

No. 47377-1-II

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEREMY ROSE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERE COUNTY
THE HONORABLE JOHN HICKMAN

SUPPLEMENTAL BRIEF OF APPELLANT

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A. Issue Requested To Be Briefed

The Court directed the parties to provide supplemental briefing addressing the trial court's failure to give a jury instruction for assault in the third degree.

B. Statement of the Case

The pertinent facts are set forth in appellant's opening brief and incorporated by reference. Mr. Rose was charged with two counts of first-degree assault. After the evidence had been presented, the state proposed instructions on the lesser degree offense of assault in the second degree for both counts. (CP 41-44). The defense added proposed instructions for a lesser-included offense of assault in the third degree. (7/8/14 RP 703; CP 73-78).

Both parties agreed the legal prong under the *Workman* test had been met. (7/8/14 RP 703; 705). The parties disagreed as to whether the factual prong had been met. The court concluded it would not give an instruction on assault third degree because "this wasn't criminal negligence." The court equated negligence with "accidental" infliction of injury saying, "And it wasn't like the knife slipped out of his hand or that was accidental, that he meant to stab her toe." (7/8/14 RP 706).

Mr. Rose was convicted of one count of assault in the second degree of Susan Ortloff. He was found not guilty of either first or second-degree assault of Steven Ortloff. (7/9/14 RP 802-803).

C. Argument

Without conceding the argument that Mr. Rose produced evidence showing that he had a good faith and objectively reasonable belief in the necessity of the use of force to protect himself, Mr. Rose contends he had the right to a jury instruction on third degree assault.

A trial court's decision whether to instruct the jury on an uncharged inferior-degree offense involves the application of law to facts, which is reviewed de novo. *State v. Corey*, 181 Wn.App. 272, 276, 325 P.3d 250 (2014). Under Washington law, a person charged with a crime can be convicted of a lesser degree of the crime. RCW 10.61.033¹. Further, when an offense has been proved against an accused, and there is reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest. RCW 10.58.030.

¹ Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant 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.

While a trial court may not submit a theory to the jury for which there is insufficient evidence, over 100 years ago, the Washington Supreme Court held:

“If there is even the *slightest evidence* that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.”

State v. Young, 22 Wash. 273, 276, 60 P.650 (1900); *See also State v. Wright*, 152 Wn.App. 64, 70, 214 P.3d 968 (2009). (internal citation omitted). Additionally, in reviewing sufficiency of evidence to support a trial court’s decision to instruct the jury on an uncharged inferior-degree offense, the evidence must be viewed in a light most favorable to the instruction’s proponent, here, the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). Such evidence must permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Corey*, 181 Wn.App. at 276.

A person is guilty of assault in the third degree if he, under circumstances not amounting to assault in the first or second degree with *criminal negligence*, *causes bodily harm* to another person *by means of a weapon* or other instrument or thing *likely to*

produce bodily harm. RCW 9A.36.031(1)(d). He is criminally negligent when he *fails to be aware of a substantial risk that a wrongful act may occur* and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation. RCW 9A.08.020(1)(d).

A person is guilty of assault in the second degree if he, under circumstances not amounting to assault in the first degree intentionally assaults another thereby *recklessly inflicts substantial bodily harm.* RCW 9A.36.021(a).

A person acts recklessly when he *knows of and disregards a substantial risk a wrongful act may occur* and his disregard of substantial risk of gross deviation from the conduct of a reasonable person in the same situation. RCW 9A.08.010.

The critical question here is whether evidence was produced at trial showing that Mr. Rose failed to be aware of a substantial risk that a wrongful act might occur and such a failure of awareness was a gross deviation from the standard of care a reasonable person would have exercised in the same situation. Prior to and during the attack, according to Mr. Rose, he was in the apartment space he had been using as a home. Two older, homeless

individuals broke down the door of the apartment with a pick axe. (7/8/14 RP 655; 656). Susan Ortloff, angry and yelling, kicked in the door. (7/8/14 RP 657). She continued to yell at him and then lunged at his chest with a knife. (7/8/14 RP 657). In the ensuing struggle, Mr. Rose wrestled the knife away from her to prevent her from stabbing him. (7/8/14 RP 658). He stabbed her in the chest one time, and in shock, thought to himself, "I just stabbed somebody." (7/8/14 RP 659). Within seconds, Stephen Ortloff charged into the room, tackled Mr. Rose, choking and punching him. (7/8/14 RP 660). Mr. Ortloff beat Mr. Rose into unconsciousness. (7/8/14 RP 660).

An instruction on third degree assault would have allowed the jury to consider whether Mr. Rose caused physical harm to Ms. Ortloff by means of a weapon or thing likely to produce bodily harm and yet failed *to be aware of a substantial risk that a wrongful act may occur*. The analysis does not depend, as the trial court reasoned, on whether Mr. Rose "accidentally" stabbed Mrs. Ortloff. Rather, the Court should have allowed the jury to determine whether Mr. Rose's mental state was such that he acted without reflection or awareness of a substantial risk, or in obvious disregard of a substantial risk that a wrongful act may occur.

D. Conclusion

Based on the foregoing facts and authorities, Mr. Rose respectfully asks this Court to reverse his conviction for second-degree assault.

Submitted this 14th day of January 2016.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on January 14, 2016, I served a true and correct copy of Appellant's supplemental brief by first class, USPS mail, postage prepaid, or by electronic service by prior agreement between the parties to the following:

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