

35039-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN MARK NORRIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The trial court improperly sentenced defendant for a completed crime as opposed to an attempted crime.

II. ISSUE PRESENTED

Does 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 constitute an assault?

III. 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 36:6-18, 37:3-8

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 35:23-25, 37:17-21.

Mr. Norris continued his aggressive behavior, attempting to interfere with employees arriving for work. He attempted to lunge at Mr. Smith and Mr. Valentine, the manager of Fred Meyer. Kerbs RP 38:18-25, 48:8-18, 50:10-11.

Mr. Norris began to walk across the parking lot. As he neared Sullivan Road, Deputy Booth arrived. At the time of his arrival, Deputy Booth “observed a white male sticking his chest out in an assaultive manner with an elderly patron with -- who was wearing a Vietnam veteran hat at the time.” Kerbs RP 64. When Deputy Booth identified himself Mr. Norris stated: “Fuck you, you’re going to have to take me in cuffs.” Kerbs RP 68:12-18. Norris also informed the deputy that he would have to fight him to put him in cuffs. Kerbs RP 69. Norris had a drink or unopened can in his hand left hand. *Id.*

As Deputy Booth went hands on with Mr. Norris, Mr. Norris took a swing at the deputy with his left hand, the hand containing the canned drink. Because this swing occurred in the heat of the moment, Deputy Booth was unsure as to whether the punch connected or whether he blocked the blow. Kerbs RP 70.

As Deputies Booth and Schaum tried to control Mr. Norris, Deputy Hinkley joined the fight and they all fell to the ground. Kerbs RP 71. Deputy Schaum’s ACL in his left knee was torn as a result of the fight. Kerbs RP 71:14-20, 101:17-23, 112:6-16.

After Deputy Hinkley hit Mr. Norris in the mouth he said “I’m done. I’m done.” Deputy Booth also heard Norris say “I don’t want to fight anymore.” Kerbs RP 72:4-6, 113:3-11. After being arrested, Mr. Norris

explained that he had been up for several hours and was out looking for a fight. Kerbs RP 72.

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, 49. A judgment and sentence was entered on January 12, 2017. CP 84. Mr. Norris filed a timely notice of appeal on January 20, 2017. CP 108.

IV. ARGUMENT

AN ASSAULT IS AN ATTEMPT, WITH UNLAWFUL FORCE, TO INFLICT BODILY INJURY UPON ANOTHER ACCOMPANIED WITH THE APPARENT PRESENT ABILITY TO GIVE EFFECT TO THE ATTEMPT IF NOT PREVENTED.

For the first time on appeal, the defendant argues that his conduct constituted an assault under the attempt to commit a battery definition of assault, and therefore should be sentenced as a gross misdemeanor under the criminal attempt statute, RCW 9A.28.020. In so arguing, defendant fails to cite one single case dealing with assault. Defendant does not argue that he did not swing intending to strike Deputy Booth from a proximate position to the Deputy, but argues that because he missed the Deputy, no assault, but rather only an attempted assault occurred - a “whiff.” Br. of Appellant at 4.

Regardless of whether defendant's record at hitting what he intends to hit is as poor as the 1915 Yankees' center fielder Skeeter Shelton,¹ our State Supreme Court has long been "committed to the rule that an assault *is an attempt*, with unlawful force, to inflict bodily injury upon another accompanied with the apparent present ability to give effect to the attempt if not prevented." *State v. Rush*, 14 Wn.2d 138, 139, 127 P.2d 411 (1942) (emphasis added). Indeed, the *Rush* opinion noted that under circumstances as in the present case: "Within this definition [of assault] one would be guilty of assault if he raised his hand in anger, with an apparent purpose to strike and sufficiently near to enable the purpose to be carried into effect." *Rush*, 14 Wn.2d at 139-140.

As far back as 1910, our state courts have used the common law definition for assault in the absence of a statutory definition. In *Howell v. Winters*, 58 Wash. 436, 108 P. 1077 (1910), a civil assault case, the Court noted that the former statutory definition of assault as "an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into

¹ It is reported that Skeeter Shelton hit 1-for-40 in 1915 for a .025 batting average.

execution”² was repealed by the “new Criminal Code.” 58 Wash. at 437-38. Therefore, the Court looked to the common law for a definition of “assault.” In doing so, the Court defined both the language of the term and the public purpose for the law that prevents the attempted battery of our citizens.

Cooley defines the terms thus: “An assault is an *attempt*, with unlawful force, to inflict bodily injuries on another, accompanied with the apparent present ability *to give effect to the attempt* if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is in its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man’s face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person - A right to live in society without being put in fear of personal harm.” COOLEY ON TORTS (3d Ed.) 278. *See, also, Commonwealth v. White*, 110 Mass. 407; *Mailand v. Mailand*, 83 Minn. 453, 86 N.W. 445; *Morgan v. O’Daniel* (Ky.) 53 S. W. 1040.

Howell, 58 Wash. at 438 (emphasis added); *and see State v. Hall*, 104 Wn. App. 56, 65, 14 P.3d 884 (2000) (“From a policy standpoint, allowing inchoate liability for third degree assault fulfills the social function of preventing harmful conduct and punishing those with criminal tendencies before their conduct causes tangible harm”).

² Formerly found in Ballinger’s Ann. Codes & St. § 7055, (Pierce’s Code, § 1572).

Washington recognizes three forms of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). Our courts continue to use the common law definition of assault. *See State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014) (“However, there is no statutory definition of assault and so we must turn to the common law definition of assault. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942)”).

Here, the jury was properly instructed that “[a]n 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.” CP 9 (Instruction no. 9). The evidence showed that the defendant, while in close proximity to Deputy Booth, attempted to strike Booth with his hand containing a can of liquid.

Indeed, the defendant does not argue that this conduct does not fit the definition of assault given in the instruction. He argues that an attempt

to batter must be prosecuted under the general attempt statute, stating that he has been unable to find any case law addressing the particular issue. Br. of Appellant at 7. However, it seems that cases have addressed and rejected this argument. This very argument was firmly rejected in *State v. Music*, 40 Wn. App. 423, 431-32, 698 P.2d 1087 (1985) (discussing whether an individual could ever have an “attempt to attempt” an assault, rejecting the claim as being both implausible and absurd).

After *Music*, this Court re-examined and discounted the theory that an assault by attempted battery was punishable under the general attempt statute, RCW 9A.28.020. In *Hall*, this Court held that attempted assault is implausible when assault is defined as in this case as an attempted battery, but may not be totally implausible when assault is defined as placing another in fear of imminent harm. In doing so, this Court noted:

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. See *State v. Austin*, 105 Wn.2d 511, 514-15, 716 P.2d 875 (1986) (discussing applicability of attempt statute when crime definition includes attempt). Thus the viability of a separate attempt under the second definition is doubtful.

Hall, 104 Wn. App. at 65. Moreover, *Hall* is factually similar to the instant case:

With regard to Deputy Harris, no proof of actual contact exists. Even still, Mr. Hall was close enough to the deputy that but for the restraints an injury could have resulted. Moreover, the deputy had to dodge the attempted head butts to remove himself from harm's way. This conduct falls within the second [attempted battery] definition of assault.

Id. at 65.

As in *Hall*, here we have a completed assault - the intentional swinging of defendant's fist, trying, but failing, to commit a battery. *Id.* at 64-66. Stare decisis requires this Court to follow its prior precedent as well as that of our State Supreme Court adopting the common law definitions of assault. *See State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). To effectuate the purposes of stare decisis, appellate courts will reject their prior holdings only upon a clear showing that an established rule is both incorrect and harmful. Here, defendant does not argue that the established rule that we use the common law definition of assault is either incorrect or harmful.

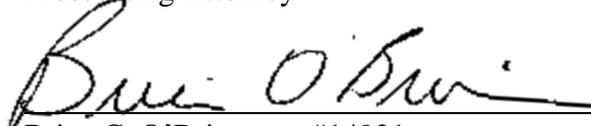
V. CONCLUSION

Under the common law, an assault is an attempted battery. The defendant was properly convicted of a completed assault, which does not

require a consummated battery. The defendant's unsupported claims otherwise should be rejected by this Court.

Dated this 17 day of July, 2017.

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

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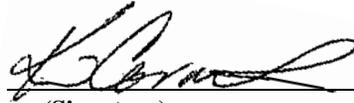
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I certify under penalty of perjury under the laws of the State of Washington, that on July 17, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Place)


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SPOKANE COUNTY PROSECUTOR

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