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Court of Appeals
Division III
State of Washington
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NO. 35145-9-III

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

STATE OF WASHINGTON,
Respondent,

v.

RORY ALAN STAR,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR THE COUNTY OF
BENTON

The Honorable Vic L. Vanderschoor

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Star's second-degree assault convictions in counts one and two violated the guarantees of due process under the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution because the evidence was insufficient to prove each offense.

2. The state failed to prove Mr. Star assaulted Wright.

3. The state failed to prove Mr. Star assaulted Schweiger.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove Mr. Star guilty of second-degree assault, the evidence had to establish that Mr. Star had the specific intent to create fear and apprehension of bodily injury in the charged victims through his use of a deadly weapon. Angry at being ignored by Ms. Wright, and wanting to get her attention, Mr. Star yelled profanities at her and showed her his knife. Mr. Star then yelled profanities at Mr. Schweiger while holding the knife. Mr. Star never held the knife to either charged victim, did not say that he intended to use the knife, nor did he hold the knife in a way that showed he would use it in a slashing or stabbing manner. Was the evidence insufficient to support second-degree assault against Wright or Schweiger when Mr. Star yelled profanities at them while holding a knife, but

made no motions such as would indicate that he would use the knife to cause injury to either person?

C. STATEMENT OF THE CASE

Rory Star was a 53-year-old homeless man who struggled with alcoholism when he went into a Starbucks on October 19th, 2016. RP 33, 41-42, 72. Mr. Star was well known to local law enforcement, which understood that he was homeless and that he had a severe alcohol problem. RP 34, 41-42. Mr. Star's interactions with others tended to be antagonistic. RP 34. Earlier that same day, law enforcement had an encounter with Mr. Star at a Jack in the Box restaurant after receiving complaints that he was drunk and yelling profanities at customers. RP 33-34. The police did not arrest Mr. Star, but did provide notice that he was trespassed from that Jack in the Box. RP 34. About an hour later, police were called to a second disturbance involving Mr. Star at a nearby Starbucks. RP 34-35.

Mr. Star went to the Starbucks to get a cup of coffee that afternoon and at first appeared to be doing okay. RP 65. Mr. Star encountered Sara Wright, a nurse who was sitting down doing work on her computer. RP 102. Mr. Star unsuccessfully tried to engage Ms. Wright in conversation. RP 102-03. Wright could not hear Mr.

Star well, as he was mumbling. RP 102-03, 110. She would smile and nod, not knowing what to do. *Id.* Mr. Star left the store and while he was outside he continued to try to get Wright's attention. RP 65-66, 103. Mr. Star came back inside the Starbucks and his demeanor had noticeably changed, he had become angry. RP 65-66, 68, 103-04. Mr. Star went back to where Wright was sitting, sat down right next to her and asked if she wanted to see what was in his pocket. RP 104-05. Mr. Star then took out a knife. RP 68, 104-05.

Another Starbucks patron, Robert Schweiger, was sitting nearby and, after seeing Mr. Star holding a knife, he immediately dialed 911. RP 68, 84. Mr. Star yelled profanities at Wright while holding the knife. RP 104, 107. Wright approached the barista about the situation. RP 66, 75-76, 114. Trying to avoid Mr. Star, Wright went in the back employee area, tried unsuccessfully to lock herself in and armed herself with a fire extinguisher. RP 108-09, 114.

With Wright no longer in the same room, Mr. Star turned his attention to Schweiger, who remained on the phone with 911. RP 86-87, 95. Mr. Star acted similarly with Schweiger as he did with Wright, holding his knife, waving it around and yelling profanities.

RP 68, 78, 85-86. At one point, according to Mr. Isley (the barista), Mr. Star put away his knife and knocked over a display sign while yelling at Schweiger. RP 68, 74. Mr. Isley redirected Mr. Star's attention away from Schweiger by asking if he wanted a cup of coffee. RP 68-69, 88. The police arrived soon thereafter. *Id.*

According to the testimony of all the eyewitnesses, Mr. Star never lunged at anyone, nor did he make slashing or stabbing motions with the knife. RP 74, 94, 96. Similarly, Mr. Star did not hold the weapon to the person of either Wright or Schweiger and made no threats to harm them with the knife. RP 74, 94, 96.

After a jury trial, Mr. Star was found guilty of two counts of second-degree assault. CP 78-89; RP 156-57. Mr. Star was sentenced with an offender score of 4, as agreed by the parties. CP 80; RP Sentencing 7-8. The court imposed a sentence of 17 months on each count, to run concurrent with each other, and Mr. Star timely appeals. CP 83; RP Sentencing 12.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. STAR OF SECOND-DEGREE ASSAULT.

Due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime

charged. Wash. Const. art. I, § 3; U.S. Const. amend. XIV; *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). In challenging the sufficiency of the evidence, the appellant admits the truth of the state's evidence and all reasonable inferences that can be drawn from it. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

To prove second-degree assault, the State had to prove that Mr. Star had the specific intent of causing the charged victims fear and apprehension of bodily injury through the use of a deadly weapon. A person commits second-degree assault by assaulting another with a deadly weapon. RCW 9A.36.021(1)(c). Based on the common law, there are three definitions of "assault": "(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011) (quoting *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). Mr. Star was convicted under the third meaning.

Assault by attempt to cause fear and apprehension of injury requires proof that the defendant had specific intent to create reasonable fear and apprehension of injury in the charged victim.¹ *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *Abuan*, 161 Wn. App. at 158 (adhering to rule). “Specific intent” means “intent to produce a specific result, as opposed to intent to do the physical act that produces the result.” *Elmi*, 166 Wn.2d at 215; see also RCW 9A.08.010(1)(a) (“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.”).

For example, specific intent to create fear in the charged victim may be inferred when a defendant points a gun at the person, unless the person knows the gun is unloaded. *Eastmond*, 129 Wn.2d at 500; *State v. Callahan*, 87 Wn. App. 925, 930 n.1, 943 P.2d 676 (1997). The mere display of a gun, however, is insufficient to infer specific intent. *Id.* The defendant may, in the

¹ As defined in the pattern instructions and provided in the court’s instruction no. 6: “An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th ed) (brackets omitted); accord CP 57.

words of the statute prohibiting the unlawful display of weapons, only have “an intent to intimidate.” RCW 9.41.270(1). Unlawful display of a weapon is a misdemeanor, not a felony.² RCW 9.41.270(2). Thus, the state bore the burden of proving that Mr. Star had the specific intent to create reasonable fear and apprehension of bodily injury in Wright (count 1) and Schweiger (count 2).

The evidence did not prove that Mr. Star intended to create fear and apprehension of bodily injury by showing his knife to Wright or Schweiger. Instead of pointing the knife in a way that would suggest a slashing or stabbing motion, the evidence supports that Mr. Star had his knife out to be seen, waving it around, to get attention. RP 74-75, 78, 85. As Mr. Isley (the barista) testified, Mr. Star was waving the knife around and seemed to have wanted to be noticed, for people to see he had a knife and to be taken seriously. RP 74-75, 78.

The evidence did not support a conclusion that Mr. Star intended to cause fear and apprehension of imminent bodily injury. Displaying a knife in a public place does not inevitably mean that

² The jury received an instruction for the lesser-included offense of Unlawful Display of a Weapon (no. 14). CP 66, 68; RP 117, 132-34.

the person intended to cause fear and apprehension of bodily harm in nearby persons. If it did, the statute providing that it is a misdemeanor to unlawfully display a weapon would be meaningless. RCW 9.41.270. Thus, the prosecution did not prove that Mr. Star assaulted either Wright or Schweiger on October 19, 2016 and his convictions for second-degree assault should be reversed and dismissed.

- a. The state failed to prove that Mr. Star assaulted Wright (count one).

The prosecution did not prove that Mr. Star assaulted Wright. The state's evidence showed that during the second time Mr. Star approached Wright, he had asked her if she wanted to know what was in his pocket and then he showed her a knife. RP104-05. Mr. Star yelled profanities at Wright. RP 104, 107. He made no slashing or stabbing motion and did not hold the knife up to her. RP 74, 94, 96. Nor did he make any statement regarding using the knife to harm her. *Id.* Mr. Star displayed the knife in a manner that showed he wanted Wright and others to see it, not in a manner that showed that he was intending to use it to cause fear of imminent bodily injury.

When Ms. Wright approached the barista regarding Mr. Star's behavior, she asked him to ask Mr. Star to leave the Starbucks. RP 75-76. She did not run out of the store, was not overly upset, and did not scream for help. RP 76-77. She did not say that there were any threats of harm. *Id.* Thus, the evidence presented does not support that Mr. Star engaged in an act done with the intent to create in Wright apprehension and fear of bodily injury, but one designed to get her attention. *See State v. Godsey*, 131 Wn. App. 278, 288, 127 P.3d 11 (2006) (assault complete when defendant adopted a fighting stance and then charged deputy).

b. The state failed to prove that Mr. Star assaulted Schweiger (count two).

Even if the evidence supported the conclusion that Mr. Star intended to cause fear and apprehension of bodily harm as to Wright, the evidence did not prove he had this specific intent as to Schweiger (count 2). Unlike Wright, there was no evidence that Mr. Star was even aware of Schweiger for most of the time while he was holding the knife at the Starbucks. The state's evidence showed that after Wright had left the main seating area and went to the employee area, Mr. Star then noticed Schweiger on the phone

with 911. RP 86-87, 95. Mr. Star started yelling profanities at Schweiger while holding the knife, the same as he did with Wright. RP 68, 78, 85-86, 104, 107. While yelling at Schweiger, Mr. Star knocked over a display sign. RP 68-74. Then Mr. Isley (the barista) turned Mr. Star's attention away from Schweiger by asking if he wanted coffee and this began to de-escalate the situation, when the police arrived and Mr. Star put his knife away. RP 68-69, 79, 88.

Mr. Star's conduct towards Schweiger was less aggressive than his conduct towards Wright. It does not appear that Mr. Star even noticed Schweiger at all when he was trying to speak with Wright or when he took out the knife and that he only became aware of Schweiger at some point after Wright left the main Starbucks area. RP 83-84. Mr. Star made no slashing or stabbing motion and did not hold the knife near Schweiger. RP 74, 94, 96. Nor did he make any statement regarding using the knife to harm Schweiger. *Id.* Thus, the evidence did not show a specific intent to assault Schweiger. After his interactions with Wright, Mr. Star kept the knife out and displayed it in a manner that showed he wanted Schweiger to see it, not in a manner that showed that he was about to use it.

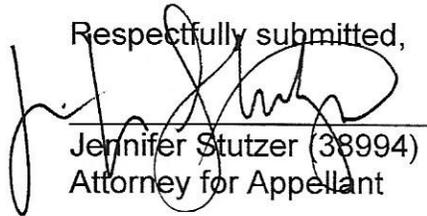
Thus, the evidence was insufficient to convict Mr. Star on counts one and two. The convictions must be reversed and the charges dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013).

E. CONCLUSION

For the foregoing reasons, this Court should reverse Rory Alan Star's convictions and dismiss the charges with prejudice.

DATED this 22nd day of February, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jennifer Stutzer', is written over a horizontal line. The signature is stylized and cursive.

Jennifer Stutzer (38994)
Attorney for Appellant

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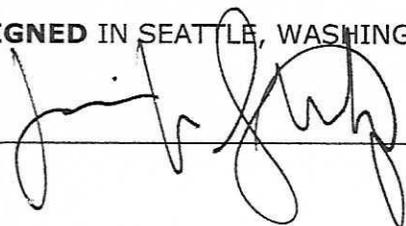
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[X] RORY ALAN STAR Known to be homeless. No longer listed in DOC custody and did not provide forwarding address. I am holding a copy of the brief for him and looking for a current address or family member.	() ()	U.S. MAIL HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 22nd DAY OF February, 2018.

X 

STUTZER LAW PLLC

February 22, 2018 - 4:38 PM

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