

FILED
Court of Appeals
Division III
State of Washington
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NO. 36504-2-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

State of Washington,

Respondent / Plaintiff,

v.

Demetrius Robinson,

Appellant / Defendant.

Appeal From The Superior Court
Of Whitman County
Case No. 18-1-00160-38
The Honorable Gary Libey

BRIEF OF RESPONDENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

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I. DEFENDANT / APPELLANT'S ASSIGNMENT OF ERROR

The defendant argues that his conviction for Assault Fourth Degree should be reversed / vacated as a violation of the double jeopardy clause, since, he argues, it was part of the same course of conduct upon which the conviction for Assault Second Degree was had. The State concedes that at least some of the facts upon which the Assault Fourth Degree conviction was based (some of the punches and kicks) were not sufficiently different from the fact upon which the Assault Second Degree conviction was based (suffocation for holding victim's head under water). Therefore, the Assault Fourth Degree conviction should not stand.

The defendant also alleges that defendant's right to a unanimous verdict on the Assault Second Degree conviction was violated because there was not sufficient evidence to establish one of the alternative means presented to the jury. The State responds that the jury was given a special verdict form regarding the two alternative means that were presented (assault with a deadly weapon and suffocation). The jury returned that special verdict noting that they were not unanimous regarding whether or not defendant assaulted the victim with a deadly weapon; however, that special verdict noted the jury's unanimous verdict that the defendant assaulted the victim by suffocation. While the State believes there was substantial evidence to support a conviction based on use of a deadly

weapon, the issue is moot given the jury's special verdict that they specifically found defendant guilty under the suffocation alternative.

II. STATEMENT OF THE CASE

The victim, Mr. Bright Johnson, was an acquaintance of the defendant. On one day in July, 2018, in Pullman, Washington, the two of them spent an afternoon together, drinking beer and recreating in two different apartment complex pool areas. Late in the evening, the two joined other friends and acquaintances in a small group and went to various private parties or gatherings around Pullman. By the early morning hours, the group ended up back at an in-door pool and club-house at an apartment complex. (See generally Appellant's factual recitation up to this point, and RP 91-112).

There was a pool and a hot tub in one large room, and the group came and went in the club-house and around the pool. The victim, Mr. Johnson, got in the hot tub. The defendant kicked a phone charger into the pool and asked the victim to get in the pool and retrieve it. The victim demurred. The defendant insisted, hitting and kicking victim, though not severely. The victim agreed to get the item and got the phone charger from the bottom of the pool, and sat on the edge. (RP 113- 131, Exhibit 16).

The defendant then lost his temper. He punched victim in the head – very violently, and kicked victim in the head and punched him some more. He then held victim’s head under water. Victim scrambled away and got his head back above water. The defendant, who remained out of the hot tub, began chasing the victim around the tub while the victim remained in the tub. Defendant threw some chairs at victim, tried to whip him with a belt. Defendant forcefully threw a number of beer bottles at victim, striking victim with the bottles. Defendant then took some items from his pockets in preparation to jumping in the hot tub to get at the victim. As defendant jumped in the hot tub, victim scrambled out the other side and ran, being chased by defendant. Victim ran into a pole near the pool, fell to the ground, was jumped on by defendant, who began punching victim. Bystanders finally intervened and allowed victim to run out of the clubhouse. All of this is described in victim’s testimony (RP 115-143) But the best evidence is the surveillance video that was recorded by the apartment complex’s system. That is Exhibit 16, and is part of the Clerk’s Papers at the Court of Appeals. The State respectfully suggests that in this case, the video is worth more than a thousand words.

While appellant gets some of the assaultive conduct in the wrong order, when it comes to the order of the various ways in which the defendant assaulted the victim, the correct order and level of severity of

this attack can be readily seen on the video. For instance, the defense suggests the suffocation under water comes near the end, when the video shows it near the beginning. But viewing the video, one can see this attack lasted a full eight to nine minutes.

At about 5:36, the group comes in. At 5:37 defendant kicks a phone charger into the pool (apparently by accident). At 5:39 victim gets in hot tub. At 5:40, defendant (standing on pool deck) asks victim to get in the pool and retrieve the charger from the bottom of the pool. At 5:41, victim gets in the pool. At 5:43, defendant hits and kicks victim, who is apparently not getting the charger from the bottom of the pool, although the hit and kick are not severe. Thirty seconds later, victim gets the charger from the pool bottom and hands to the defendant. At 5:44, victim gets out of the pool, and sits on the edge, with his feet still in the pool. Within seconds, the defendant slugs victim full force with a fist to the face. Defendant immediately begins punching and kicking victim, including kicks to the victim's head. This is followed quickly by the victim trying to escape into the hot tub, the defendant tries to hold victim's head under the water, victim writhes away. Two bystanders try, very very ineffectually, to intervene. Defendant continues to attack victim. The bystanders go back to just watching the felony be committed before them. One bystander does use his phone, but not to call 911; instead he

apparently videos the crime. What citizens. At 5:49, defendant begins throwing beer bottles at victim. At 5:51, defendant empties his pockets, then jumps in the hot tub to get at victim. Victim gets out, runs, falls, gets jumped on, punched, then escapes at 5:52.

At the end of the trial, the jury was instructed on two alternative means of committing Assault Second Degree: assault with a deadly weapon and assault by suffocation. CP 84. The terms ‘deadly weapon’ and ‘substantial bodily harm’ were defined according to the usual WPICs. CP 89 and 90. The jury was given a Special Verdict Form (CP 95) and the closing instruction to accompany a special verdict form (CP 92-93).

The jury returned a verdict of Guilty as to Count One, Assault in the Second Degree, and Guilty as to Count Two, Assault in the Fourth Degree. CP 74. It also returned the Special Verdict Form, noting that it was ‘not unanimous’ as to whether the defendant assaulted the victim with a deadly weapon, but that the defendant did assault the victim by suffocation. CP 75.

III. ARGUMENT

- A. The State believes the appellant is correct that the Assault Fourth Degree was committed in the same course of conduct as the Assault Second Degree.

The State believes the evidence shows that under the test established in State v. Villanueva-Gonzalez, 180 Wn.2d 975 (2014) and PRP of White, 1 Wn.App.2d 788 (2017), at least some of the punches and kicks that formed the basis of the Assault Fourth Degree conviction here, were part of the same course of conduct as the act of suffocation that formed the basis for the conviction of Assault Second Degree. Since the State did not differentiate between the punches and kicks which could have been considered a different course of conduct and those which do seem to be the same course of conduct, the State agrees with Appellant that the conviction for Assault Fourth Degree should be vacated.

- B. The jury in this case unanimously found that defendant committed Assault Second Degree by suffocation, as noted in the Special Verdict, but even if it had not, there is ample evidence that the bottles, as used by defendant, were ‘deadly weapons.’

Defendant argues that his right to a unanimous verdict was violated, as to the conviction for Assault Second Degree, because one of the alternative means in this case was not supported by substantial evidence. The State disagrees. But the court need not even reach the issue, because the jury returned a Special Verdict, noting that they were unanimous as to the suffocation means of committing Assault Second Degree. This makes defendant’s argument moot.

However, even if the court were to consider the argument, when the court views the video, the court will see the force with which the bottles were thrown at defendant. The question then is whether any rational trier of fact could conclude, based on that video, that the bottles throw were readily capable of causing a ‘temporary but substantial disfigurement’ or a ‘temporary but substantial loss or impairment of the function of a bodily part or organ’ or of causing ‘a fracture of a bodily part.’ See State v. Owens, 180 Wn.2d 90 (2014). The State suggests that any reasonable juror could find that a bottle thrown like that, against a victim in that proximity, was readily capable of causing that sort of injury, such as a black eye, broken facial bone, broken tooth, etc.

IV. CONCLUSION

The State concedes that the conviction for Assault Fourth Degree should be vacated as being (under the facts as argued to the jury) possibly committed as the same course of conduct as the conviction for Assault Second Degree.

The State respectfully asks the Court to deny defendant’s argument as to the conviction for Assault Second Degree, and affirm that conviction.

Respectfully submitted this 18 day of October, 2019.



Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

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IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. DEMETRIUS ROBINSON, Defendant,	Court of Appeals No. 36504-2-III No. 18-1-00160-38 AFFIDAVIT OF DELIVERY
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STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 18TH DAY OF OCTOBER, 2019 I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

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-EMAILED THROUGH THE COURT OF APPEALS PORTAL TO LISE ELLNER AT VALERIE.LISEELLNER@GMAIL.COM; LISEELLNERLAW@COMCAST.NET

DATED this 18TH DAY OF OCTOBER, 2019.

Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 18TH DAY OF OCTOBER, 2019.



Kay E Auvil
NOTARY PUBLIC in and for the State of Washington, residing at: Oakside
My Appointment Expires: 4/10/20

WHITMAN COUNTY PROSECUTOR'S OFFICE

October 18, 2019 - 2:41 PM

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