

NO. 64512-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

EDGAR I. AMELCO,

Appellant.

2010 AUG -3 10:10:07

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

I. ISSUE ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 6

IV. CONCLUSION..... 10

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Brown</u> , 140 Wn.2d 456, 998 P.2d 321 (2000) .....	7, 8
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	7
<u>State v. Daniels</u> , 87 Wn. App. 149, 940 P.2d 690 (1997) .....	7
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000).....	8
<u>State v. Keend</u> , 140 Wn. App. 858, 166 P.3d 1268 (2007), <u>review</u> <u>denied</u> , 163 Wn.2d 1041 (2008).....	7
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	6, 8
<u>State v. Walton</u> , 64 Wn. App. 401, 824 P.2d 533 (1992).....	7, 9

## **I. ISSUE**

Where there was evidence which would allow a reasonable juror to find beyond a reasonable doubt that defendant committed each element of third degree assault, was the evidence sufficient to sustain defendant's conviction for third degree assault?

## **II. STATEMENT OF THE CASE**

On February 9, 2009, defendant and some other members of his family were at J. R, Phinickey's, a bar in Marysville, Washington. At around 1:00 AM, members of defendant's family got into an argument with a group of Hispanic males that were in the bar. Defendant's family and the group of males were thrown out of the bar, a total of 15-20 people, and the police were called. 9/22 RP 146, 166.

When the police arrived, one of the officers started talking to defendant, whose clothing matched the description on one of the persons involved. 9/21 RP 22, 24. Defendant was seated on a bench outside the bar. A second officer took over questioning defendant. When he asked defendant for identification, defendant stood up and reached into his back pocket. The officer asked defendant to sit down. Defendant did not sit down, so the officer

put his hand on defendant's shoulder and "escorted him to a sitting position." 9/21 RP 25-26.

The officer then turned his attention to the crowd and moved a couple of steps away from defendant. Defendant again stood up. Officer Ingram told defendant to sit back down. When defendant refused to sit down, Officer Ingram "pushed him back down onto the bench." Defendant told Officer Ingram he wanted to fight her, and that if he got back up, he would hit her. Defendant then started to calm down. 9/21 RP 72-73.

At some point, defendant's wife approached the officers and defendant. Defendant's wife said she could calm defendant down, so they let her talk to him. Defendant yelled at his wife, grabbed her arm, and pulled her to the bench. He did not listen to her. Defendant then "backhanded" his wife. The officer arrested defendant for fourth degree assault (DV). 9/21 RP 28.

Defendant became very uncooperative. He wouldn't stand up. When the officer stood defendant up, he "clenched his fists, he straightened up and stiffed up his body. He was not complying with any of [the officer's] demands." 9/21 RP 29. The officer, assisted by Officer Ingram, was able to handcuff defendant. The officer tried to search defendant's person incident to his arrest. Defendant

refused to cooperate, so the officer took defendant down to the ground. Defendant fought with the officer “the whole way down[.]” 9/21 RP 30-31.

The officer completed his search of defendant and then tried to have defendant sit up for his comfort. Defendant “refused to sit up, and continued to ask [the officer] if [he] wanted to lose his job[.]” The officer left defendant lying on the ground. 9/21 RP 33.

The officer broke contact with defendant. Defendant then got up and “lunged forward towards Officer Ingram.” Two officers grabbed defendant and sat him back on the bench. The officers then took defendant to the ground into “the prone position.” 9/21 RP 35-36. One officer had his hand on defendant’s shoulder, and his knee on defendant’s hip. Defendant “shifted his body weight out from underneath [the officer] kicking out at Officer Ingram, striking her at least twice.” 9/21 RP 37. The kicks left “red marks on her shin . . . [the officer] could see distinct lines of shoelaces.” 9/21 RP 40. When asked “Did you see the defendant kick Officer Ingram?” the officer answered, “I heard the impact, and then I saw two kicks that – after the impact that didn’t connect.” 9/21 RP 37. Officer Ingram was sure defendant kicked her “[b]ecause [she]

watched him two times kick me and connect and then miss two other times with the same leg.” 9/21 RP 97.

The State charged defendant with third degree assault of a police officer. CP 56. At trial, the officers testified as set out above. Defendant’s brother testified that Officer Ingram was not in the group of officers that took defendant down to the ground. It was after defendant was on the ground that Officer Ingram approached him. 9/22 RP 112.

Defendant’s wife testified. She recalled being told to sit down next to her husband. Defendant’s wife denied that defendant told her to shut up or backhanded her. 9/22 RP 138.

Defendant also testified. He denied trying to stand up after he was seated on the bench. Defendant showed the jury what he was doing when the officer told him to sit back down. He said the officer arrested him “because [he] won’t stay sitting down. “9/22 RP 151. Defendant said that after he was arrested and handcuffed, he “leaned over again, and . . . [the officer] throws me on the ground. Then, after that a whole bunch of cops jump on top of me.” 9/22 RP 153. Defendant testified that Officer Ingram was not there when he was thrown on the ground. She came running over

“towards my face where I couldn’t see her uniform. Her uniform was covering my face.” 9/22 RP 155.

Counsel asked defendant if he tried to kick or strike Officer Ingram. Defendant answered, “I didn’t see her, I didn’t see her at all. There was a whole bunch of people on top of me.” Defendant also denied threatening Officer Ingram. 9/22 RP 157.

In rebuttal, Officer Ingram testified that defendant kicked her. 9/22 RP 166.

The court instructed the jury that the elements of third degree assault were:

- (1) That on or about February 9, 2009, the defendant assaulted Officer Molly Ingram;
- (2) That at the time of the assault Officer Molly Ingram was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of these acts occurred in the State of Washington.

CP 38.

The court defined assault as:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking, would offend an ordinary person who is not unduly sensitive.

CP 39.

The court defined the mens rea required as “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 40.

Defendant argued that he did not commit an assault because “nobody intended it.” 9/22 RP 190. He concluded his argument saying, “If it was inadvertent, then it’s not assault. If [defendant] didn’t intend to do it, then it’s not assault[.]” 9/22 RP 191.

The State argued “We know [defendant] intended to kick her because he kicked her four times. He was able to hit her twice, and then he kept going after he struck her.” 9/22 RP 192.

The jury convicted defendant of third degree assault. CP 30. The court imposed a standard range sentence. 11/16 RP 2, 8, CP 20, 23.

### **III. ARGUMENT**

Evidence is sufficient to support a conviction if, after viewing all the evidence “in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the fact finder and are not

subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts “defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 401, 415-16, 824 P.2d 533 (1992).

The elements of third degree assault of a police officer were correctly set out by the court. CP 38, See State v. Brown, 140 Wn.2d 456, 467, 998 P.2d 321 (2000) (the State needs to prove only that a defendant committed an assault against another person and that person was a police officer performing his or her duties).

The intent required was the intent to perform the act that resulted in the offensive striking. That was a correct statement of the law. State v. Keend, 140 Wn. App. 858, 867, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008), see also, State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997) (“Assault by battery does not require specific intent to inflict substantial bodily harm or cause apprehension.”).

Here, the testimony of both police officers was that defendant intentionally kicked at Officer Ingram four times, striking her twice (9/21 RP 37, 97); that Officer Ingram was a police officer in the performance of her duties (9/21 RP 63, 65); and that the

assault occurred in Washington (9/21 RP 18, 65). This evidence would permit a rational trier of fact to find each element of third degree assault beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

Citing Brown, defendant initially argues that the elements of assault included “the law enforcement officer had a reasonable apprehension and imminent fear of bodily injury at the time of the assault; and the defendant’s actions created that apprehension.” Brief of Appellant 4. That is not a correct statement of the law for assault by actual battery.

In Brown, the officer was assaulted by the defendant “unzipping his jacket, reaching inside, and slowly removing what appeared to the officer to be a handgun.” The defendant then pointed what turned out to be a cigarette lighter designed to look like a gun at the officer. The officer testified he was afraid when the defendant pointed the lighter at him. Brown, 140 Wn.2d at 461-62.

Since there was no actual battery in Brown, the intent required of the defendant was different from the intent required here.

Apparently recognizing this, defendant next cites State v. Hall, 104 Wn. App. 56, 14 P.3d 884 (2000), and states “assault by

battery requires intent to commit the physical act that constitutes the assault.” He then asserts “the State was required to prove the ‘kick’ by [defendant] described by the officers was an intentional act not merely inadvertent. Brief of Appellant 4.

To commit the assault, defendant only needed to intend to move his leg vigorously. He did not need to intend to strike anyone with his leg. The evidence was sufficient to support defendant’s conviction. To the extent there was an issue of whether defendant intended to kick his leg, both officers testified he actually kicked Officer Ingram twice. He then tried to kick her twice more. Defendant argued to the jury that he did not intend to kick anyone. The jury obviously concluded the testimony of the officers was more credible than that of defendant and his wife. This is not reviewable. Walton, 64 Wn. App. at 415-16.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on August 2, 2010.

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August 2, 2010

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**Re: STATE v. EDGAR I. AMELCO  
COURT OF APPEALS NO. 64512-9-1**

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Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

THOMAS M. CURTIS, #24549  
Deputy Prosecuting Attorney

cc: Washington Appellate Project  
Attorney(s) for Appellant

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.  
I certify under penalty of perjury under the laws of the State of Washington that this is true.  
Signed at the Snohomish County Prosecutor's Office

2010 August 10

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THE STATE OF WASHINGTON,

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EDGAR I. AMELCO,

Appellant.

No. 64512-9-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 2<sup>nd</sup> day of August, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
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SEATTLE, WA 98101-4170

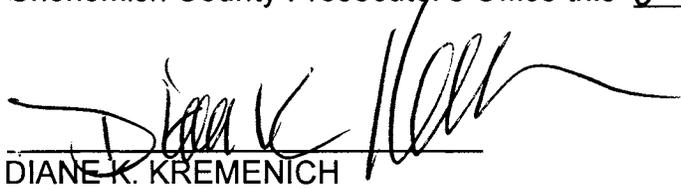
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 2<sup>nd</sup> day of August, 2010.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit