

COA No. 30341-1-III

FILED

SEP 04 2012

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON, Respondent,

v.

JOSHUA CHARLES DONLEY, Appellant.

BRIEF OF APPELLANT

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(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support Joshua Charles Donley's conviction of second degree assault.

Issue Pertaining to Assignment of Error

1. Was the State's evidence sufficient to support a finding of guilt when Mr. Donley was so intoxicated he could not form the requisite intent to commit the crime of second degree assault?

(Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Donley was charged with one count of attempted first degree rape, one count of attempted second degree rape, and one count of second degree assault with sexual motivation. (CP 79-81). The case proceeded to jury trial.

Between 4 and 6 p.m. on July 26, 2009, Cynthia Cabe and her friend, Mike Buchanan, were going to go out and pick up a pizza for dinner. (10/19/10 RP 28). She lived on Potter Street in Richland with her son, Nathan, and Mr. Buchanan. (*Id.* at 27-28). Along the way, they decided to stop at the Uptown Bar for a drink. (*Id.* at 28). She was introduced to Mr. Donley there. (*Id.* at 29).

They talked. Ms. Cabe was between Mr. Donley and Mr. Buchanan. (10/19/10 RP 30-31) They sat around having drinks

and were getting “pretty drunk.” (*Id.* at 31). Mr. Donley had a wallet full with a significant amount of cash that he left on the bar. (*Id.*) Ms. Cabe told him he could not leave it sitting there. (*Id.*) She and Mr. Donley left the Uptown to go to Lee’s Tahitian. (*Id.* at 32). Ms. Cabe had a good buzz when she left. (*Id.* at 30).

Mr. Buchanan eventually came over to Lee’s. (10/19/10 RP 32). Mr. Donley was pretty quiet. (*Id.* at 33). Ms. Cabe and Mr. Donley talked about her going back to his house, but she was not going to go there. Instead, they could go to her house. (*Id.* at 33-34). Mr. Buchanan left and went home. (*Id.* at 34).

Ms. Cabe and Mr. Donley started walking to her house on Potter, some 7-8 blocks away from Lee’s. (10/18/10 RP 34). He was not doing at all well walking so she gave him a piggy-back ride for a few steps. (*Id.* at 35). Before doing so, Ms. Cabe handed Mr. Donley her driver’s license and food stamp card to put in his wallet. (*Id.* at 35). She saw a friend who gave them a ride back to the house. (*Id.* at 34).

Ms. Cabe introduced her son to Mr. Donley. (10/19/10 RP 35). She changed clothes from her sun dress to jeans and a tank top. (*Id.*) Mr. Buchanan was asleep on her bed while she was changing. (*Id.*) She said Mr. Donley looked perturbed when he

saw her topless sitting on Mr. Buchanan's lap while he was lying there. (*Id.* at 36). Nathan was not happy with his mother bringing Mr. Donley to the house and told her to get rid of him. (*Id.*). At some point, Mr. Donley left the bedroom and then the house. (*Id.* at 37). Ms. Cabe went to look for him. (*Id.* at 37).

She walked to the corner, looked back, and saw Mr. Donley walking toward the Uptown when she remembered he had her driver's license. (10/19/10 RP 37-38). When she caught up with him, he could not find her license so she asked if she could get it herself. (*Id.* at 38-39). As soon as she did, he yelled, "Bitch, give me my shit." (*Id.* at 39). She held up the driver's license telling him he was not a pretty blond girl and his name was not Cindy when she got the first hit in the face. (*Id.*).

Ms. Cabe fell to the asphalt and chipped her tooth. (10/19/10 RP 39). She tried to be calm and not fight back. (*Id.*). She remembered a car driving by and not stopping. (*Id.* at 40). Mr. Donley put her in a choke hold with his left arm. (*Id.*). They ended up in the front yard of a house on Williams and Potter. (*Id.*). She had a hard time breathing and got smashed in the nose. (*Id.* at 41). He had his legs wrapped around her, ripped her jeans down from behind, and hit her some more. (*Id.* at 42-43).

The police arrived and the car that had driven by before came back. (10/19/10 RP 43). Mr. Donley rolled off and asked where the Mexican went. (*Id.* at 43). Ms. Cabe went to the hospital. (*Id.* at 44). She suffered stacked double vision and bruising on her neck and face. (*Id.* at 46). As the days went by, Ms. Cabe's eye and tongue got more swollen. (*Id.*).

She said Mr. Donley was very drunk. (10/19/10 RP 49). He was wandering aimlessly after he left her house and was stumbling. (*Id.* at 57). She said Mr. Donley just snapped and completely lost it. (*Id.* at 59). It was less than five minutes from the time they left the house until things went wrong. (*Id.* at 61). Mr. Buchanan also testified Mr. Donley was extremely drunk. (*Id.* at 86).

Natalie McGuffin was driving by and saw a man on top of a woman at the corner of Williams and Potter. (10/19/10 RP 97). She looked in the rear view mirror and saw a man punching her. (*Id.* at 97, 100). She flipped a U-turn and asked Mr. Donley what he was doing, whereupon he said, "Stay out of it or I will kill you." (*Id.* at 97). Ms. McGuffin called the police. (*Id.* at 98).

Responding police officers said they found a man on top of a woman face-down on the ground. (10/19/10 RP 111). Ms. Cabe had a bloody face, swollen eyes, and marks on her head and neck.

(*Id.* at 112,114). She was sobbing and crying. (*Id.* at 114). Mr. Donley was arrested. The officer taking him to the station did not recall if he appeared to be intoxicated. (*Id.* at 123).

Mr. Donley testified in his own behalf. (10/19/10 RP 132). On July 26, 2009, he had been drinking beer and then hard liquor from 11 a.m. to dusk at the Uptown. (*Id.* at 133, 135). He was getting “hazy” at the second bar. (*Id.* at 136). Mr. Donley remembered nothing about going home with Ms. Cabe or meeting her son. (*Id.* at 137). He recalled nothing about the house, what happened there, or leaving it. (*Id.*). Mr. Donley did remember a grassy patch and it being dark. (*Id.*). He also recalled Ms. Cabe wanting something out of his wallet. (*Id.* at 138). His memory was a “pretty good blank.” (*Id.* at 139).

There were no objections or exceptions to the court's instructions. (10/20/10 RP 144). The jury found Mr. Donley not guilty of attempted first degree rape and attempted second degree rape, but convicted him of second degree assault. (10/20/10 RP 174; CP 257-267). This appeal follows.

III. ARGUMENT

A. The State's evidence was insufficient to support the second degree assault conviction beyond a reasonable doubt

because Mr. Donley was so intoxicated he could not form the requisite intent to commit the crime.

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). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Donley had the intent to commit an assault. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The State charged Mr. Donley with second degree assault, alleging he "did intentionally assault Cynthia Cabe . . ." (CP 80). Ms. Cabe and Mr. Buchanan testified Mr. Donley was extremely intoxicated. (10/19/10 RP 31, 35, 49, 57, 86). He had been drinking since 11 a.m. that day and could not recall anything from the time he left the second bar until the police arrived. (*Id.* at 136, 139). The officer taking him to the station could not recall whether Mr. Donley appeared to be intoxicated. (*Id.* at 123). That is not evidence at all. In these circumstances, the record reflects the undisputed evidence that Mr. Donley was so intoxicated he could

not recall a thing and he snapped – a textbook example of an alcohol blackout.

The jury was given instruction 22 on intoxication:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant failed to act with intent. (CP 233).

The to-convict instruction for second degree assault stated in part the jury must find beyond a reasonable doubt the essential element that “the defendant intentionally assaulted Cynthia Cabe.” (CP 232). The only evidence at trial was that Mr. Donley was extremely intoxicated to the point of blacking out while still conscious. When the evidence is undisputed, the jury makes no credibility determination and no deference is accorded to it. See *Malstrom v. Kalland*, 62 Wn.2d 732, 734-35, 384 P.2d 613 (1963). The State failed to produce evidence showing Mr. Donley acted with intent when he was so extremely intoxicated that no such intent could even be formed. Indeed, the existence of facts cannot be based on guess, speculation, or conjecture by the jury. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The State's evidence was insufficient to prove intent beyond a reasonable

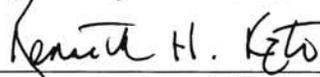
doubt. Mr. Donley's conviction for second degree assault must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Donley respectfully urges this court to reverse his conviction of second degree assault and dismiss the charge.

DATED this 4th day of September, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 4, 2012, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Joshua C. Donley, # 947511, Clallam Bay C.C., 1830 Eagle Crest Way, Clallam Bay, WA 98326; and Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl. – Bldg A, Kennewick, WA 99336.

