

No. 66018-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHIRLEY LOVERN,

Appellant.

2011 FEB 23 PM 1:36



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

BRIEF OF APPELLANT

GREGORY C. LINK
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.....2

D. ARGUMENT.....3

THE STATE DID NOT PROVE MS. LOVERN
INTENTIONALLY ASSAULTED ANOTHER PERSON3

1. The State was required to prove the elements of the
offenses beyond a reasonable doubt3

2. The State did not prove Ms. Lovern assaulted Ms. Ulloa4

3. The State did not prove Ms. Lovern assaulted Ms. Crager .5

4. The court must reverse and dismiss each of Ms. Lovern’s
convictions6

E. CONCLUSION7

TABLE OF AUTHORITIES

United States Constitution

| | |
|---------------------|---|
| U.S. amend XIV..... | 3 |
|---------------------|---|

Washington Constitution

| | |
|--------------------------|------|
| Const. Art. I, § 7 | 1, 5 |
|--------------------------|------|

Washington Supreme Court

| | |
|--|---|
| <u>Clark v. Baines</u> , 150 Wn.2d 905, 84 P.3d 245 (2004) | 4 |
|--|---|

| | |
|---|---|
| <u>In re the Welfare of Colyer</u> , 99 Wn.2d 114, 660 P.2d 738 (1983) | 5 |
|---|---|

| | |
|--|---|
| <u>McNabb v. Dep't of Corrections</u> , 163 Wn.2d 393, 180 P.3d 1257 (2008) | 5 |
|--|---|

| | |
|---|---|
| <u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), <u>reversed on other grounds</u> , <u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) | 6 |
|---|---|

| | |
|---|---|
| <u>Physician's & Dentists' Business Bur. v. Dray</u> , 8 Wash.2d 38, 111 P.2d 568 (1941) | 5 |
|---|---|

| | |
|--|---|
| <u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992)..... | 4 |
|--|---|

| | |
|--|---|
| <u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984)..... | 4 |
|--|---|

| | |
|--|---|
| <u>State v. Stevens</u> , 158 Wn.2d 304, 143 P.3d 817 (2006) | 4 |
|--|---|

United States Supreme Court

| | |
|--|------|
| <u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) | 3, 6 |
|--|------|

Statutes

RCW 18.71.200.....4

RCW 9A.36.0314

A. ASSIGNMENT OF ERROR

The trial court denied Ms. Lovern due process when it entered convictions of of third degree assault in the absence of sufficient evidence that Shirley Lovern assaulted anyone.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. To convict Ms. Lovern of third degree assault the State was required to prove she unlawfully touched a person with criminal intent. In its best light, the State's evidence established the alleged assault was an accidental act. Can an accidental act sustain a conviction of assault?

2. Article I, section 7 of the Washington Constitution protects the right of a competent adult to refuse medical care. Forcing unwanted medical care on a competent adult is an assault. Where Ms. Lovern made clear she did not want certain medical intervention yet medical personnel ignored her statements. Can she be convicted of assault for physically resisting such unwanted care?

C . STATEMENT OF THE CASE

Shirley Lovern suffers a host of medical conditions that limit her mobility. RP 255. 257. In addition, Ms. Lovern suffers from alcoholism. RP 262.

A taxi driver who had just driven Ms. Lovern to her home called 911 when Ms. Lovern collapsed on the ramp leading to her home. An ambulance staffed by paramedic Debbie Crager responded to Ms. Lovern's house and found Ms. Lovern unresponsive. RP 134-35. Once Ms. Lovern was placed in the back of the ambulance, Ms. Crager attempted to insert an IV. RP 135. Ms. Lovern promptly said "You're not going to put in an IV." Id. Nonetheless, Ms. Crager continued her efforts and inserted the IV line. RP 136.

While the ambulance was driving to Whidbey General Hospital, Ms Lovern pulled the IV from her arm. RP 141. Ms. Crager attempted to stop the bleeding and grabbed Ms. Lovern's arm. RP 142 Ms. Lovern, in turn, attempted to remove Ms. Crager's hands and in the process scratched Ms. Crager's arm. Id.

At the hospital emergency room, nurse Patricia Ulloa was tending to Ms. Lovern. RP 192. As Ms. Ulloa bent down near the foot of the bed, she was struck by Ms. Lovern's foot. RP 193-94.

Ms. Lovern immediately said “I’m so sorry, I didn’t mean to do that.”

RP 194.

The State charged Ms. Lovern with two counts of third degree assault. CP 38-40. A jury convicted Ms. Lovern on both counts. CP 55-56.

D. ARGUMENT

THE STATE DID NOT PROVE MS. LOVERN
INTENTIONALLY ASSAULTED ANOTHER PERSON

1. The State was required to prove the elements of the offenses beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

To convict Ms. Lovern the State was required to prove she “assaulted a nurse . . . or health care provider who was performing

his or her nursing or health care duties at the time of the assault.”

RCW 9A.36.031(1)(i). A paramedic is a “health care provider.”

RCW 9A.36.031(1)(i); RCW 18.71.200. Because the term “assault”

is not defined by statute, Washington courts rely on the three

common-law definitions of the term:

(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm

State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006)

(citing Clark v. Baines, 150 Wn.2d 905, 909 n. 3, 84 P.3d 245

(2004)).

2. The State did not prove Ms. Lovern assaulted Ms. Ulloa.

Ms. Ulloa said that it not appear that Ms. Lovern intended to kick her. RP 204. Ms. Ulloa, as well as the second nurse in the room, Jacqueline Haynes, testified Ms. Lovern immediately apologized and said she had not meant to kick Ms. Ulloa. RP 194, 210.

The term “assault” does not include an “accidental act.”

State v. Hopper, 118 Wn.2d 151, 158, 822 P.2d 775 (1992)

(quoting State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683

(1984)). The court defined “intent” for the jury as “acting with the

objective or purpose to accomplish a result which constitutes a

crime.” CP 26. Thus, it is not enough that the State prove Ms. Lovern purposefully kicked her leg and accidentally struck Ms. Ulloa. Instead, the State had to prove that Ms. Lovern kicked her leg out with the intent to strike Ms. Ulloa. The State’s own evidence does not support that finding.

3. The State did not prove Ms. Lovern assaulted Ms. Crager. Absent very narrow circumstances, none of which are present here, Article I, section 7 of the Washington Constitution guarantees a competent adult the right to refuse medical aid. In re the Welfare of Colyer, 99 Wn.2d 114, 120-22, 660 P.2d 738 (1983), see also, McNabb v. Dep’t of Corrections, 163 Wn.2d 393, 400-01, 180 P.3d 1257 (2008). Unwanted medical treatment has long been deemed an assault in Washington. Colyer, 99 Wn.2d at 121 (citing Physician’s & Dentists’ Business Bur. v. Dray, 8 Wash.2d 38, 111 P.2d 568 (1941)).

Ms. Lovern told Ms. Crager she did not want an IV. RP 135, 168. Ms. Crager inserted an IV nonetheless. RP 136. Ms. Lovern subsequently removed the IV. RP 141. Ms. Crager then attempted to staunch the blood flow and reestablish the IV. RP 142. Trying to loosen Ms. Crager’s grip on her arm, Ms. Lovern grabbed and pulled on Ms. Crager hand and wrist. Id. In doing so, Ms. Lovern

caused what Ms Crager described as a “little tiny scratch” on her wrist. RP 143.

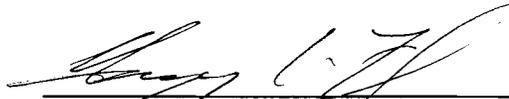
Ms. Lovern was entitled to refuse medical care and was not obligated to allow Ms. Crager to ignore her wishes. Ms. Lovern’s acts were not “an unlawful touching with criminal intent” and thus were not an assault.

4. The court must reverse and dismiss each of Ms. Lovern’s convictions. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment’s Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State did not prove Ms. Lovern assaulted either Ms. Crager or Ms. Ulloa, this Court must reverse and dismiss Ms. Lovern’s convictions.

E. CONCLUSION

For the reasons above this Court should reverse Ms. Lovern's convictions.

Respectfully submitted this 28th day of February, 2011.



GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant

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

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | NO. 66018-7-I |
| |) | |
| SHIRLEY LOVERN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING 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:

- | | | |
|---|---|-------------------------------------|
| <input checked="" type="checkbox"/> ISLAND COUNTY PROSECUTING ATTORNEY P.O. BOX 5000 COUPEVILLE, WA 98239 | <input checked="" type="checkbox"/> <input type="checkbox"/> | U.S. MAIL HAND DELIVERY |
| <input checked="" type="checkbox"/> SHIRLEY LOVERN 2134 NAUTILUS RD FREELAND, WA 98249 | <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> | U.S. MAIL HAND DELIVERY _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2011.

X _____ 

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