the assault changed from an offensive touching, a poking with the small diameter pipe, to a far more serious and subsequent striking of Mr. Radke in the head with the hammer. In this manner, the defendant's intent and motivation changed as the objects of the assaults changed. The assault with the poking pipe had ended. Then, Mr. Trice called in his friend, Mr. Banderman, and requested that he strike Mr. Radke in the head with the hammer. The fourth-degree assault and the second-degree assault involved different motives and different people to accomplish different ends. The prohibition against being twice convicted for the same offense was not violated under these particular facts.

IV. CONCLUSION

Sufficient evidence supports the jury's finding of guilt on both assaults. Because the separate assaults involved more than one course of conduct, there was no violation of the prohibition against being twice convicted for the same offense.

Dated this 5 day of February, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

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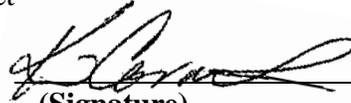
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I certify under penalty of perjury under the laws of the State of Washington, that on February 5, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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2/5/2018
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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