

NO. 65915-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN DAVID NORDVALL,

Appellant.

2011 JUN 21 10:15 AM
COURT OF APPEALS
JW

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Heavey

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 7

THE STATE FAILED TO PROVE THAT NORDVALL
INTENTIONALLY ASSAULTED DEPUTY PACEY, AN
ESSENTIAL ELEMENT OF THE CHARGE OF ASSAULT IN
THE THIRD DEGREE..... 7

1. The State must prove the essential elements of a criminal
charge..... 7

2. The State did not present sufficient evidence to prove that
Nordvall committed an assault or that he had specific intent to
do so 8

3. The remedy is reversal and dismissal..... 13

E. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	8
<u>State v. Brown</u> , 140 Wn.2d 456, 998 P.2d 321 (2000)	9
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 796 (1995).....	7, 9
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	10
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8

Washington Court of Appeals Decisions

<u>State v. Mann</u> , 157 Wn. App. 428, 237 P.3d 966 (2010).....	10, 12
<u>State v. Oakley</u> , 158 Wn. App. 544, 242 P.3d 886 (2010).....	10
<u>State v. Pedro</u> , 148 Wn. App. 932, 201 P.3d 398 (2009), rev. denied, 169 Wn.2d 1007 (2010)	11

Washington Constitutional Provisions

Const. art. I § 3.....	7
------------------------	---

United States Supreme Court Decisions

<u>Burks v. United States</u> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	13
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	7

United States Constitutional Provisions

U.S. Const. amend. XIV	1, 7
------------------------------	------

Statutes

RCW 9A.36.031	8
---------------------	---

A. ASSIGNMENT OF ERROR

In violation of Nordvall's Fourteenth Amendment right to due process of law, the State failed to prove the essential elements of assault in the third degree beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause requires the State to prove the essential elements of a criminal charge beyond a reasonable doubt. Should this Court conclude that the State did not present sufficient evidence to prove that Nordvall intentionally assaulted a police officer?

C. STATEMENT OF THE CASE

Appellant John David Thomas Nordvall owned his own home in Shoreline, Washington, where he lived with his pets. 3RP 16-17, 30.¹ A journeyman electrician by trade, Nordvall had difficulty finding steady work for several years and in 2009 hoped to start a doggie daycare business with his daughter. 1RP 30; 3RP 36. Because of Nordvall's financial difficulties, his mother, Barbro

¹ The verbatim report of proceedings consists of multiple volumes. There is one citation to the sentencing hearing which is referenced as "Sentencing RP" followed by page number. Otherwise, in this brief, only the transcripts from the actual trial are cited. They are referenced as follows:

5/27/10	-	1RP
6/1/10	-	2RP
6/3/10	-	3RP

Nordvall,² loaned him money to prevent his house from going into foreclosure. 1RP 29, 101-03.

In late August, 2009, Nordvall went to the Shoreline Bank of America branch, where he and his mother had a banking relationship with the manager, Alan Askew, and asked for a loan. 1RP 30. Nordvall hoped to fund his and his daughter's prospective business and to remodel his mother's home, in particular to install heated sidewalks so that his mother would not slip and fall when it was icy. Id. Nordvall had his dog with him and his bird on his shoulder, and the interaction with Askew was friendly, although the loan did not proceed to application. 1RP 30-31.

Nordvall's next interaction with Askew was not so pleasant. On September 8, 2009, Nordvall went to see Askew to request that he print Barbro's bank statements. 3RP 11. Because Nordvall's own accounts had been closed for a couple of years, his mother was assisting him in paying a debt that had gone into collection. Id. Nordvall asked Askew to prepare the statements, explaining that his mother was going to come and pick them up. Id. Askew did not want to comply with Nordvall's request, and Nordvall called him an "idiot." 1RP 37; 3RP 11.

² For clarity, Barbro Nordvall is referred to in this brief as "Barbro." No disrespect is intended.

Sometime later that same day, an elderly and irascible neighbor and friend of Nordvall, Bobbie Dyer, came into the Bank of America Branch and told Askew that Nordvall had threatened to kill Askew and Barbro. 1RP 38, 75, 80, 89. Dyer was hard of hearing and was not wearing hearing aids when he allegedly heard this threat. 1RP 66-68. Dyer did not believe that Nordvall would carry out the threat but Askew was frightened. 1RP75, 89. Although Barbro was untroubled by the supposed threat, Askew decided to report it to the police. 1RP 40-42, 46, 106, 110.

Believing that they had probable cause for Nordvall's arrest, two King County Sheriff's Deputies went to Nordvall's home without a warrant and asked him to come outside. 2RP 8-12. They did not tell him why they were there or that they intended to arrest him. 2RP 18; 3RP 43-44. Nordvall told the officers several times that they were trespassing if they did not want to tell him why they wanted him to come outside. 3RP 43. He believed that he was being harassed. 3RP 44.

Because Nordvall refused to come out of his house, a SWAT team was dispatched. 6RP 15-16, 22. King County Sheriff's Deputy Scott Click directed the SWAT team operation. 6RP 24. When Click arrived outside of Nordvall's residence, he knew that

the police did not have an arrest warrant for Nordvall and were not going to obtain one. 6RP 75. Nor had they obtained a search warrant. Id. He was not sure whether Nordvall had ever been told that the police had probable cause for his arrest. 6RP 75-76.

The SWAT team first set up flood lights and illuminated the house. 2RP 29. The purpose of the lights was to enable police to see clearly inside the house, and to blind anyone looking out. Id. Then SWAT team hostage negotiators arrived on their armored vehicle, the Bear, and began calling into Nordvall's house on their PA system. 2RP 31. The SWAT team then started trying to "take away portions of the home from him." 2RP 35. Using projectiles, they shot away the windows from the downstairs rooms. 2RP 35-37. They then started shooting tear gas and pepper spray into the house. 2RP 44-46.

Meanwhile, a "particularly strong deputy" used a battering ram to break down Nordvall's back door and a team entered and cleared Nordvall's basement. 2RP 98-100, 103. Another team entered the first floor of Nordvall's house. 2RP 49-51. The police continued to shoot tear gas and pepper spray every 15-20 minutes, now targeting the upstairs area of Nordvall's home, where they believed he was hiding. 2RP 54, 106.

The SWAT team officers who had entered Nordvall's basement and the officers who were on the first floor advanced together upstairs. 2RP 51, 101. They employed a strategy they called "break and take", where they broke windows and destroyed curtains of the rooms as they cleared them. 2RP 105. Their intent was to force Nordvall out of his bedroom and/or use psychological intimidation to compel him to surrender. 2RP 79, 105.

The officers heard sounds from Nordvall's bedroom as if he was barricading the entrance. 2RP 104. Inside, Nordvall was terrified. 3RP 14-16. He had been woken up by the glass in his bedroom window breaking. 3RP 14. He did not know who was in his home but was suspicious it was a neighbor who had a vendetta against him. 3RP 16. His only thought was to protect himself and his dog and bird, which were in the room with him. 3RP 17, 30.

Meanwhile, the police attempted to gain entrance to Nordvall's bedroom by boring through the wall from the adjacent room. 2RP 107. Deputy Bryan Pacey punched through the wall using a "break and rake" tool. 2RP 110. As he was doing this, the officers heard a "pop" and saw a spray of sheetrock, and Pacey felt something hit his right bicep protector. 2RP 56, 110. They thought that a shot had been fired, possibly from a .22 or a small caliber

pistol, and Click made the decision to detonate a Noise Flash Diversionary Device,³ or “flash-bang”, inside the room. 2RP 60, 113. The device creates overpressure, a very loud noise, and a bright light when it is deployed. 2RP 61. It is intended to overwhelm the senses. Id.

The device landed on top of Nordvall’s dog, which was on the bed, melting her hair and injuring her. 3RP 17. The dog jumped off of the bed and onto the floor, where Nordvall was, and the device exploded, causing lasting damage to Nordvall’s hearing. Id.

Nordvall hid himself and the dog in the closet under a blanket, and put the bird on a shelf in the hope that it would be safe.⁴ Id. He did not know what to do; he “was hoping everything would just stop.” 3RP 45. Nordvall was still under the blanket when the police entered the room and broke into the closet. 2RP 67.

Click fired a “blue nose” projectile directly at Nordvall. 2RP 68. Although a hit at close range by this weapon would have been

³ Deputy Pacey referred to the item as a “Noise Bang Diversion Device,” 2RP 113, but it appears it is commonly called a Noise Flash Diversionary Device. See <http://www.ncjrs.gov/App/publications/Abstract.aspx?id=133662>.

⁴ At the sentencing hearing, Nordvall’s counsel advised the court that the dog was injured and two birds were killed. Sentencing RP 11.

very painful, Nordvall did not respond. Id. Click then jumped on top of Nordvall and forcibly subdued him, ultimately placing him in handcuffs. 2RP 70-71. Click admitted that after this he had to be “treated for blood exposure.” 2RP 72.

Based on these events the King County Prosecuting Attorney charged Nordvall with two counts of felony harassment and one count of assault in the third degree for assaulting Deputy Pacey. CP 19-21. A jury acquitted Nordvall of the felony harassment charges but convicted him of the assault charge. CP 74-76. Nordvall appeals. CP 88-89.

D. ARGUMENT

THE STATE FAILED TO PROVE THAT NORDVALL INTENTIONALLY ASSAULTED DEPUTY PACEY, AN ESSENTIAL ELEMENT OF THE CHARGE OF ASSAULT IN THE THIRD DEGREE.

1. The State must prove the essential elements of a criminal charge. The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Wash. Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the

evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State did not present sufficient evidence to prove that Nordvall assaulted Pacey, or that he did so intentionally. Nordvall's conviction should be reversed and dismissed.

2. The State did not present sufficient evidence to prove that Nordvall committed an assault or that he had specific intent to do so. According to statute,

A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree . . . [a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault[.]

RCW 9A.36.031(1)(g).

"[K]nowledge that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault." State v. Brown, 140 Wn.2d 456, 467, 998 P.2d

321 (2000). However, specific intent to cause harm or to create an apprehension of harm is an essential element of the crime of assault. Byrd, 125 Wn.2d at 713. The State did not present sufficient evidence to prove the fact of an assault or specific intent.

Click and Pacey did not see anyone shoot at them, nor were they able to testify without equivocation that someone had fired a shot at them. The most Pacey could say was that he heard what he thought was a gunshot from a small caliber weapon. 2RP 107. Click and Pacey testified that after they entered Nordvall's bedroom, they found a "pellet rifle" and pellets on the floor or on the bed. 2RP 72, 113. At trial, Nordvall denied that he fired the "pellet rifle" at anyone or tried to harm the police officers. 3RP 17.

Click and Pacey did not search for or locate any pellet that would have been discharged from the rifle. 2RP 81. The State also did not present evidence that the rifle was test-fired to prove it was operational. No evidence was presented to establish the range, power, or effectiveness of a "pellet rifle." No evidence was presented to prove that a shot fired from a pellet rifle would have been capable of penetrating through sheetrock.

Courts have held that "if a defendant fires his or her weapon at a victim, it is reasonable to infer that the defendant intended to

inflict . . . harm.” State v. Mann, 157 Wn. App. 428, 237 P.3d 966 (2010) (citing State v. Hoffman, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991) (emphasis added)). Thus, in Mann, the Court held that where the State showed that (1) the police officer saw the defendant’s hand pointing a gun at him; (2) the defendant was ordered to surrender but fired his gun while crawling toward the officer; (3) two .380 caliber bullet casings that were recovered at the scene matched the defendant’s gun; (4) a .380 caliber bullet was recovered from a mattress that had been leaning against a tree where the officer had taken cover; and (5) the evidence established that the bullet trajectory was horizontal, the State had presented sufficient evidence to support a an inference of an intentional assault. Mann, 157 Wn. App. at 439.

Similarly, in State v. Oakley, 158 Wn. App. 544, 242 P.3d 886 (2010), which involved a challenge to the sufficiency of the evidence to support a conviction for attempted drive-by shooting, the Court held the evidence was sufficient where (1) witnesses saw a gun protruding from a car and identified Oakley as the person holding the gun; (2) Oakley’s older brother heard a crackling sound like the gun jamming when Oakley “tried to shoot again”; and (3) a

firearms expert stated that the gun was operable if loaded correctly. Id. at 550.

In State v. Pedro, 148 Wn. App. 932, 201 P.3d 398 (2009), rev. denied, 169 Wn.2d 1007 (2010), the defendant claimed on appeal that there was insufficient evidence to support the intent element of assault, noting that several witnesses did not see him fire a gun. Id. at 950-51. In rejecting the claim, the Court noted that one witness did testify that she saw Pedro pull a black handgun on the victim and shoot at him as the victim ran. Id. at 951. The Court further noted that there was extensive testimony about prior altercations between Pedro and the victim and Pedro was seen chasing him. Id.

In contrast, in this case there was no direct evidence or evidence from which a reasonable juror could draw an inference that Nordvall shot at the officers or that he did so with specific intent. Pacey and Click thought that they heard what could have been a shot and Pacey believed he felt something strike his bicep protector. 2RP 56, 110. No one saw Nordvall discharge a weapon at the officers. The officers did not bother to search the scene for the discharged pellet. The pellet gun recovered from the scene was not tested to determine it was operable.

Even assuming without conceding that Pacey and Click's observations, considered together with the discovery of the pellet rifle in Nordvall's room, were sufficient to support a reasonable inference that Nordvall had fired the rifle, the State did not prove Nordvall fired the rifle with the specific intent to do harm or create an apprehension of harm. Nordvall was inside his bedroom, which was heavily barricaded, when the shot allegedly was fired. 2RP 65. The police had been lobbing tear gas and pepper spray inside the room every 15-20 minutes for at least a couple of hours. 2RP 48, 54. It was uncontroverted that when the shot was allegedly fired Nordvall was unable to see outside the room and would not necessarily have known where people were located on the other side of the wall.

Further, as noted, the State presented no evidence whatsoever of the range or capability of a "pellet rifle" such as the item found in Nordvall's bedroom. There was no basis to conclude that a projectile fired from the "pellet rifle" would have been capable of penetrating through sheetrock. Again, there was no evidence that the specific "pellet rifle" that was found was operable. There was no evidence, as in Mann, of a horizontal trajectory which would have supported an inference of specific intent. There was no

evidence that the item was fired intentionally rather than accidentally. There simply was no evidence to support the essential element of specific intent.

3. The remedy is reversal and dismissal. “The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Thus, as a matter of law, a determination that the evidence is insufficient as to any essential element of the charged offense requires dismissal with prejudice. This Court should reverse and dismiss Nordvall’s conviction with prejudice.

E. CONCLUSION

This Court should conclude that the State presented insufficient evidence to support Nordvall's conviction for assault in the third degree. Nordvall's conviction should be reversed and dismissed.

DATED this 21st day of April, 2011.

Respectfully submitted:

Susan F. Wilk (by Vinter #7780)
SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65915-4-I
v.)	
)	
JOHN DAVID NORDVALL,)	
)	
Appellant.)	

2011 APR 21 PM 4:28
COURT FILED
[Signature]

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 21ST DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| [X] KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] JOHN D. NORDVALL
15274 DENSMORE AVE. N.
SHORELINE, WA 98133 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF APRIL, 2011.

X _____ *[Signature]*

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710