

NO. 47377-I

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY ROSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 14-1-0059-8

Supplemental Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Where the evidence in this case did not support an inference that third degree assault was committed to the exclusion of first degree assault, did the trial court properly decline to include it as a lesser included offense? 1

B. STATEMENT OF THE CASE. 1

C. ARGUMENT.....2

 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GIVE A LESSER INCLUDED INSTRUCTION ON THIRD DEGREE ASSAULT BECAUSE THE EVIDENCE SHOWED DEFENDANT ACTED WITH INTENT RATHER THAN CRIMINAL NEGLIGENCE.2

D. CONCLUSION.5

Table of Authorities

State Cases

State v. Boswell, 185 Wn. App. 321, 333, 340 P.3d 971 (2014).....2
State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015)2
State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975).....4
State v. Prado, 144 Wn. App. 227, 242, 181 P.3d 901 (2008).....3
State v. R.H.S., 94 Wn. App. 844, 846, 974 P.2d 1253 (1999).....4
State v. Shepard, 167 Wn. App. 887, 889, 275 P.3d 364 (2012).....3
State v. Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978)2, 3

Statutes

RCW 10.61.006.....2
RCW 9A.36.0113
RCW 9A.36.0213
RCW 9A.36.0313
RCW 9A.36.031(1)(d).....3

Other Authorities

WPIC 10.043
WPIC 35.223

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the evidence in this case did not support an inference that third degree assault was committed to the exclusion of first degree assault, did the trial court properly decline to include it as a lesser included offense?

B. STATEMENT OF THE CASE.

Respondent incorporates the Statement of the Case set forth in the Brief of Respondent. The following additional facts are relevant for the supplemental issue:

Defendant proposed a lesser included third degree assault instruction regarding both counts of first degree assault. 7RP 703; CP 73–75.¹ After hearing argument from both parties, the trial court ruled:

I simply don't think that either Assault III or Assault IV is applicable simply because there's no criminal negligence here based on [defendant's] testimony. And so I'm not going to give that instruction since this wasn't criminal negligence. This was an intent to do exactly what [defendant] did, albeit his claim was self-defense, but there was no ambiguity in terms of his testimony as to what he was attempting to do. And it wasn't like the knife slipped out of his hand or that was accidental, that he meant to stab her toe. There's just no

¹ It should be noted that lesser included instructions of second degree assault were given on both counts. *See* CP 106.

element of negligence that I could interpret in this case based on his testimony, and I'm going to respectfully decline to give those lesser included [sic].

7RP 706.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO GIVE A LESSER INCLUDED INSTRUCTION ON THIRD DEGREE ASSAULT BECAUSE THE EVIDENCE SHOWED DEFENDANT ACTED WITH INTENT RATHER THAN CRIMINAL NEGLIGENCE.

A defendant is entitled to an instruction on a lesser included offense if two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the offense charged (legal prong); and (2) the evidence in the case must support an inference that the lesser crime was committed (factual prong). *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978); see RCW 10.61.006. “Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, **to the exclusion of the greater**, charged offense.” *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015) (emphasis in original). Appellate courts review the legal prong of *Workman* de novo and the factual prong for an abuse of discretion by the trial court. *State v. Boswell*, 185 Wn. App. 321, 333, 340 P.3d 971 (2014).

As the State below acknowledged, 7RP 703, third degree assault is a lesser degree crime of assault, therefore the first legal prong of *Workman* is satisfied. The second prong, however, is not met in this case, making a lesser included instruction on third degree assault inappropriate.

For third degree assault, the relevant part of RCW 9A.36.031 states:

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 . . . With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

RCW 9A.36.031(1)(d). Third degree assault thus requires that the defendant acted with criminal negligence. *See, e.g., State v. Shepard*, 167 Wn. App. 887, 889, 275 P.3d 364 (2012); WPIC 35.22 (Assault – Third Degree – Criminal Negligence – Elements). A person is criminally negligent if he fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of that risk is a gross deviation from the standard of care that a reasonable person would exercise in the same situation. WPIC 10.04 (Criminal Negligence – Definition). First and second degree assault, on the other hand, require the State prove the person acted with intent. *See, e.g., RCW 9A.36.011, 9A.36.021; State v. Prado*, 144 Wn. App. 227, 242, 181 P.3d 901 (2008) (“First degree assault

requires intent”), *State v. R.H.S.*, 94 Wn. App. 844, 846, 974 P.2d 1253 (1999) (“Second degree assault requires proof of an intentional assault”).

In the present case, the evidence does not support an inference that defendant acted with criminal negligence rather than with intent. In defendant’s version of events, Susan Ortloff was the first aggressor. Susan Ortloff lunged at defendant and they struggled over the knife. 7RP 657–658. Defendant testified, “I [took] the knife out of her hand and I stabbed her once.” 7RP 658. On cross examination, defendant admitted that when he stabbed Susan Ortloff in the neck, he did it on purpose and acted with intent. 7RP 691. The defense at trial was not that defendant did not commit the act or intend to commit the act; rather, it was that defendant acted in self-defense. *See* 7RP 767; CP 113. Self-defense is in fact an *intentional* act that is nevertheless lawful. *See State v. Kerr*, 14 Wn. App. 584, 587, 544 P.2d 38 (1975).

Defendant acted with intent rather than criminal negligence. Therefore the evidence does not support an inference that defendant committed third degree assault to the exclusion of first degree assault. The trial court did not abuse its discretion in declining to instruct the jury on third degree assault.

D. CONCLUSION.

The evidence in this case does not support an inference that defendant committed third degree assault to the exclusion of first degree assault because defendant acted with intent rather than criminal negligence. Therefore, the trial court did not abuse its discretion in declining to give a third degree lesser included instruction.

DATED: JANUARY 13, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

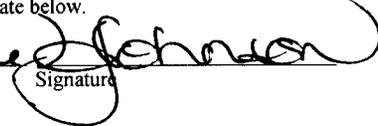


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Jordan McCrite
Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by *efile* U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/13/16 
Date Signature

PIERCE COUNTY PROSECUTOR

January 13, 2016 - 1:07 PM

Transmittal Letter

Document Uploaded: 6-473771-Supplemental Respondent's Brief.pdf

Case Name: State v. Jeremy Rose

Court of Appeals Case Number: 47377-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Supplemental Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

marietrombley@comcast.net