NO. 47258-9-II

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

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STATE OF WASHINGTON,
Respondent,

v.

JOHN W. RUSSELL,
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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# BRIEF OF RESPONDENT

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KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

WSBA #34097

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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## I. COUNTER STATEMENT OF THE CASE

Overall, the State agrees with the facts as presented by the Appellant. However, there are a few things that need to be clarified or added.

Robert VanBlaricom, Ben Clark, and Ike Stone do not live in a house owned by the Johnsons. They live in a neighboring house owned by Bob Eager. RP 58.

The Appellant's assertion that "The tone of the evening changed, and the heavier drinking began at this point" is unsupported by citation and should be disregarded. Appellant's Brief at 3.

The State also disagrees with the description of the alcohol consumption of the witnesses. Mrs. Johnson testified that she had "four or five" drinks on the night of the assault between 7PM and approximately 3AM. RP 86. She stated that she could feel the effects of the alcohol and was "a little buzzed" but that she "was fully aware of what was going on." RP 87. Ike Stone had five mixed drinks spaced over the entire night. RP 96. He also stated that he was "buzzed" but not impaired. RP 96.

Ike Stone saw the Appellant with a knife earlier in the evening. RP 98-99. As Mr. Stone, Mrs. Johnson, and the Appellant were sitting in the kitchen, the knife was on the table and closed. RP 100. Mr. Stone saw the

Appellant "...stand up, just make a gesture that seemed across her throat. And then he came at me swinging and I was able to garb his hand and there was a knife in it." RP 99. Mr. Stone was cut once on the neck and once on the chest. RP 99. Mr. Stone was able to restrain the Appellant, and the Appellant eventually went to the floor. RP 101.

The Appellant does not included that Mr. Stone repeatedly asked the Appellant why he hurt Mrs. Johnson, and the first three times the Appellant said "because she hurt me." RP 101. The fourth time, the Appellant answered "I just wanted to show that people will do things for no reason." RP 101-102.

Mrs. Johnson spent two days in intensive care after the assault. RP 75. She was then hospitalized an additional three days. RP 76. The assault left Mrs. Johnson with several wounds, a slashed neck, damaged hand, and cut to her forehead. RP 76. Mrs. Johnson required a five and a half hour surgery to repair the damage to her neck and hand. RP 75. The Appellant cut through the tendon to the bone of Mrs. Johnson's right hand. RP at 75-76.

At the time of trial, Mrs. Johnson still had troubles with range of motion in her hand due to scar tissue. RP 76-77. The slash to her neck still affects her range of motion, caused nerve damage to her face, and left a

"pretty healthy scar." RP 77-78. These issues might never be resolved to a pre-attack level. RP 78.

Dr. Jonathon Gifford is a surgeon that treated Mrs. Johnson. RP 167-68. Dr. Gifford described Mrs. Johnson's injury as a 13 centimeter (approximately 5 inch) laceration that cut through the thyroid down to the trachea. RP 171-72. The doctor acknowledged that many anatomical structures that are crucial to life are located in the general area of the wound. RP 173-74.

The doctor testified that the wound, if untreated, would have a "guarded to poor prognosis" and that Mrs. Johnson had lost a lot of blood. RP 174. He further stated that Mrs. Johnson will "probably not be able to get back to prior levels of functioning given the division of [the neck] muscles." RP 179.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

### a. There is sufficient evidence to support the jury's verdict of guilty regarding Assault in the First Degree.

"The test for determining the sufficiency of the evidence is whether, after viewing 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, 1074 (1992) (citing *State v. Green,* 94 Wash.2d 216, 220–22, 616 P.2d 628

(1980).) "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin,* 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).)

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd,* 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts "defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan,* 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson,* 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

In order to support a conviction for Assault in the First Degree in this case the State was required to prove that:

> (1) That on or about June 29, 2014, the defendant assaulted Jeanette M. Johnson;
>
> (2) That the defendant acted with intent to inflict great bodily harm;
>
> (3) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death; and
>
> (4) That this act occurred in the State of Washington.

CP 34-35; WPIC 35.08.

The Appellant focuses his challenge on whether or not the State produced sufficient evidence that he "acted with intent to inflict great bodily harm." The jury in this case was instructed that:

> Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

WPIC 2.04

Given the extensive injuries suffered by Mrs. Johnson, the only reasonable conclusion is that she suffered great bodily harm. Her neck was slashed with a knife causing her to lose a great deal of blood. The wound required a lengthy surgery to repair, and the injury caused a multiple day hospital stay.

The Appellant does not seem to challenge the level of injury suffered by the victim, but whether or not the Appellant "intended" such injury. Appellant's Brief at 8.

In order for the Appellant to assault Mrs. Johnson, he had to stand up, pick up his closed knife, open the knife, step behind Mrs. Johnson, and slash her neck. RP 99-101. Following the attack, the Appellant told Ike Stone that "I just wanted to show that people will do things for no reason." RP 101-102.

There was no evidence that his intoxication was such that he could not form the requisite intent for Assault in the First Degree. In fact, regardless of his intoxication, the Appellant was able to do all of the above described actions. He was then able to articulate a reason for his actions. There is no evidence to support a theory that this assault was accidental.

The Appellant was able to form the requisite intent to inflict great bodily harm. Indeed he actually did inflict great bodily harm on Mrs. Johnson.

b. The trial court can order evaluation for civil commitment.

For the factual reasons discussed in both briefs, the trial court had concerns about the Appellant's mental health and future dangerousness. The Appellant came before the court with no prior criminal history after committing two extremely violent assaults without provocation. It follows that some type of mental health issue could be at play.

The court's directive does not order the Appellant to "be held until he is subjected to a mental health evaluation and possibly subject to civil commitment, following his lawful sentence." Appellant's Brief at 12. Instead, the court ordered, in section 4.6, that the Appellant "shall be evaluated for civil commitment on mental health grounds prior to release." CP 2-10.

This simply alerts the Department of Corrections that this should be done as part of readying the Appellant for release. This is not practically different from asking the County Designated Mental Health Professional to conduct an involuntary outpatient evaluation pursuant to RCW 71.05.150. There is no reason that such evaluation should lengthen the Appellant's incarceration, unless a civil commitment proceeding were initiated; however, that detention would be governed by a separate court proceeding.

c. Legal Financial Obligations

i. The trial court appropriately imposed legal financial obligations.

The Appellant is 27 years old and there was no evidence presented during the trial or sentencing that would indicate that he is unable to seek employment. Further, the Appellant's own sentencing statement agreed that the costs and fees imposed were proper. Thus the court and counsel complied with their obligations under RCW 10.01.160. But, even if they hadn't, the court should not review this issue.

ii. The Court should not review the issue of Legal Financial Obligations.

For the first time on appeal the Appellant asks the court to consider the trial judge's failure to consider his future ability to pay Legal Financial

Obligations (LFO's) as a matter of discretionary review. The court should decline. The purpose of RAP 2.5 "Is to give the trial court a chance to correct the error and give the opposing party a chance to respond." *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). The State Supreme Court held that an appellate court does not abuse its discretion when it declines to review this issue. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

In reviewing *Blazina* the Supreme Court essentially held that the case involved an issue of public interest that should be decided by an appellate court. RAP 13.4(b)(4). *Blazina* has resolved that significant question of public interest, and the message has been sent to the trial courts to take the issue more seriously. Deciding this case and remanding adds nothing to *Blazina*, and does not make a statement regarding a significant question of public interest. The Appellant makes no argument as to why the court should accept review.

The Appellant's discretionary LFO's total $575. In order to accomplish what the Appellant suggests, he would have to be transported to Grays Harbor County to appear before the trial court, appointed a new public defender, take court and prosecutor time, and possibly file a new appeal, which would require another appellate counsel at public defense to

review the case and either file an *Ander's* brief (*see Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)) or come up with some other issue, which would require more appellate court time and attention. These costs simply are not worth it when Appellant makes no showing he is entitled to actual relief, and may petition at any time for relief from the LFO's. RCW 10.01.160(4) This is exactly the type of issue RAP 2.5 was designed for. The court should not review this issue.

## III. CONCLUSION

The State respectfully requests that, for the reasons stated above, the Appellant's appeal be denied and the trial court's verdict and sentence be affirmed.

DATED this 18th day of December, 2015.

Respectfully Submitted,

By: _____
KATHERINE L. SVOBODA
WSBA # 34097

# GRAYS HARBOR COUNTY PROSECUTOR

## December 18, 2015 - 2:28 PM

**Transmittal Letter**

Document Uploaded: 3-472589-Respondent's Brief.pdf

Case Name: State v. John Russell

Court of Appeals Case Number: 47258-9

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No Comments were entered.

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