No. 48815-9

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

WALLACE TOMLIN, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE CUTHBERTSON

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The evidence was insufficient to support a conviction for assault in the third degree.

B. The Court should not award appellate costs to the State if Mr. Tomlin does not substantially prevail on appeal.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Was the evidence insufficient to establish an intentional assault?

B. Should this Court award appellate costs to the State if Mr. Tomlin does not substantially prevail on appeal ?

II. STATEMENT OF FACTS

Fifty-six year old Wallace Tomlin continues to suffer physical and emotional pain from the vicious physical beating he endured approximately two years ago. CP 3-35. As a result of having been beaten almost to death, he is blind in one eye and his vision is severely compromised in the other. RP 245. He required extensive reconstructive surgery on his face and scalp. RP 246; CP 34; He lost teeth and still has difficulty eating and swallowing food. CP 31. His family reported he still suffers from constant pain and headaches. CP 31-32; 34. His equilibrium was affected. RP 245.

He experienced damage that caused foot drop[1] and has disk disease in his back. RP 246.

Mr. Tomlin lives with and helps care for his elderly mother. 4/1/16 RP 5. He cannot work, but plays guitar at his church, and receives disability income from social security. 4/1/16 RP 17-18.

On the evening of August 18, 2015, Mr. Tomlin and his friend, Luisa Pedro, had a conversation which resulted in Mr. Tomlin telling her he was leaving. Based on his statements to her, she believed he was going to jump off the bridge. RP 215-216. Concerned for his welfare, Ms. Pedro followed him in her car as he walked toward the Tacoma Narrows Bridge. RP 217-18. He refused to get in her car. RP 225. He found it frustrating that friends and family were overprotective of him because of his disabilities. RP 244. Increasingly concerned, Ms. Pedro called 911 in hopes the officers would bring him home. RP 237.

Officers approached Mr. Tomlin on the pedestrian walkway headed westbound toward Gig Harbor. RP 173. When officers contacted him he gestured and they understood he was telling them he was visually impaired. RP 201. They asked if he was

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[1] Foot drop is a general term for difficulty lifting the front part of the foot. It is a sign of an underlying neurological, muscular, or anatomical problem. *http: www.mayoclinic.org*

intending to harm himself and reported he responded nonverbally by shaking his head "no." RP 201. They transported him to St. Joseph's hospital. RP 176.

When he first arrived at the hospital, Mr. Tomlin did not speak with anyone and was calm. RP 176-177. Nurse Anna Zinchenko (Zinchenko) had been assigned to "Serenity" : the area designated for individuals brought to the hospital for a mental health assessment. RP 56-57. She took his vital signs and attempted to gather information. RP 68. She said he nodded "no" when she asked if he felt like hurting himself or others. RP 68. She testified, "he was not answering any of my questions. He was refusing to talk to staff." RP 59-60.

Mr. Tomlin testified his throat hurt so he did not speak. RP 249. One officer offered him a pen so he could write his answers to the questions. RP 249. He was sent to the waiting room. RP 68-69. Zinchenko eventually called Mr. Tomlin back into the Serenity area and told him to change into a gown and they would take blood and urine samples. RP 71.

Mr. Tomlin became increasingly agitated, refusing to change into the gown or to provide blood and urine. RP 72. He said he

wanted to go home. RP 74. Zinchenko left the room to get an ER doctor. RP 74.

Hospital security officer Norlund said that Mr. Tomlin became belligerent and aggressive toward the police officers who had transported him to the hospital. RP 127. At one point he got out of the chair and walked up to the police officers, who pushed him back into the chair. RP 129. He yelled and cursed at the officers. RP 129. Norlund testified medical staff requested Mr. Tomlin be restrained in four-point lock-in restraints, although the record is silent which medical staff made the request. RP 131. Security officers restrained Mr. Tomlin's arms and legs so he could not get off the gurney. RP 132.

Zinchenko re-entered the area where security officers Barkley and Norlund were with Mr. Tomlin. RP 78. She reported that when she had a restrained male in the room she made it her personal practice to have two security officers in the room with her to protect her. RP 101. Barkley testified Zinchenko was annoyed and curt with Mr. Tomlin. RP 165.

Mr. Tomlin yelled "Get her out of here. I don't want her here" for a minute or two. RP 81;157. Although she had training in de-escalation, rather than retreating to let him calm down, or

passing off to another nurse, Zinchenko tied the tubing around his arm to do a blood draw. RP 81;100-101.

Zinchenko testified that Mr. Tomlin turned toward her and spit at her face. RP 82. Security officer Norlund only saw Mr. Tomlin spit in a direction to his right. RP 139. Security officer Barkley testified that he heard Mr. Tomlin yell he did not want Zinchenko in the room, and then he saw Mr. Tomlin spit at her. RP 157. He grabbed Mr. Tomlin's head and pointed it away toward the wall, and put a "spit sock" over his head. RP 158;164.

By contrast, Mr. Tomlin testified that prior to being restrained on the gurney, he told the officers he was ready to go home. They told him he could not leave. RP 252. He said he was forced to change into the hospital scrubs in a hallway in front of the officers, and nurses and doctors using the hallway. RP 252-53.

When Zinchenko returned to do the blood draw, he yelled that he did not want her to touch him. RP 256. He said one of the security officers then added a fifth restraint, which did not allow him to set up on the gurney. RP 256. One of the officers put Mr. Tomlin's head into a "full nelson" , or a headlock. RP 256. He said he continued to yell, but between yelling and being in the headlock he gagged and choked. He spit as he gagged. RP 257-258. He

did not see Zinchenko. RP 257. He said one of the officers punched him and they placed the spit sock over his head. CP 258. He reported that he later apologized to Zinchenko and told her he had no intention of spitting on her. RP 259.

The Court gave the definition of assault in jury instruction No. 6:

> Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 16.

The jury found Mr. Tomlin guilty of assault in the third degree. CP 22. At sentencing, the trial court found Mr. Tomlim's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was significantly impaired. The court found substantial and compelling reason to justify the exceptional downward sentence. CP 50. He was sentenced to 15 days served, with six months of community custody, and the requirement of a mental health evaluation and follow up. CP 40-41.

The court imposed only the mandatory legal financial obligations, as Mr. Tomlin relies exclusively on social security disability for income. CP 38; 4/1/16 RP 18; 22. Mr. Tomlin makes this timely appeal. CP 52.

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain A Conviction For Assault In The Third Degree.

There is insufficient evidence that Mr. Tomlin intended to assault Zinchenko. The State must prove beyond a reasonable doubt every element of a charged crime. *In re WInship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 24 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Drum,* 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

To find Mr. Tomlin guilty of the crime, the trier of fact had to find that Mr. Tomlin either intentionally touched or struck Zinchenko

in a way that was harmful or offensive, or he acted with the intent to create in her apprehension and fear of bodily injury, and which in fact created in her reasonable apprehension and imminent fear of bodily injury, even though Mr. Tomlin did not actually intend to inflict bodily injury. CP 16. Here, the primary issue was whether Mr. Tomlin intended to touch Zinchenko in a harmful or offensive way.

Mr. Tomlin testified that he was held down with his head to the right. He gagged and choked and spit into the air. He said he did not even see Zinchenko. RP 257. Mr. Tomlin testified he later apologized to Zinchenko, saying he had no intention of spitting on her, and the state presented no evidence to the contrary. RP 259-260.

Zinchenko testified Mr. Tomlin looked at her, she heard him coughing and gurgling, and then he spit. RP 83. She said it happened very fast. RP 83. By all reports, Zinchenko was annoyed and curt with Mr. Tomlin and made no allowances for his needs by bringing in another nurse or giving him time to calm down. Her perception he intentionally spit at her face must be seen in the light of her contemporaneous behavior and attitude.

While credibility evaluations are for the trier of fact to determine, the existence of facts cannot be based on guess,

speculation, or conjecture. *State v. Hutton,* 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). Here, it is conjecture that Mr. Tomlin intended to assault Zincheko.

B. This Court should not award appellate costs.

RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The Court of Appeals has held that an indigent appellant must object, before the Court has issued a decision terminating review, to any such cost bill that might eventually be filed by the state. *State v. Sinclair,* 192 Wn. App. 380, 395-394, 367 P.3d 612 (2016). The appellate courts may deny awarding the State the costs of appeal. RCW 10.73.160(1); *State v. Nolan,* 141 Wn.2d 620, 628, 8 P.3d 300 (2000); *Sinclair,* 192 Wn. App. at 382. In exercising its discretion, a defendant's inability to pay appellate costs is a significant factor to consider when deciding whether to impose such costs. *Sinclair,* 192 Wn. App. at 382.

The Washington Supreme Court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court

involvement which "inhibit re-entry" and increases the chances of recidivism. *State v. Blazina,* 182 Wn.2d 827, 836, 344 P.3d 680 (2015). An appellate court should deny an award of costs to the State if the defendant is indigent and lacks the ability to pay. *Sinclair,* 192 Wn. App. at 382.

In *Sinclair,* the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair,* 192 Wn. App. at 392.

In a very recent Washington Supreme Court case, *City of Richland v. Wakefield*, the Court was asked to decide whether strict legal financial obligation enforcement against homeless, disabled, and indigent people in Benton County violated state and federal statutes. *City of Richland v. Wakefield,* ---P.3d---, 2016 WL 5344247 , September 22, 2016. The Court reiterated its position that under state law, legal financial obligations should be imposed only if an individual has a present or future ability to pay. *Slip Op.* at 1. The Court went on to remind that under GR34 "courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps." *Slip Op.* at 4.

The Court also concluded that "federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is social security disability." *Slip Op.* at 5.

Here, Mr. Tomlin is indigent and disabled. His source of income is his monthly social security disability check. As the trial court found, Mr. Tomlin does not have the current or likely future ability to pay discretionary legal financial obligations. For these reasons, he respectfully asks this Court to deny an award of appellate costs should the state substantially prevail on appeal.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Tomlin respectfully asks this Court to reverse his conviction and dismiss with prejudice.

Dated September 30, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on September 30, 2016, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the brief to the following:

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