

No. 35340-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

ION VELCOTA,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: [Signature]

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

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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STATEMENT OF FACT

On April 3, 2006, an information was filed in the Grays Harbor Superior Court charging the appellant with the crimes of Assault in the Second Degree and Assault in the Third Degree. The charge of Assault in the Second Degree alleged that the appellant intentionally assaulted Julie Jordan Alexander with a deadly weapon, particularly the vehicle the appellant was driving. The charge of Assault in the Third Degree alleged that the appellant assaulted Officer Chris Iverson, a police officer, performing his duties.

The case was brought to jury trial on August 22, 2006. the State presented a number of witnesses to establish the elements of the crimes charged, and the defense called witness to establish his defense. At the end of trial the jury returned a verdict of guilty on both counts.

The State's first witness was Officer Shawn Beebe of the Ocean Shores Police Department. (RP, August 22, 2006 at 21). The officer testified that on April 1, 2006, he was dispatched to a vehicle collision on Olympic View Avenue in Ocean Shores, Washington. When he arrived on scene he contacted two people that explained to him that they observed a truck ram into another vehicle. The smaller passenger car was still on scene. They directed the officer to its location down the block. (RP 23).

Officer Beebe contacted the driver of the vehicle, Jordon Alexander, who was still in the driver's seat. He testified that she was hysterical, moody, and crying. He observed damage to the front bumper fender, and headlight of her vehicle. The female driver apologized to the officer for what had happened, but persisted that "*he* had done nothing wrong." (RP 26).

Officer Beebe stepped back from the vehicle to consult with a fellow officer. At that time Ms. Alexander started her car and drove back in the direction of the residence at 370 Olympic View. Officer Beebe pursued her and arrested her in front of the residence for Driving Under the Influence and Obstructing a Law Enforcement Officer (RP 27).

The State's next witness was Officer Jeff Weiss of the Ocean Shores Police Department. Officer Weiss testified that he was also dispatched to the collision. As he responded to Officer Beebe's location, he observed Officer Chris Iversen talking to a male subject on the side of the road. (RP 33). He described the male as wearing a white T-shirt and boxer shorts, with short hair. (RP 34). When Officer Weiss arrived on location, he observed the driver of the vehicle to be a person that he had dealt with before. He knew her as Julie Jordan Alexander. (RP 35). He testified that she was crying and distraught.

The officer made an effort to interview possible witnesses. (RP 36). Based on their statements he contacted Officer Iversen. The two officers left with the intent of contacting the subject with whom Officer Iversen had previously spoken. Officer Weiss knew where Ms. Alexander lived and believed that is where the suspect would be walking. As the officers proceeded back to the residence, they observed the pickup which was initially described as ramming Ms. Alexander's vehicle. It was parked in the middle of Olympic View Avenue. Officer Weiss described it as a blue Ford pickup.

The two officers arrived at 370 Olympic View and attempted to locate the subject. (RP 37). As they approached the front porch officers observed debris in the yard including a water bottle and a broken chair. Officers also observed a machete stuck in an alder tree and kitchen plates on the front yard. (RP 38).

After Officer Iversen knocked on the front door, the appellant could be heard yelling inside the house. No one came to the door for a number of minutes, so Officer Weiss was preparing to leave.

Before the officer left, he heard footsteps coming down. Officer Weiss heard somebody at a screen window by the door. He then observed two arms push through the window, shoving the screen off of the window. The screen hit Officer Iversen. (RP 41). Officer Iversen reached out and

grabbed the subject in an attempt to apprehend him. (RP 43). Officer Iversen went through the front window, and there was an altercation between the appellant and the officer. Officer Weiss had to deploy a taser in order to subdue the appellant.

The next witness called by the State was Paul Cokeley. (RP 65). Mr. Cokeley explained that he was a contractor and on the day of the incident he was performing a job on a house at 265 Olympic View Avenue. He explained that he had observed the collision between the small passenger vehicle and the truck.

He stated that he saw a car driving down Olympic View at a high rate of speed. He believed that the car was traveling much too fast and explained that the road was populated with walkers and joggers. Later, he observed a truck traveling in the direction of the car. He believed that the two would either pass on the wrong side or collide. (RP 67). The car pulled off the road into an empty lot. Mr. Cokeley observed the truck slow down and then run into the car. After this, he observed the truck back up, move around the vehicle and “rammed it from the other side.” (RP 68). He stated that he saw the truck ram the car twice. After the truck rammed the vehicle it sped off north on Olympic View at a high rate of speed. He saw the female driver of the car get out of the vehicle and inspect the damage, she looked distraught. Mr. Cokeley called 911.

Kristy Moore testified that she witnessed the collision. She stated that she was looking out of her kitchen window when she saw a blue pickup smash into a tan vehicle. (RP 89). She observed the truck deliberately back up and smash into the tan car a second time.

Chris Iversen of the Ocean Shores Police Department testified to the events that he saw on the day in question. (RP 93). He stated that he had responded to the dispatch of a truck ramming into a second vehicle. (RP 94). As he approached the reported crime scene he observed a man walking in underwear and a t-shirt. He observed that there were red stains on the man's underwear. Officer Iversen stopped the man and spoke with him. Officer Iversen asked the subject if he had seen a blue pickup truck, and the subject stated that he did not. Officer Iversen asked about the red stains on the man's underwear, and the man explained that he had spilled wine on himself. When asked why he was outside in his underwear the subject explained that his dog had gotten out and he was chasing it. The subject identified himself as Ion Velcota, the appellant. (RP 95).

Officer Iversen responded to the collision scene where he waited for further instructions. He was contacted by Officer Beebe who explained that a man named Ion was a possible suspect in the collision. Officer Iversen assumed that it was the person with whom he had previously

spoken. (RP 96). After that, Sergeant Weiss and Officer Iversen returned to the residence at 370 Olympic View.

Officer Iversen approached the front door and knocked on it. He could observe through a window the man he previously had spoken with walking around with a large bottle of wine in his hand. He stated that the man walked towards the window in an angry fashion. (RP 97). He stated that the man came to the window and tried to open it. As some point the man lunged through the window. The Office stated that the window screen hit him in the face and the force of the blow pushed him back against the railing of the porch. (RP 98).

Officer Iversen grabbed the man and was pulled back through the window. The two grappled on the floor until the appellant was tazed.

The appellant testified as to his recollection of the events of the incident. He claimed to have only have consumed one drink before the incident. (RP 151). He claimed that Ms. Alexander consumed the bottle of wine before for she left the residence. His justification for pursuing her and stopping her vehicle was to stop her from driving intoxicated. (RP 153). He never claimed to be suffering a post traumatic episode when confronting Ms. Alexander.

The appellant testified to the events that occurred between him and the officers. the appellant denied pushing through the window. He

explained that the officer pushed through the window. (RP 160). He remembered the officer coming into his house and pushing him to the ground and then the officer put his knee on the appellant's chest. After that he did not remember what had happened. (RP 161).

During the appellant's closing argument he chose to argue his client's version of the events that the officer was the primary aggressor. Counsel did not mention a Post Traumatic episode, but claimed that the physical evidence supported the appellant's assertion that Officer Iverson attacked him.

ARGUMENT

Defense counsel performance was not ineffective.

The appellant first argues that he was prejudiced by his counsel poor performance at trial. This argument is that counsel failed to litigate the concepts of diminished capacity and voluntary intoxication. The first applying to count II only and the second applying to both counts equally.

The Washington State Supreme Court adopted a two prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to

maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney's performance fell below an acceptable standard, but also that his attorney's failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel's performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689.

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Id.* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

Appellant's claim of diminished capacity is found on evidence presented at trial that he suffers from Post Traumatic Syndrome. This condition was the result of severe treatment he experienced in his native Romania, when he was a young man. Testimony of a defense expert suggested that the appellant may experience an episode of disassociation if confronted by men that remind him of his abusers, namely men in uniform.

This argument only applies to Count II of the information because the named victim in count I was not a man nor in uniform. The police had not arrived at the location of the crime until after the appellant had assaulted Ms. Alexander. Moreover, no evidence was presented that the appellant, in fact, suffered a post traumatic episode before the police arrived. If the court finds the appellant's argument regarding diminished capacity persuasive, then the jury's verdict should only be overturned on Count II.

Appellant first charges that defense counsel's understanding as to the defensive of diminished capacity was lacking. This seems to be justified by the appellant's objection to counsel phrasing in his argument. Trial counsel spoke in terms of "minimized" intent, where appellant would have preferred the statement: "negate the mental element of the crime."

Appellant's statement of the standard is more precise, but trial counsel's is not inaccurate. Diminished capacity implies a reduction in the appellant's capacity to form a mental state, but what is meant by the phrase is that the appellant entirely lacked the capacity to form the mental state in question. The difference between "minimized" and "negated" is the same. It is simply hair-splitting.

The appellant must prove to this Court that counsel's mistake was so serious that he was not functioning as an attorney. The record indicated that trial counsel had a correct understanding of the purpose of diminished capacity. Appellant's argument is that he could have done better. This may be true, but "could have done better" is not the standard for determining whether or not trial counsel was ineffective.

Appellant further claims error on the part of trial counsel for failing to ask for an instruction on diminished capacity. It is clear from the record that counsel chose to abandon this line of defense. One can second guess these decisions, but one cannot that it was absolutely the wrong decision.

The appellant testified that he experienced the post traumatic episode after the police had subdued him. Prior to police contacting the appellant he was fine. The crime charged in Count II was based on the appellant's attack on Officer Iverson. The appellant's claim was not that

he committed the assault, but that he was in a disassociative episode at the time. The appellant denied that the assault happened at all. In order to argue diminished capacity, trial counsel would have had to ask the jury to disbelieve his client's account of the story.

Counsel for the appellant stated that the defendant has a right to argue contradictory defenses, but no real trial attorney would do that. Given the testimony of his client, trial counsel chose the best defense the evidence would allow, that is, the appellant's story is supported by the evidence and no assault was committed, and that is what counsel pursued in his closing argument.

This was not ineffective assistance. It was a legitimate course of action given the testimony of the appellant. While appellate counsel may disagree, it is simply a difference of opinion. If there is not a clear mistake then a claim of ineffective counsel cannot be supported.

The appellant also argues that his counsel should have asked for an instruction on voluntary intoxication. Again, choosing not to argue voluntary intoxication after the appellant's testimony was a legitimate trial strategy given the evidence.

The appellant testified that he only had one drink. According to the appellant, it was Ms. Alexander who was intoxicated. In fact, this was appellant's justification for stopping her vehicle.

If the jury was inclined to believe the appellant up until closing argument, it would have been disastrous for counsel to argue that the appellant was being dishonest about his drinking. It would have undermined the appellant's own credibility and chosen defense. Given the appellant's own testimony, it is hard to claim that trial counsel made a mistake in not pursuing these arguments that were contrary to the appellant's testimony.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in all significant decisions. *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985). In the case at bar, trial counsel made decisions that were tied to a legitimate trial strategy, and the appellant cannot make the showing that he was ineffective.

The state was not required to prove the crime did not amount to assault in the First degree.

A charging document must contain all of the essential elements of a crime in order to put the defendant on notice of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An Information which charges a crime in the language of the statute and which defines the crime is sufficient to apprise an accused person of the nature of the accusation; however, it is not necessary to make

the accusation in the exact language of the statute to sufficiently inform the defendant of the nature of the charge. *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989).

When the sufficiency of an Information is challenged for the first time on appeal, it is liberally reviewed to determine if the Information reasonably apprises the defendant of the elements of the crime and whether the defendant suffered any actual prejudice from any vague or inartful language contained in the Information. *State v. Kjorsvik*, at 102-106. However, before engaging in such an analysis, it is necessary to make a threshold determination that the Information omits an essential element of the crime. *State v. Williams*, 133 Wn.App. 714, 718, 136 P.3d 792 (2006).

In *Williams*, the court reviewed the Bail Jumping statute, RCW 9A.76.170, to determine if the statutory language which specifies the penalty classification of the crime depending on the classification of the underlying felony was an essential element which must be alleged in the Information. The court held that the jury did not need to know or consider the penalty classification in order to determine whether the defendant committed the crime of Bail Jumping. It was not an essential element of the crime. For the same reason, the jury did not have to be instructed in the “to convict” instruction on the class of the underlying crime in order to

find the defendant guilty. *State v. Williams*, 133 Wn.App. at 720-721.

The appeal courts have also addressed similar arguments on Felony Violation of No Contact Orders and Third Degree Theft. In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court addressed the issue of whether the statutory language, which described the Assault element in the crime of Domestic Violence Protection Order Violation as one that does not amount to Assault in the First or Second Degree, constituted an essential element of a Felony Violation of a No Contact Order. *State v. Ward*, 148, Wn.2d at 810-811. The Supreme Court in *Ward* held that the "does not amount to" provision elevates a no contact violations when any assault is committed and thus, did not function as an essential element of Domestic Violence Protection Order Violation, but rather served to explain that all assaults committed in violation of a no contact order will be penalized as felonies. *State v. Ward*, 148 Wn.2d at 812-813. The *Ward* court went on to point out that if they were to interpret the "does not amount to" language as an essential element of the crime, it would not advance the Legislature's purpose and would place the defendant in the awkward position of arguing that his conduct amounted to a higher degree than that charged by the State. *State v. Ward*, 148 Wn.2d at 813.

The court also addressed a similar argument in *State v. Tinker*, 155 Wn.2d 219, 118 P.3d 885 (2005). In *Tinker*, the court addressed the issue of whether the language in the Third Degree Theft statute, RCW 9A.56.050(1), which describes theft of property or services which does not exceed \$250.00, makes the value of the goods and services stolen an essential element of the crime of Third Degree Theft. The Supreme Court in *Tinker* held that since the valuation was a maximum value, it only distinguished the crime of Third Degree Theft from the higher degrees of theft which have minimum value thresholds. *State v. Tinker*, 155 Wn.2d at 222. The court also pointed out that to hold otherwise would place the defendant in the awkward position of arguing that his conduct amounted to a higher degree crime than that charged by the State. *State v. Tinker*, 155 Wn.2d at 224.

The appellant relies on *State v. Azpitarte*, 140 Wn.2d 138, 995 P.2d 31 (2000), to argue that the “does not amount to” language requires a showing that the injury caused to the victim did not amount to Assault in the Second Degree. The Supreme Court directly addressed this argument in *State v. Ward* and rejected it. *State v. Ward*, at 628. The Supreme Court distinguished *Azpitarte* from *Ward* in that the defendant in the former was charged with Assault in the Second Degree and also found guilty of Assault in Violation of a No Contact Order, where in *Ward* the

defendant was merely charged and found guilty of Assault in Violation of a No Contact Order. The court concluded that prior case law was on point and that the “does not amount to” language did not require the State to negate the possibility the defendant committed the crime of Assault in the Second Degree.

The use of the common law definition of assault was not a violation of separation of powers

The defendant asserts that since the Legislature has not adopted a statutory definition of the term “assault” and, by failing to do so, has unconstitutionally invited or permitted the judiciary to encroach upon the legislative function. The defendant’s argument that the Legislature has not defined the term “assault” and that the courts have supplied the common law definition of that term, is correct. However, that does not establish an unconstitutional violation of the separation of powers.

The defendant’s argument was specifically answered by this court in *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006). In *Chavez*, the court directly addressed the Second Degree Assault statute and the argument that the Legislature’s failure to define an essential element of the crime together with the use of a judicial definition violates the separation of powers doctrine. The court stated:

“The principle is violated when ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another’. *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting *Carrick*, 125 Wn.2d at 135). But the doctrine does not require that the various branches be ‘hermetically sealed off from one another’. *Carrick*, 125 Wn.2d at 135. They ‘must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government.’ *Carrick*, 125 Wn.2d at 135 (citing *In Re Salary of Juvenile Director*, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976).” The court held that the Legislature had a history of delegating to the judiciary how statutes will be specifically applied which demonstrated the practice did not offend the separation of powers doctrine and that the Legislature had instructed that the common law must supplement all of the criminal statutes pursuant to RCW 9A.04.060.”

State v. Chavez, 134 Wn.App. at 667. The court concludes “in summary, consistent with their history, the legislative and judicial branches have cooperated in defining the offense of assault”. *State v. Chavez*, 134 Wn.App. 668.

This court has also recently addressed the same argument as it pertains to the Vehicular Homicide statute and the use of the common law definition of proximate cause. In *State v. David*, 134 Wn.App. 470, 141 P.3d 646 (2006), the court held:

“It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed, but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature’s

legitimate expressed expectations, as well as failing to fulfill judicial duties, if the courts had not employed longstanding common law definitions to fill in legislative blanks in statutory crimes”.

State v. David, 134 Wn.App at 481. The court in *David* also held that the definition of some criminal elements are not purely legislative functions and that the Legislature has historically left to the judiciary the task of defining some criminal elements. *State v. David*, 134 Wn.App. at 482.

CONCLUSION

There is no merit to any of the appellant’s claims. Trial counsel’s performance did not fall below the expected standard of professionalism. The fact that trial counsel was not successful in his efforts does not mean his tactics were faulty. Given the evidence presented at trial, the suggestions of appellate counsel seem unwise. Moreover, the state was not required to disprove greater degrees of assault and the trial court was within its authority to define the term assault. For these reasons the State asks this court deny the appellant’s claims of error.

Respectfully Submitted,

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

No.: 35340-7-II

v.

DECLARATION OF MAILING

ION VELCOTA,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 13th day of July, 2007, I mailed a copy of the Brief of Respondent to MANEK R. MISTRY and JODI R. BACKLUND, BACKLUND & MISTRY, 203 EAST FOURTH AVENUE, SUITE 404, OLYMPIA, WA 98501, and to the Appellant, ION VELCOTA, #816314, McNEIL ISLAND CORRECTIONS CENTER, POST OFFICE BOX 88900, STEILACOOM, WA 98388-0900, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Randi M. Toyra

DECLARATION OF MAILING

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