

61735-4

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No. 61735-4-I

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

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STATE OF WASHINGTON

Respondent,

v.

ANDRE REBOLLEDO,

Appellant.

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STATE APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. STATEMENT OF THE CASE IN REPLY.

Every brief should contain “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument.” RAP 10.3(a)(4); State v. Todd, 101 Wn.App. 945, 949, 6 P.3d 86 (2000) (overruled on other grounds). The State’s recitation of the facts contains misinterpretations and omissions relevant to the issues of Mr. Rebolledo’s appeal.

First, the State asserts Mr. Rebolledo was arrested after investigation by Bothell Police. Brief of Respondent, BOR, at 2. Yet it failed to even mention that despite arriving at the Lazy Wheels Mobile Home Park and seeing Mr. Rebolledo and another male, later identified as Matthew Harmon, pushing each other, the police only handcuffed Mr. Rebolledo. (BOR at 2; 4/2/08 RP 66-67; 4/7/08 RP 17, 21) Furthermore, the officers only questioned Messrs. Harmon and Silauter about the 911 call before determining an “assault occurred” and that Mr. Rebolledo was the “primary aggressor.” 4/3/08 RP 47; 4/7/08 RP 22. Moreover, the State fails to mention that the State dismissed its original charge of assaulting David Silauter because he would have been advised to assert his

Fifth Amendment rights when questioned about the events in question.<sup>1</sup> 3/19/08 RP 55.

Second, the State also asserts that Mr. Rebolledo “swung at Officer Odegaard with his right hand, causing the officer to move his head out of the way to avoid being hit.” BOR at 2. This assertion is unsupported by the evidence as no witness, including Officer Odegaard himself, testified that Mr. Rebolledo swung his arm at or towards the officer’s head. Moreover, it does not explain how Mr. Rebolledo could have swung his arm at the officer when he was handcuffed behind his back. 4/7/09 RP 24.

Third, the State misinterprets Officer Odegaard’s testimony of his physical response to Mr. Rebolledo by asserting the officer applied a pain compliance hold only after being kicked in the leg. BOR at 3. However, Officer Odegaard testified he was kicked after he applied a pain compliance hold on Mr. Rebolledo. 3/7/08 RP 34-35. By claiming the officer only applied the hold in response to being kicked, the State could argue the alleged kick was an unprovoked assault and not an unintentional response to a pain

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<sup>1</sup> During the trial, Mr. Silauter was charged with one count of a violation of the Uniform Firearms Act in the second degree. 3/19/08 RP 40. According to the defense, Mr. Silauter threatened Mr. Rebolledo with a gun prior to the police arriving at the scene. 3/18/08 RP 40. Mr. Rebolledo’s attorney advised the court that he planned to question Mr. Harmon whether he sold Mr. Silauter a gun.

compliance hold. The State's assertion is unsupported by the evidence.

B. ARGUMENT IN REPLY.

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. REBOLLEDO OF ASSAULT IN THE THIRD DEGREE.

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The guarantees of due process of law contained in article 1 § 3 of the Washington Constitution<sup>2</sup> and the 14<sup>th</sup> Amendment of the federal constitution demand before an accused is convicted of a crime the State must prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged." Sandstrom v. Montana, 442 U.S. 510, 523, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (citing In re Winship, 397 U.S. at 364); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

As stated in his opening brief, Mr. Rebolledo was convicted of assaulting Officer Odegaard during an incident where the police handcuffed and searched Mr. Rebolledo after Bothell police officers determined he was the primary aggressor in an assault against his

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<sup>2</sup> Art. 1, § 3 provides, "No person shall be deprived of life, liberty or property without due process of law."

neighbors, David Silauter and Matthew Harmon.<sup>3</sup> To prove assault in the third degree, the State must prove Mr. Rebolledo intended to assault Officer Odegaard. State v. Hall, 104 Wn.App. 56, 62, 14 P.3d 884 (2000). Mr. Rebolledo's state and federal constitutional rights to due process of law were violated because he was convicted of assault in the third degree without sufficient evidence to prove beyond a reasonable doubt that he intended to assault Officer Odegaard.

The State does not counter Mr. Rebolledo's argument that Officer Odegaard's claims that Mr. Rebolledo kned him and attempted to "head-butt"<sup>4</sup> and pushed past him were not intentional acts. Rather, these acts were consistent with a loss of balance caused by Mr. Rebolledo's state of mind at the time of the incident, his sudden sensation of vertigo and exacerbated by being handcuffed and held against the patrol car.

Instead, the State focuses its arguments on Officer Odegaard's claims he was kicked when he tried to get off of Mr.

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<sup>3</sup> The State charged Mr. Rebolledo with assault against David Silauter and Matthew Harmon. As stated in Mr. Rebolledo's opening brief, the State dismissed the charge of assaulting Mr. Silauter and the trial court declared a mistrial for the charge of assaulting Matthew Harmon as the jury could not return a verdict.

<sup>4</sup> The State argues in its response brief that Mr. Rebolledo attempted to "head-butt" and actually "head-butted" Officer Odegaard. BOR at 2, 4. At trial, Officer Odegaard never testified that Mr. Rebolledo hit his head against Officer Odegaard's head. 4/7/08 RP 33.

Rebolledo and out of the car after they both fell in. BOR at 7-8.

Despite the presence of two other officers at the patrol car attempting to help Officer Odegaard, neither of them testified that they saw Mr. Rebolledo kick him. Officer David Nelson was only eight to ten feet away from the patrol car when he saw Officer Odegaard use "some force" in getting Mr. Rebolledo into the patrol car. 4/7/08 RP 86. Officer Davis testified he heard some movement in the patrol car and that only Officer Odegaard's head was in the car. At this point Officer Davis moved closer to the patrol car to assist. 4/7/08 RP 88. Although Officer Davis was next to Officer Odegaard and saw Mr. Rebolledo "kind of thrashing around" and Officer Odegaard's head quickly snap back from the car, he never saw Mr. Rebolledo make contact with Officer Odegaard. 4/7/08 RP 91. Officer John Valentino, who tried to assist Officer Odegaard by reaching for Mr. Rebolledo from the opposite door, testified that Officer Odegaard's entire body was in the car on top of Mr. Rebolledo. He testified that he saw Mr. Rebolledo kicking but, despite being only a couple of feet away, he did not see whether Mr. Rebolledo made contact with Officer Odegaard. 4/3/07 RP 15.

The State correctly states that evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970). However, the State seems to argue that merely because Officer Odegaard testified to being kicked several times and Officer Valentino witnessed one of the kicks, this Court must simply accept the jury’s finding and affirm the conviction. Mr. Rebolledo does not argue this Court must not defer to the jury on issues of conflicting testimony, credibility or persuasiveness of the evidence. Rather, the inquiry is whether any rational trier of fact could have found the essential elements of assault in the third degree beyond a reasonable doubt. Here, the State’s evidence fails to support the conviction as no rational trier of fact could have found Mr. Rebolledo intentionally assaulted Officer Odegaard.

First, as argued above, Mr. Rebolledo’s state of mind, sudden dizziness and his physical constraints caused by the police are consistent with a loss of balance and not an intentional assault.

Second, the three kicks at Officer Odegaard after he forced Mr. Rebolledo in the car were not corroborated by his fellow officers. It is inconceivable that two police officers on opposite sides of a patrol car attempting to help would not see Mr. Rebolledo make contact with Officer Odegaard after being allegedly kicked in the mid-section, chest, and chin. Finally, the State does not counter Mr. Rebolledo's contention that Officers Odegaard's and Valentino's testimony describing Mr. Rebolledo as belligerent and assaultive is not consistent with the rest of the evidence. Mr. Rebolledo was by all accounts cooperative and the State's charges of assaulting Messrs. Harmon and Silauter were never substantiated and later dismissed. The State never proffers any reason as to why Mr. Rebolledo would suddenly and seemingly without provocation intentionally assault Officer Odegaard.

Mr. Rebolledo's right to due process of law under the state and federal constitution was violated because the evidence was insufficient to support his conviction. Therefore, the conviction must be reversed and dismissed.

C. CONCLUSION.

Based on the aforementioned reasons and his opening brief,  
Mr. Rebolledo respectfully requests this Court to reverse his  
conviction.

Respectfully submitted this 8th day of June, 2009.

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