

NO. 35039-8-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**JONATHAN MARK NORRIS,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENT OF ERROR**

1. The trial court improperly sentenced Jonathan Mark Norris for a completed crime as opposed to an attempted crime.

## **ISSUE RELATING TO ASSIGNMENT OF ERROR**

1. Where a person is convicted of third degree assault, based upon an instruction defining assault solely as an attempted battery, should the sentence be for the completed crime or the attempted crime?

## **STATEMENT OF THE CASE**

Mr. Norris was outside the Fred Meyer store in the Spokane Valley at 6:00 a.m. on October 23, 2016. He was yelling and cursing at employees arriving for work. (Kerbs RP 36, ll. 6-18; RP 37, ll. 3-8)

Jesse Smith, an assistant manager at Fred Meyer, requested that Mr. Norris leave. Mr. Norris told him to fuck off; that he was going to kill his family; and that he was the son of God. (Kerbs RP 35, ll. 23-25; RP 37, ll. 17-21)

Steven Valentine, the manager of the Fred Meyer store, later joined Mr. Smith. Mr. Norris told him I am God's kid. I don't have to fucking leave your property. I can do what fucking ever I want. (Kerbs RP 47, ll. 13-14; RP 49, ll. 6-8)

Mr. Norris continued his rants. He continued to interfere with employees arriving for work. He attempted to lunge at Mr. Smith and Mr. Valentine. (Kerbs RP 38, ll. 18-25; RP 48, ll. 8-18; RP 50, ll. 10-11)

Mr. Norris began to walk across the parking lot. As he neared Sullivan Rd. Deputy Booth arrived. Mr. Norris was still using vulgar language, waving his hands in the air, had his fists clenched and took an aggressive stance as the deputy approached. (Kerbs RP 61, ll. 22-24; RP 67, ll. 17-22)

Deputies Schaum and Hinckley also arrived while Deputy Booth was contacting Mr. Norris. (Kerbs RP 96, l. 23 to RP 97, l. 6; RP 98, ll. 17-22; RP 110, ll. 9-12)

When Deputy Booth identified himself Mr. Norris stated: "Fuck you, you're going to have to take me in cuffs." (Kerbs RP 68, ll. 12-18)

The contact between the deputies and Mr. Norris intensified. Mr. Valentine said that Mr. Norris charged the officers and a struggle ensued. Deputy Booth indicated that Mr. Norris would approach him and then back off. Deputy Booth alleged that Mr. Norris took a swing at him but

did not connect. He resisted arrest and continued to swing his arms. (Kerbs RP 53, ll. 21-24; RP 69, ll. 5-8; RP 70, ll. 2-17; RP 71, ll. 4-11)

On the other hand, Deputy Schaum said that Mr. Norris did not get to Deputy Booth. Deputy Schaum tried to take him down but they fell backward into Deputy Booth's car. (Kerbs RP 100, l. 24 to RP 101, l. 15)

Deputy Hinkley saw something different. He claimed that Mr. Norris went at Deputy Schaum. Deputies Booth and Schaum were trying to control Mr. Norris. As Deputy Hinkley joined the brouhaha they fell to the ground. Deputy Schaum was hit in the right side and the ACL in his left knee was torn as a result of the impact. (Kerbs RP 71, ll. 14-20; RP 101, ll. 17-23; RP 112, ll. 6-16)

After Deputy Hinkley hit Mr. Norris in the mouth he said "I'm done. I'm done." Deputy Booth also heard him say that along with "I don't want to fight anymore." (Kerbs RP 72, ll. 4-6; RP 113, ll. 3-11)

An Information was filed on October 24, 2016 charging Mr. Norris with third degree assault of Deputy Booth and disorderly conduct. (CP 5)

Mr. Norris was found guilty of both charges following a jury trial on January 4-5, 2017. (CP 48; CP 49)

Judgment and Sentence was entered on January 12, 2017. (CP 84)

Mr. Norris filed his Notice of Appeal on January 20, 2017. (CP 108)

## SUMMARY OF ARGUMENT

The State elected to proceed with the third degree assault charge based upon attempted battery. Only that definition of assault was provided to the jury. (CP 42; Instruction 9; Appendix “A”)

An attempted crime is not a completed crime. The trial court sentenced Mr. Norris for a completed crime. He should have been sentenced for an attempted crime.

Third degree assault, based upon attempted battery, is a gross misdemeanor as opposed to a class C felony.

Mr. Norris’s sentence on third degree assault should be reversed and the case remanded to the trial court for imposition of a sentence based in accord with RCW 9A.20.021(2).

## ARGUMENT

A swing and a miss is a “whiff.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (6<sup>th</sup> ed.) defines “whiff,” in part, as follows: “*Baseball Slang.* (Of a batter) to strike out by swinging at and missing the pitch charged as the third strike.”

Mr. Norris was charged with third degree assault under RCW

9A.36.031(1)(g). RCW 9A.36.031(1) provides, in part:

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

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault ....

The jury instructions used the definition for an attempted battery.

WPIC 35.50, NOTE ON USE, provides: “Use the second bracketed definition in cases involving an attempt to inflict bodily injury but not resulting in a battery.”

Since Mr. Norris’s swing never connected with Deputy Booth there was no actual physical contact to constitute a battery. He attempted to strike him and failed.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1); *see also*: *State v. O’Neil*, 24 Wn.(2d) 802, 807, 167 P.(2d) 471 (1946).

When Mr. Norris tried to hit Deputy Booth he took a substantial step toward the commission of third degree assault.

A recent pronouncement on attempt crimes is set forth in *State v. Patel*, 170 Wn.2d 476, 481, 242 P.3d 856 (2010). The Court stated:

By contrast, attempt crimes do “not depend on the ultimate harm that results or on whether the crime was actually completed.” *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006). ... The attempt statute focuses on the defendant’s intent by imposing criminal liability if the defendant intends a criminal result and takes a substantial step toward achieving that result, regardless of whether the act is completed. *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). The statute specifically eliminates legal or factual impossibility as a defense. RCW 9A.28.020(2). Criminal attempt crimes provide “a basis of punishment for actors who, by mere fortuity, have not completed a crime, but who are indistinguishable in blameworthiness from those who succeed.” Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RCH. L. REV. 477, 479 (2004).

Mr. Norris contends that the analysis in *Patel* clearly supports his position that an attempted battery is an attempted assault and cannot be punished as a completed crime.

RCW 9A.28.020(3) states, in part: “An attempt to commit a crime is a : ... (d) Gross misdemeanor when the crime attempted is a class C felony ....”

Third degree assault is a class C felony. An attempt to commit third degree assault is a gross misdemeanor.

Mr. Norris has been unable to find any case law addressing the particular issue he is raising in this case. It appears to be an issue of first impression in the State of Washington.

Since the Legislature has not addressed this issue, it is Mr. Norris's position that he is entitled to the same benefits as any other defendant who has been convicted of an attempted crime. These benefits include the statutory directives contained RCW 9A.28.020(1) and (3).

Mr. Norris cannot conceive of any reasoning that should deprive him of the benefits indicated. An attempted crime is an attempted crime is an attempted crime.

## CONCLUSION

In the absence of any other statutory directive, legislative enactment, or contrary case law, the rule of lenity should be applied and his case remanded to the trial court for resentencing. *See: State v. Reeves*, 184 Wn. App. 154, 158-59, 336 P.3d 105 (2014).

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DATED this 18th day of May, 2017.

Respectfully submitted,

s/ Dennis W. Morgan

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## **APPENDIX "A"**

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INSTRUCTION NO. 9

An assault is 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.

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**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	SPOKANE COUNTY
Plaintiff,	)	NO. 16 1 04145 1
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
JONATHAN MARK NORRIS,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 18th day of May, 2017, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

COURT OF APPEALS, DIVISION III  
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CERTIFICATE OF SERVICE

**May 18, 2017 - 11:38 AM**

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