

COURT OF APPEALS  
DIVISION II

NO. 40190-8-II

11 JAN 18 AM 10:15

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

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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STATE OF WASHINGTON,  
Respondent,

v.

ANTHONY L. COUCH,  
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 GORDON GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

### **Procedural Background**

The defendant was charged by Information on December 30, 2008, with Assault in the Second Degree, RCW 9A.36.021(1)(a). The matter was tried to a jury in July 2009. The jury was unable to reach a verdict and a mistrial was declared. The matter was retried commencing on December 1, 2009. On December 3, 2009, the jury returned a verdict of guilty. (CP 70).

### **Factual Background**

On the evening of June 20, 2009, Mickle Madison and his wife, Meagan, went to Rounders, a café and lounge located in McCleary, Grays Harbor County, Washington. They met with friends, Mr. and Mrs. Roger Swartz, and Mr. and Mrs. Cory Ralkey. The three couples sat at a table in the café portion of the establishment. (RP 63, 199). The owner of the establishment, Dan Whyms, was performing a Johnny Cash tribute show. (RP 6-8). The defendant, his wife Shari, his brother-in-law John Helberg, and his friends Shane Coon and Jesse Huggins, were also there, sitting near the pool tables adjacent to the stage. (RP 279). Neither Mr. Madison nor Mr. Swartz were acquainted with the defendant or his wife and friends. (RP 358-59).

At one point during the evening according to the defendant's wife and friends, John Helberg got into an argument with Richard Brookhouser, another patron in the establishment, as the band was performing, (RP 9-10,

335-36). For his part, Brookhouser denied being in any altercation or seeing Helberg or the defendant get hit. (RP 399). Defendant's friends testified that the defendant went to intercede and was struck by another patron, Gene Mathis. (RP 283-85, 336). Brooke Jacobsen saw a "big group of guys" fighting on the floor next to the stage. (RP 81).

The defendant was escorted to the door by Helberg, Huggins, and Coon. John Helberg recalled that he, Mr. Coon, and the defendant ended up on the sidewalk, about ten feet from the door. (RP 346). The defendant's wife followed them outside. (RP 10, 25, 319, 338, 364). Brooke Jacobsen confronted the defendant outside. At this point, he was with his friends who had escorted him out. (RP 83, 95). She told the defendant that he needed to leave before the police arrived. (RP 81-83).

Shortly before this incident, the Ralkeys decided to leave. They went out the back door of the establishment. Mr. Ralkey saw the defendant at the bar. The defendant, for no apparent reason, swore at Mr. Ralkey. (RP 65). Some time after the Ralkeys left, the Madisons and the Swartzs decided to leave. Mr. Madison and his wife were not aware of the prior altercation between the defendant and Brookhouser. (RP 228, 201). Mr. Madison and Mr. Swartz left their table and headed for the front door.

Mr. Madison recalls that he was standing near the front door talking with some friends as he was preparing to leave. He heard a loud bang, turned to see what the noise was, and was hit in the face. (RP 31). Another patron in the bar, Kenneth Stutesman, who was standing near

Madison, was also hit. (RP 127). Mr. Stutesman identified the defendant as the person who threw the punch. Madison's friend, Roger Swartz, saw the defendant hit Madison. Mr. Swartz and Dan Whyms saw the defendant rip off his shirt. (RP 11, 162). The defendant was outside jumping up and down and threatening to kill everybody. (RP 162). Mr. Madison's wife, Meagan, saw the defendant, "come through the front door on a run" and hit her husband in the face. (RP 203). Brooke Jacobsen saw the defendant hit Mr. Madison as Madison was standing just inside the door. No one heard words exchanged, and no one saw any provocation by Mr. Madison. (RP 84-85).

Mr. Madison suffered several chipped teeth and a broken nose as a result of the assault. The injury to the nose was confirmed by CT scan. The injuries required surgery. (RP 179-180).

The defendant alleged that he acted in self defense. His wife testified that people inside the establishment were hitting her husband as he was being escorted outside the bar by Helberg and Coon. (RP 289). She asserted that people came outside the bar threatening to attack her husband. (RP 291). She described a, "jumble of people" running at her husband, who was outside the bar. (RP 296). She claimed not to have seen her husband strike anyone.

Shane Coon testified that people were coming out of the establishment to fight with the defendant and that the defendant was defending himself. (RP 320-321). Helberg testified that, "half the bar"

came outside after the defendant. (RP 339). He claimed that Mr. Madison was one of the group who was coming after the defendant. (RP 348, 339).

The defendant, for his part, claimed that Mr. Madison was in a group of people who were coming out of the tavern toward him. He claimed to have been “hit by the people coming after me” outside the establishment. (RP 365). He denied, however, hitting Mr. Madison. He denied trying to get back inside. He denied hitting anyone standing inside the door. (RP 366, 370).

Jesse Huggins assisted the defendant to his feet and helped escort him to the door after the initial altercation. Huggins recalled that the people inside the tavern were yelling profanities at them as they were taking the defendant outside. (RP 425). As they got to the door, the defendant went outside with Helberg. Huggins testified that he stopped to confront Gene Mathis, who was trying to follow Couch out the door. (RP 425-26). While Huggins was talking with Mathis, Brookhouser came to the door trying to get outside and follow the defendant. Huggins took a swing and hit Brookhouser who fell backwards. (RP 431). At this point Huggins saw the defendant outside talking to Brooke Jacobson. (RP 431). Shortly after this, Huggins saw the defendant step to the door and hit an individual who was standing in the doorway. (RP 436). The evidence at trial was that the person that Huggins saw being hit by the defendant was Mikle Madison.

## RESPONSE TO ASSIGNMENTS OF ERROR

### **The state presented ample evidence to support the verdict of the jury. (Response to Assignment of Error Number 1)**

The defendant asserts that there was insufficient evidence to support the finding of the jury that the conduct of the defendant was not in self defense. This court must review such an allegation in the light most favorable to the state and determine whether, “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 (1992). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. A claim of insufficiency of the evidence admits the truth of the state’s evidence and all inferences reasonably drawn from such evidence. State v. Salinas, supra 119 Wn.2d at page 201. Circumstantial and direct evidence are to be considered as equally reliable. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Clearly, on the facts of this case, the question of self defense was for the jury to decide. The evidence, when viewed most favorably to the state showed the following.

The defendant was in a fight inside the establishment. (RP 81). His friends carried him to the outside of the building. (RP 10, 25, 319, 338, 364). He was seen outside ranting and raving, tearing off his shirt,

and threatening to kill anyone and everyone. (RP 162). The two persons who had been involved in the prior altercation never made it outside. (RP 425-26). Mr. Brookhouser was hit by the defendant's friend, Jesse Huggins, before he ever got out the door. (RP 431). Huggins confronted Gene Mathis before he got out the door. (RP 425). During this time the defendant, for no apparent reason other than to seek retribution, or to continue the fight, charged back through the door and struck an innocent bystander, Mr. Madison, who happened to be standing just inside the door. (RP 203).

The defendant cites to the testimony of the defendant in support of this claim. (RP 364-66). Unfortunately, his testimony is contradicted by the testimony of other witnesses, including his friends.

He was taken outside by his friends. When Brooke Jacobsen spoke to him he was there with Helberg and Coon. None of the other patrons were assaulting him. (RP 83, 95). No one else described the defendant as being prone on the ground outside. There was evidence that neither Brookhouser nor Mathis made it outside. (RP 425-26, 431). The defendant was with Helberg and Coon, about ten feet from the door when he charged back into the building. (RP 346, 203). In the end, the jury was entitled to decide the facts. This court cannot overturn this conviction solely on the defendant's version of the facts.

The question before the jury was whether the defendant believed in "good faith and on reasonable grounds" that once he was outside he was in

actual danger of injury. (CP 64-69, Instruction 7). Obviously, the jury was entitled to find otherwise on the facts of this case. It is not for this court to substitute its opinion for that of the jury. This assignment of error must be denied.

**The defendant received effective assistance of counsel  
(Response to Assignment of Error 2).**

The defendant must show two things in order to prevail on a claim of ineffective assistance for counsel: (1) He must first show that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) He must show that if there was a deficient performance that it resulted in prejudice which the courts have defined as "a reasonable possibility that but for the deficient conduct, the outcome of the proceeding would have differed." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The short answer is that the defendant was not entitled to instructions for the lesser crime of Assault in the Third Degree. There was no evidence in the case to support such a verdict.

RCW 10.61.003 does provide as follows:

"Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

The statute, however, is not without its limitations. The trier of fact may return a verdict as to an inferior degree of an offense if the

charged offense and the inferior offense “proscribe but one offense” and if there is evidence from which the jury could conclude that the defendant committed only the inferior offense. State v. Daniels, 56. Wn.App. 646, 651, 784 P.2d 579, review denied, 114 Wn.2d. 1015 (1990). Assault is a crime divided into degrees, and the various degrees of assault “proscribe but one offense.” State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979). The problem herein, however, is that there is no evidence from which the jury could conclude that only the crime of Assault in the Third Degree occurred. See State v. McJimpson, 79 Wn.App. 164, 901 P.2d 354 (1995).

In the first instance, there is no evidence from which the jury could conclude that the defendant suffered anything less than “substantial bodily harm.” Substantial bodily harm includes the fracture of any bodily part. RCW 9A.04.110(4)(b). Contrary to the assertion of the defendant in his brief, the only testimony at trial was that Mr. Madison suffered a broken nose and chipped teeth. The broken nose was confirmed by CT scan. (RP 179, 180):

Q Now, what injuries did you observe, sir, in your initial observations?

A He had sort of a swollen deformed nasal bridge, part of the nose. It would be consistent with a broken nose. He had a couple small cuts on the nose. He also had some bruising over the right eye.

Q Okay.

A And had chipped his teeth.

- Q What is a - a - you list in here a stellate laceration, what is that?
- A A stellate laceration is sort of an irregular tear that usually goes in a couple of directions that often results from kind of a blunt force.
- Q That's what I was going to ask, is that consistent with blunt force?
- A It is.
- Q Like being struck with a fist in the nose area?
- A It would be.
- Q Was his nose swollen?
- A It was.
- Q How was it upon - did you palpitate it or try to?
- A Yea. It was swollen here and looked, you know, grossly deformed like it had been broken.
- Q Did you subsequently do an x-ray or CT scan?
- A Yes. He had a CT scan on the head and some neck x-rays.
- Q What did you find?
- A On the CT of the head, broken nose.
- Q What's the treatment for a broken nose?
- A Sort of depends on the injury. It's - basically if it's offset they will often be straightened out. I believe in this case that he underwent that procedure, it's called close reduction, done by Dr. Jensen.
- Q I see. So there was a surgery that followed this to correct the problem?
- A Yes.

There was additional testimony that Mr. Madison suffered six broken teeth. (RP 206). There was no other medical testimony. The defendant did not present evidence from which the jury could conclude that Mr. Madison did not suffer the injuries as described by the doctor.

There must be evidence in the case to affirmatively establish defendant's theory of the case - it is not enough that the jury might simply disbelieve the evidence pointing to guilt. In short, the defendant is not entitled to an instruction for Assault in the Third Degree if the only evidence in the case is that the defendant suffered substantial bodily harm, a broken nose, and chipped teeth. State v. Fernandez-Medina, 141. Wn.2d 448, 456 6 P.3d 1150(2000); State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

Secondly, there is no evidence to support a conclusion that the defendant acted with criminal negligence. There was no evidence that the defendant was intoxicated. The jury was not instructed on the defense of voluntary intoxication. There was no evidence to support such an instruction. State v. Washington, 34 Wn.App. 410, 661 P.2d 605, on remand 36 Wn.App 792, 677 P.2d 786 (1983).

The only evidence at trial was that the blow to Mr. Madison was intentional. See State v. Daniels, 56 Wn.App. 646, 651, 784 P.2d 579 (1990):

“In the case of third degree assault, the language of the statute defining the offense specifically requires that the evidence not rise to the level of first or second degree

assault. See State v. Stationak, 73 Wn.2d 647, 649-50, 440 P.2d 457 (1968). “Since Third Degree Assault is defined as one ‘not amounting to assault in either the first or second degrees,’ if the facts of the case are such that defendant could have been found guilty of either first or second degree assault, then he could not have been found guilty of third degree assault.” (Footnote omitted). Stationak. In Stationak, the defendant pointed a gun at the victim, who suffered serious injury when it discharged. The defendant insisted he did not know the gun was loaded. Therefore, he argued, he did not have the requisite intent to inflict bodily harm, and should have been convicted, if at all, of third degree assault. Our Supreme Court disagreed.

Under all of the evidence . . . the defendant was guilty of first or second degree assault or of none at all. There was no evidence which would justify the jury in returning a verdict of guilty of assault in the third degree. The proposed instruction on third degree assault was, therefore, properly refused.

Stationak, at 650-51.

In Daniels’ case, it is inconceivable he did not knowingly inflict grievous bodily harm. “A person . . . acts knowingly . . . when . . . he has information which would lead a reasonable [person] in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b)(ii). The fact in question is the infliction of grievous bodily harm. Any reasonable person in Daniels’ position would have known he was inflicting grievous bodily harm.”

In the case at hand, there is absolutely no evidence that the defendant acted other than intentionally. The throwing of the punch was intentional. The result was that he recklessly inflicted substantial bodily harm on Mr. Madison. There was no evidence to support a finding that his conduct, the assault on Mr. Madison in the first instance, was done with

criminal negligence. See State v. O'Connell, 137 Wn.App. 81, 96 152 P.2d 349 (2007). The mental element of criminal negligence applies to the act, not to the result. The fact that he hit an innocent bystander isn't evidence that he acted with criminal negligence. All the evidence at trial was that the blow was intentional. State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

There is a strong presumption that counsel provided effective assistance. His determination whether the decision to seek acquittal was a legitimate trial strategy. State v. Hassan, 151 Wn.App. 209, 220, 211 P.3d 441 (2009). Assuming for the sake of argument that the evidence supported instructions for the lesser included offense of Assault in the Third Degree, the courts have set out factors to examine in order to determine whether the decision not to request a lesser included offense is appropriate. State v. Breitung, 155 Wn.App 606, 615, 230 P.3d 614 (2010):

We consider three factors "to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

The defendant had a prior felony conviction for Vehicular Assault. Upon conviction of Assault in the Second Degree his offender score was 2 and he had a standard range of a year and a day to 14 months in prison. A

conviction for Assault in the Third Degree would have yielded an offender score of 1 and the standard range of 3 to 8 months in the Grays Harbor County Jail. Contrary to the assertion of the defendant in the Brief of Respondent, this is not a significant difference. This is certainly not a situation in which the defendant is looking at the difference between a lengthy prison sentence, based upon prior felony criminal history, and conviction of a misdemeanor offense such as Unlawful Display of a Weapon. State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004).

In the case at hand, counsel had a decision to make. Presumably, he could have requested instructions for Assault in the Third Degree. The problem, however, was that this defense was inconsistent with the defense of self defense offered in this case. He claimed to have acted intentionally in defense of himself. An instruction for Assault in the Third Degree would ask the jury to determine whether the act was done, not intentionally, but with criminal negligence. The defendant never claimed that the blow was “accidental” in the sense that he didn’t mean to hit someone. Here, the defendant claimed that the act was intentional and that he was innocent because he acted in self defense. State v. Hassan, 151 Wn.App. at page 220:

“Where a lesser included offense instruction would weaken the defendant’s claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy.”

Consider the options available to the defendant. There was scant evidence, if any, that the defendant acted with criminal negligence. All of the evidence in the case, from the testimony of Mr. Madison, the witnesses, the defendant, and his friends and family was that the defendant acted intentionally. The defendant admitted intentionally hitting someone, but denied that it was Mr. Madison. Why would the defendant now ask to have the jury instructed on an alternative theory of the case that is contradictory to his claim? His theory would now be: 1) I acted in self defense; or 2) I was randomly thrashing around and I “accidentally” hit someone. State v. Mullins, 241 P.3d 456, 463, 241 P.3d 456 (2010).

Certainly, where a defendant has a mental defense to the charge of Assault in the Second Degree and a proposed lesser offense, such as Unlawful Display of a Weapon, is available on the facts and is consistent with the defendant’s theory of the case, it would be ineffective assistance for counsel to decline to request instructions for Unlawful Display of a Weapon. (That is not the case at hand;) State v. Ward, *supra*. Personal Restraint of Crace, 157 Wn.App 81, 108-09, 236 P.3d 914 (2010).

The defendant asserts, without citation to authority, that the defense of self defense would have applied equally to both Second Degree and Third Degree Assault. On the facts of the case herein, there is no evidence to support a claim that a defendant acted with a lesser mental state. There was no evidence of claimed intoxication. The only evidence is that the force used was commensurate with the blow struck to the

defendant. This was clearly an intentional blow thrown by the defendant. This is not a case in which the amount of force was excessive. This is not a case in which the jury could reasonably have concluded that the injuries were the result of criminally negligent behavior by the defendant.

State v. Grier, 150 Wn.App. 619, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010) does not stand for the proposition cited by the defendant. In Grier, the defendant brought a firearm in response to being shoved by the victim. Here, the amount of force used by the defendant was no greater than the force the defendant alleged was used against him. Furthermore, in Grier, there was evidence in the case to support a finding that the assault, the shooting of the firearm, was not intentional, but occurred, rather, during a struggle over the weapon. Grier 151 Wn.App. at page 627.

Counsel for the defendant had choices to make. No one was going to reasonably believe that the defendant used excessive force. Unlike Grier, this is not a situation in which a weapon was brought to a fist fight. And, unlike Grier, there is no evidence to support a finding that the assault was anything other than an intentional act.

For the reasons set forth, this assignment of error must be denied.

**CONCLUSION**

For the reasons set forth, this conviction must be affirmed.

DATED this 13 day of January, 2011.

Respectfully Submitted,

By: Gerald R Fuller  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

No.: 40190-8-II

v.

**DECLARATION OF MAILING**

ANTHONY L. COUCH,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 14<sup>th</sup> day of January, 2011, I mailed a copy of the Brief of Respondent to Peter B. Tiller, The Tiller Law Firm, PO Box 58, Centralia, WA 98531-0058 and to Anthony L. Couch, 353 Brady Loop Road W., Montesano, WA 98563, 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.

DATED this 14<sup>th</sup> day of January, 2011, at Montesano, Washington.

Barbara Chapman