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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff-Respondent,

vs.

JAMES MICHAEL KOOGLER,

Defendant-Appellant.

On Appeal From the Court of Appeals of the State of
Washington, Division III

DEFENDANT-APPELLANT'S OPENING BRIEF - AMENDED

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I. ASSIGNMENT OF ERROR & ISSUE PERTAINING THERETO

The jury erred in finding that the State provided sufficient evidence to find that James Koogler intended to commit assault on Karolyn Koogler beyond a reasonable doubt. In a criminal proceeding, the burden is placed on the State to prove every element of a crime beyond a reasonable doubt; in the event the State does not prove an element of a crime, the jury should find the defendant not guilty, or in the alternative, the conviction should be overturned. Due to the lack of sufficient evidence presented by the State to prove beyond a reasonable doubt that Mr. Koogler specifically intended to assault Karolyn Koogler, the guilty verdict against Mr. Koogler should be overturned.

Further, Mr. Koogler's counsel was ineffective in its failure to clarify testimony made by Mr. Koogler that was later used in the State's closing argument as highly material to indicate Mr. Koogler possessed the requisite intent to be found guilty of second degree assault.

II. STATEMENT OF THE CASE

James Koogler was found guilty of Assault in the Second Degree, and acquitted of Harassment on October 31, 2018. CP at 25. Mr. Koogler timely moved for arrest of judgment and for a new trial on November 13, 2018. CP at 9. He then timely appealed the denial of his arrest for new judgment. CP

at 23. Herein he argues that substantial evidence did not exist to find him guilty beyond a reasonable doubt and thus passion or prejudice overcame the rationality of the jury, and that his counsel's assistance was ineffective.

The chief evidence against Mr. Koogler was the testimony of his wife, Karolyn Koogler, who alleged that he forcefully pushed a shotgun into her back and threatened to kill her in their bedroom. VRP at 146.¹ As reflected in the record, Karolyn testified about being pushed twice by James in front of the bedroom window. *Id.* at 152 Specifically, Karolyn testified that James entered the room, flipped on the lights and began to berate her before pushing the shotgun into her back and finally physically pushing her twice in front of the window facing the driveway. *Id.* Deputy Darrel Smith testified that he was dispatched on a domestic violence call, arrived on scene, and then focused on the Koogler's home. VRP-I at 75-77.² Deputy Smith testified that the house was dark and quiet, and then watched the bedroom lights flip on and watched James standing next to the bed the whole time until Karolyn and he exited the house. *Id.*

Karolyn Koogler also testified that James threatened to kill her when he was outside the home and in the presence of law enforcement. VRP at 159. Her quote was "You're fucking dead meat as soon as I get out, bitch." *Id.*

¹ "VRP" refers to the Verbatim Report of Proceedings for October 26, 29, 30, 31 2018; December 21, 2018; and January 18, 2019.

² "VRP-I" refers to the Verbatim Report of Proceedings for October 29, 2018.

Significantly, none of the deputies present at the time testified to hearing this threat. Deputy Carlos specifically testified that he did not hear the threat, despite standing right next to Karolyn at this time. VRP at 219. Further, Deputy Carlos testified that he would have put this statement in his report if he had and that he would expect the other deputies to put it in their reports if they had heard it. *Id.* Karolyn Koogler was very clear in her testimony that James Koogler threatened to kill her, but the jury acquitted James of threatening to kill Karolyn, as reflected by the not guilty verdict for harassment. *Id.* at 340. As the jury instruction for the harassment charge instructed the jury that they must find Mr. Koogler threatened to kill Karolyn in order to find Mr. Koogler guilty of harassment, the acquittal means that the jury did not believe Karolyn Koogler and they shouldn't have. *Id.* at 286 (Instruction No. 11). The jury finding that Mr. Koogler did not threaten to kill Karolyn also means that James Koogler was not convicted of forcefully pushing a shotgun into Karolyn Koogler's back, but of some other conduct.

Mr. Koogler testified that he manipulated the action of the shotgun for the purpose of ensuring it was unloaded after he saw it had been moved. *Id.* at 245-46. In the process, the shotgun made a loud noise as shotguns do. Mr. Koogler testified that he said, "this sounds real loud, doesn't it" a statement similar to what Colin Mathieson testified to hearing him say. *Id.* at 246; VRP-I at 64-65. When asked why he said "this sounds real loud . . ." Mr. Koogler

paused and said “I wanted her to talk to me.” VRP at 267. In closing arguments, the State argued that this statement indicated that Mr. Koogler thereby *admitted* the assault and drew the conclusion that the sound of the shotgun was used to scare Karolyn into talking to him. *Id.* at 310-11. In the light of all of the evidence of the case, that conclusion is speculative and does not amount to substantial evidence beyond a reasonable doubt which would lead a rational trier of fact to convict Mr. Koogler. Mr. Koogler had previously testified that he did not intend to scare or threaten Karolyn. Further, Mr. Koogler’s counsel failed to clarify the subjective meaning behind the statement through re-direct testimony, therefore could not effectively rebut the State’s closing argument.

It is argued herein that the State did not prove one of the essential elements of common law assault beyond a reasonable doubt – specifically “specific intent.” Mr. Koogler maintained his innocence throughout this case. He testified that he never had any intent to place his wife in fear, but only to ensure the firearm was unloaded and safe. *Id.* at 243-46. He did so in a manner that was consistent with how the involved law enforcement officers testified they would ensure that a firearm was safe, and that doing this with a shotgun is loud. *Id.* Mr. Koogler commented on the volume of the shotgun, and he then made an innocuous statement about just wanting Karolyn to talk to him. *Id.* These actions and statements together cannot show that Mr. Koogler acted

with the requisite intent to be found guilty for Second Degree Assault under a theory of common law assault. The substantial weight of the evidence in this case is that Karolyn Koogler lied under oath and James Koogler was ensuring the safety of a shotgun while trying to talk to his wife. The overall optics after the fact might be troubling, but the leap to assault is not substantially present beyond a reasonable doubt on this record. Alternatively, his counsel was ineffective in failing to realize that this connection was made in time to rebut it.

III. ARGUMENT

1. **Summary**

Mr. Koogler argues that there was insufficient evidence to find that he intended to assault his wife under the theory of common law assault presented by the State in its instructions to the jury. As assault is not defined in the relevant Washington statute, Washington courts follow three alternative means as defined by the common law to define assault. *See* RCW 9A.36.021; *see also* RCW 9A.04.060. First, attempted battery requires a showing that the defendant attempted to inflict bodily injury on another with unlawful force. Next, battery is defined as an unlawful touching with criminal intent. Finally, common law assault is intentionally putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting the harm. *See State v. Hupe*, 50 Wash.

App. 277, 282, 748 P.2d 263 (1988) (disapproved of on other grounds by *State v. Smith*, 159 Wash.2d 778 (2007)).

Mr. Koogler was charged with second degree assault, and the State attempted to prove the case against Mr. Koogler with alternative battery and common law assault theories. Based upon Karolyn Koogler's testimony that James forcefully pushed a shotgun into her back, the means would be battery. Under the theory presented in the State's closing argument the means would be a common law assault. Based upon the record, the State did not provide sufficient evidence to support either of these theories, and the jury was only instructed on the common law assault theory, therefore the argument will focus on the common law assault theory. VRP at 285-86 (Instruction No. 8). Because there was insufficient evidence to show that Mr. Koogler had specific intent to assault Karolyn, the conviction should be overturned.

Further, Mr. Koogler argues that his counsel was ineffective, in violation of his constitutionally guaranteed right to effective assistance of counsel. *See* U.S. Const. Amend. VI; *see also* Wash. Const. Art. I, Sec. 22. Mr. Koogler will argue that his counsel fell below the objective standard of reasonable representation given the circumstances, and that the ineffective counsel caused prejudice to Mr. Koogler as there is a reasonable probability that the outcome would have been different had Mr. Koogler's counsel

properly clarified specific testimony of Mr. Koogler's through re-direct examination.

2. Standard of Review

“The standard of review for a challenge to the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Sweany*, 174 Wash.2d 909, 914, 281 P.2d 305 (2012) (internal quotation marks omitted) (quoting *State v. Randhawa*, 133 Wash.2d 67, 73, 941 P.2d 661 (1997)).

“To successfully challenge the effective assistance of counsel, Petitioner must satisfy a two-part test. Petitioner must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” *In re Byrd*, 152 Wash.2d 647, 672-73, 941 P.2d 661 (2004) (internal quotation marks omitted).

3. **The State did not present sufficient evidence to prove that Mr. Koogler committed common law assault beyond a reasonable doubt.**

The problem with Mr. Koogler's case is that he is actually innocent. He lacked any intent to place his wife in fear and he testified as such. Because he answered one question wrong and the prosecutor capitalized on it while his attorney missed it, he was wrongfully convicted.

As noted prior, common law assault requires that the State prove beyond a reasonable doubt that the defendant intended to put another in apprehension of harm, whether or not the actor intends to inflict or is incapable of inflicting the harm. *See Hupe*, 50 Wash. App. at 282. Although intending to actually inflict harm is not an essential element of common law assault, the State is required to show that the defendant *specifically intended* to put the other person in apprehension of harm. *See State v. Byrd*, 125 Wash.2d 707, 710, 887 P.2d 396 (1995). To put it another way, the State must show "an *actual intention* to cause apprehension, unless there exists the morally worse intention to cause bodily harm." *Id.* at 713 (quoting Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 611 (1972) (emphasis added)). Simply showing that an intentional act caused another an apprehension of harm will not allow a jury to make an inference that the requisite level of intent was present. *State v. Elmi*, 166 Wash.2d 209, 215, 207 P.3d 439 (2009).

In *Byrd*, the Washington Supreme Court overturned a conviction for Second Degree assault because the jury had not been clearly instructed on

the intent element, and the jury instructions essentially allowed to the jury to make an inference that the requisite intent was present based upon the result. *See Byrd*, 125 Wash.2d at 716. The main point of contention between the defense and State was whether the defendant's action of pulling out a gun during a verbal confrontation with the victim would indicate that the defendant had specific intent to put the victim in apprehension of bodily harm, or if it was simply an action to intimidate the victim. *Id.* at 716. The court held that the jury instruction allowed the jury to convict the defendant simply based upon the defendant's illegal displaying of a firearm. This is impermissible as one could reasonably find that a person intentionally displayed a firearm, but did not intend for that display to put another in apprehension or fear of bodily harm. *Id.* at 710. *Byrd* illustrates that the intent element in assault is not to be examined through the objective "reasonably prudent person standard," but examined through the defendant's subjective mindset. *See id.*

The record indicates that Mr. Koogler did not have the specific intent to put Karolyn in apprehension of harm. Although Mr. Koogler may have been upset and using offensive language towards Karolyn, Mr. Koogler's testimony is clear that he had the specific intent to ensure that his shotgun was safe and unloaded, and then to simply get his wife to speak to him, not to put her in fear of losing her life. Karolyn's testimony as to what

Mr. Koogler said to her on the night in question is marred with inconsistencies, and is directly contradicted by the testimony of the responding officers, as well as Mr. Koogler. Moreover, the jury's acquittal of Mr. Koogler for harassment directly supports their lack of faith in Karolyn's testimony he harassment acquittal was based on a determination of whether Mr. Koogler actually threatened Karolyn's life. Thus, in order to have found Mr. Koogler guilty, the jury must have relied on his answer to the singular question about his statement that the shotgun was loud. There simply is no other evidence in the record to support the conviction and that answer was specifically relied upon by the prosecutor to support the common law assault charge.

Mr. Koogler's argument is that his answer was misinterpreted as creating a connection between his use of the shotgun and his intent at the moment of using it which was not supported by the evidence. If the Court does not agree and finds this tiny shred of evidence is sufficient to support a conviction beyond a reasonable doubt, it is respectfully submitted that trial counsel's failure to catch it and follow up at the time was ineffective as outlined below.

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4. Mr. Koogler's counsel was ineffective through failing to clarify Mr. Koogler's testimony in re-direct examination.

Both the United States and Washington Constitutions provide the accused with the right to effective counsel in criminal proceedings. *See* U.S. Const. Amend. VI; *see also* Wash. Const. Art. I, Sec. 22. As noted prior, Washington courts will examine two factors in determining if counsel was effective, (1) the counsel's effectiveness when compared to the objective standard of reasonableness based on the circumstances; and (2) the prejudicial effect caused by the ineffective counsel. *See Davis*, 152 Wash.2d 672-73; *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

i. ***Mr. Koogler's counsel did not rise to the minimum standard of which a competent criminal defense attorney should be held.***

To determine if counsel was effective when compared to the objective standard of reasonableness, the appellant must show "that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Further, "reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all of the circumstances." *Davis*, 152 Wash.2d at 673 (citations and quotation marks omitted).

Mr. Koogler's counsel's failure to clarify the meaning of Mr. Koogler's testimony to the State through the use of re-direct examination fell below the minimum standard that a competent criminal defense attorney would be held. The testimony of note and specific instance of ineffective counsel was when Mr. Koogler's counsel failed to us re-direct examination to clarify Mr. Koogler's subjective meaning as to what Mr. Koogler met when he said "I just wanted to talk to her" when Mr. Koogler was asked what the purpose of his actions were in the bedroom during the incident in question. VRP at 267. This falls below the threshold as set forth in *Davis*, as the competent criminal defense attorney would have attempted to clarify the statement in question due to its highly probative effect to prove the State's theory of common law assault as reflected in the State's closing argument. *Davis*, 152 Wash.2d at 672-73; see VRP at 310-11 ("He's making that noise to create a reaction, to create a fear in Karolyn."). Counsel's inability to clarify this statement left him with no evidentiary basis to rebut the State's insinuation that Mr. Koogler's racking of the shotgun had the sole purpose to scare Karolyn. See VRP 310-11.

ii. ***Mr. Koogler's ineffective counsel caused material prejudice towards Mr. Koogler.***

To determine if the ineffective counsel had a prejudicial effect on the defendant, Washington courts will attempt to determine if "there is a

reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would be different." *Davis*, 152 Wash.2d at 673. *Strickland* defines reasonable probability "as a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; *see Davis*, 152 Wash.2d at 673.

Mr. Koogler's counsel's failure to clarify the meaning of Mr. Koogler's statement, "I just wanted to talk to her," clearly caused material prejudice towards Mr. Koogler because the State interpreted the statement as an in-court admission of Mr. Koogler's intent to cause apprehension in Karolyn. *See VRP* at 293-95, 310-11. Mr. Koogler was not found guilty for harassment, the basis for this charge being Mr. Koogler's threats to kill Karolyn and how the; based on the finding of not-guilty for the harassment charge, it can be assumed that the jury did not believe Karolyn regarding the testimony that Mr. Koogler was going to kill her. *VRP* at 340. This leads Mr. Kooglers statement of wanting to talk to Karolyn to be the State's "smoking gun" that Mr. Koogler intended to assault Karolyn through the racking of the shotgun, as the jury should have disregarded the State's presenting of the death threats in closing argument. *See VRP* at 310-11. The State's interpretation of the statement was presented as direct evidence that Mr. Koogler was racking the shotgun to create fear in Karolyn. *Id.* Had Mr. Koogler's counsel properly clarified the meaning of this statement, Mr.

Koogler's counsel would have had a very strong argument to rebut the state's interpretation of the statement, thus creating a reasonable probability of a different outcome. *See id.*

As Mr. Koogler's counsel failure to clarify the meaning of material testimony provided by Mr. Koogler was clearly ineffective counsel causing a highly prejudicial effect towards Mr. Koogler, Mr. Koogler's conviction should be overturned.

IV. CONCLUSION

Based upon the foregoing, the evidence presented by the state was not sufficient to support a guilty verdict against Mr. Koogler for the charge of second degree assault, therefore the verdict should be overturned.

DATED this 12th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2019, a true and correct copy of the foregoing was delivered directly to the following:

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