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Court of Appeals
Division II
State of Washington
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No. 95880-7
COA No. 48494-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM TODD HINZMAN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR COWLITZ COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

William Hinzman asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. William Todd Hinzman*, No. 48494-3-II (April 24, 2018). A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Due process under the United States and Washington Constitutions requires the State to prove every element of the charged offenses beyond a reasonable doubt. Second and third degree assaults require an intentional assault. The evidence here established Mr. Hinzman resisted being arrested but failed to establish he intentionally assaulted the officers. Is a significant issue under the United States and Washington Constitutions involved where the decision fails to require the State prove an intentional assault?

D. STATEMENT OF THE CASE

On October 9, 2015, Kelso resident Connie Cothren called police regarding her brother-in-law, William Hinzman. RP 150. Ms. Cothren's sister, Sarah Hinzman, had been staying at Ms. Cothren's, along with Mr. Hinzman, her husband. RP 144. Mr. and Ms. Hinzman were fighting and Ms. Hinzman told her husband to leave. RP 147. Tired of the fighting between Mr. and Ms. Hinzman, Ms Cothren told Mr. Hinzman to leave. RP 148. When he did not she called the police. RP 150.

Kelso Police Officers Kurt Wiper and Douglas Lane arrived at Ms. Cothren's house. RP 200-01. The police told Mr. Hinzman to step outside. RP 205. Initially, Mr. Hinzman refused, wanting to go out another door, but ultimately complied. RP 207-08. When Lane told Mr. Hinzman to "sit," Mr. Hinzman took exception and said he was "not your . . . dog." RP 209. Mr. Hinzman refused Lane's second command to "sit" and the officers attempted to arrest Mr. Hinzman. RP 210-11. Mr. Hinzman continued to resist until the police were ultimately able to handcuff him. RP 225. In the struggle, Lane suffered a torn medial meniscus in his left knee, which required surgery. RP 249-50. Lane admitted the injury occurred during the struggle to arrest Mr. Hinzman, but not based on any assaultive action by Mr. Hinzman. RP 341.

Mr. Hinzman was subsequently charged with two counts of second degree assault, two counts of third degree assault, two counts of disarming a police officer, and a count of resisting arrest. CP 84-86. Following a jury trial, Mr. Hinzman was convicted of all four assault counts and the resisting arrest count. CP 45, 48-51. He was acquitted of disarming Wiper and the jury was unable to reach a verdict on the disarming count regarding Lane. CP 46-47. ¹

The Court of Appeals rejected Mr. Hinzman's argument the convictions were not supported by substantial evidence, relying on the decision in *State v. Craven*, 67 Wn.App. 921, 841 P.2d 774 (1992). Decision at 8-9.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

There was insufficient evidence that Mr. Hinzman assaulted either officer.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of

¹ A mistrial was declared as to this count and it was dismissed on the State's motion. RP 512, 515.

insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Each of the first four counts was premised on the fact that Mr. Hinzman assaulted the two officers, as opposed to merely resisting the arrest, for which he was also convicted. This presumption is not supported by the record, thus the assault counts must be dismissed.

All four counts required the State to prove Mr. Hinzman intentionally assaulted the two officers. CP 70-71, 73-74. Further, the jury was instructed that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 65.

At trial, the officers consistently and continually described Mr. Hinzman’s actions as resisting, not assaulting. *See e.g.*, RP 211 (“resisting”); RP 213 (“violently resisting”); RP 217 (“he continued to

struggle”); RP 223 (“using expletives” “yelling at us”): RP 330 (“stiffened up, tried to pull away from my grasp and spin to the right”);RP 334 (“[h]e pulled away and spun to his right”); RP 337 (“[h]e continued to try pull away, and again I tried to stay close”); RP 339 (“he wanted to break our grasp”) RP 343 (“[h]e was grunting and groaning like he was trying to benchpress 300 pounds”).

Wiper described Mr. Hinzman as “pulling his arms away from me.” RP 212. Wiper admitted that Mr. Hinzman did not kick him. RP 213. Wiper’s description of the events shows a clear indication that Mr. Hinzman was plainly resisting being arrested but nothing more.

Lane described his and Wiper’s attempts at taking Mr. Hinzman to the ground, which Mr. Hinzman resisted. RP 339-40. Although Lane felt blows to his leg, he admitted he did not see Mr. Hinzman kicking him. RP 337-38. Lane further admitted that the injury he suffered to his knee came from his attempts to take Mr. Hinzman to the ground in order to arrest him, not from any assaultive actions by Mr. Hinzman. RP 341.

What the officers described was an active intentional attempt by Mr. Hinzman to resist being arrested, not evidence of an intent to assault them. Resisting arrest requires “intentionally prevent[ing] or

attempt[ing] to prevent a peace officer from lawfully arresting him.” RCW 9A.76.040(1). That is precisely what Mr. Hinzman did here; he prevented or attempted to prevent Lane and Wiper from arresting him. Mr. Hinzman tried to pull away from attempts to handcuff him and tried repeatedly to keep the officers from handcuffing him; that is all he did. The officers repeatedly referred to Mr. Hinzman “fighting” them, which is merely a euphemistic term they used to describe his resisting arrest, not actually fighting them. The assault counts were merely overly ambitious attempts by the State to bootstrap more serious felony counts onto an avowed attempt by Mr. Hinzman to resist arrest.

The Court of Appeals relied on the decision in *Craven, supra*. But both *Craven* and the decision here fail to require the State to prove the defendant’s specific intent to *assault*; the decisions merely require that during an attempt to resist, an assault can be inferred from the defendant’s actions in resisting. But both second and third degree assaults require a specific intent by the defendant to assault. As such, *Craven* was wrongly decided.

The assault counts were not supported by substantial evidence and must be reversed. This Court should grant review to determine whether *Craven*, and as a result, the decision in Mr. Hinzman’s case,

were wrongly decided since they do not require a specific intent by the defendant to assault contrary to law.

F. CONCLUSION

Mr. Hinzman asks this Court to accept review of this petition and reverse his convictions with instructions to dismiss.

DATED this 21st day of May 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM TODD HINZMAN,

Appellant.

No. 48494-3-II

UNPUBLISHED OPINION

LEE, J. – William Todd Hinzman appeals his two convictions for second degree assault and his two convictions for third degree assault. All convictions involve police officers responding to a domestic dispute between Hinzman and his estranged wife, Sarah Hinzman. Hinzman argues that there is insufficient evidence to support his convictions because the State failed to prove there was an actual assault. We affirm.

FACTS

Sarah¹ lived with her sister, Connie Cothren, in Kelso. In October 2015, Hinzman came to Cothren's home and began to argue with Sarah. He then began to argue with Cothren. Cothren called the police.

¹ Because William and Sarah share the same last name, we use Sarah's first name for clarity. We intend no disrespect.

When Kelso police officers Kurt Wiper and Douglas Lane arrived, Cothren was physically shaking and upset. Cothren told the officers she wanted Hinzman out of her house. Officer Wiper instructed Hinzman to step outside.

Hinzman was agitated, sweating, fidgety, wide-eyed, and his speech was excited and erratic. He did not exit the home as instructed, so the police escorted Hinzman out of the house. As they exited the house, Hinzman clenched his hands into fists. Officer Lane instructed Hinzman to sit on a step outside. Hinzman replied, "I'm not your f***ing dog." 4 Verbatim Report of Proceedings (VRP) (Dec. 11, 2015) at 323 (jury trial). Hinzman was focused on Officer Lane and continued to clench his fists. Officer Lane instructed Hinzman to sit for a second time. Hinzman replied, "F*** you, Lane." 2 VRP (Dec. 10, 2015) at 209 (jury trial). Officer Lane then told Hinzman he was under arrest.

As Officer Lane attempted to handcuff Hinzman, Hinzman pulled away and spun to the right. Each officer then took one of Hinzman's arms. Officer Wiper attempted to push Hinzman to a wall so he could handcuff him. Hinzman was very strong and struggled violently. Hinzman pulled his arm away from Officer Wiper, causing Officer Wiper to lose control of his handcuffs.

Hinzman then kicked Officer Lane multiple times in the right knee and shin. The officers attempted to control Hinzman, but Hinzman "violently resist[ed]," continuing to twist and kick the officers. 2 VRP (Dec. 10, 2015) at 213 (jury trial).

Hinzman grabbed Officer Wiper's wrist and pulled it. Because Hinzman had taken control of Officer Wiper's arm, Officer Wiper was concerned he would not be able to protect his firearm. Officer Wiper was able to get his wrist out of Hinzman's grasp and deploy his taser. The use of the taser angered Hinzman more. Hinzman "fought more violently" against the officers. 2 VRP (Dec. 10, 2015) at 217 (jury trial).

Hinzman and the officers fell to the ground during the struggle. Hinzman attempted to kick Officer Lane off of him. Hinzman kicked Officer Lane in the shin, knee, pelvis area, and collarbone. Hinzman then grabbed the taser out of Officer Wiper's hand and pointed it at Officer Wiper. Officer Wiper was able to grab the taser back. The taser was activated and shocked Officer Wiper as he grabbed it back.

Officer Lane then deployed his taser on Hinzman. Hinzman went down but was able to roll to his back and reach for Officer Lane's holster. Hinzman pulled down the lower half of Officer Lane's holster. Wiper then employed three knee strikes to Hinzman, which subdued Hinzman enough so that the officers could handcuff him.

Kelso Police Department Captain Darr Kirk arrived on the scene. Hinzman told Captain Kirk, "[Y]ou're lucky you came, Captain, or I would have kicked their a**es." 3 VRP (Dec. 10, 2015) at 272 (jury trial).

As a result of the incident, Officer Lane suffered a torn medial meniscus of his right knee. He needed surgery to repair the damage to his knee. Officer Lane had limited mobility, was unable to work patrol, and was placed on light duty.

The State charged Hinzman with two counts of second degree assault, two counts of third degree assault, two counts of disarming a law enforcement officer, and resisting arrest. The jury found Hinzman guilty of all four assault charges and resisting arrest.² The jury found Hinzman not guilty of one of the counts of disarming a law enforcement officer and could not reach a verdict on the other disarming count. Hinzman appeals.

ANALYSIS

Hinzman argues that there is insufficient evidence to support his four assault convictions because the State failed to prove Hinzman intentionally assaulted Officers Lane and Wiper. We disagree.

A. STANDARD OF REVIEW

In a criminal case, the State must present sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In reviewing whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Circumstantial evidence receives the same weight as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Appellate courts defer

² Hinzman does not challenge his conviction for resisting arrest.

to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014).

B. SUFFICIENCY OF THE EVIDENCE

The jury found Hinzman guilty of two counts of second degree assault. The jury also found Hinzman guilty of two counts of third degree assault.

A person is guilty of second degree assault if he or she, under circumstances not amounting to assault in the first degree, “intentionally assaults another and thereby recklessly inflicts substantial bodily harm” or “with intent to commit a felony, assaults another.” RCW 9A.36.021(1)(a) and (e). Disarming a law enforcement officer is a felony. RCW 9A.76.023(2).

The State charged Hinzman with second degree assault based on an intentional assault and reckless infliction of substantial bodily harm relating to Officer Lane. The State charged Hinzman with second degree assault based on an intentional assault with intent to commit a felony relating to Officer Wiper.

A person commits third degree assault if he or she “[a]ssaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault.” RCW 9A.36.031(1)(g). The State charged Hinzman with two counts of third degree assault relating to both Officers Lane and Wiper.

Hinzman contends the State did not establish that there was an assault to support any of the assault convictions. Because the criminal code does not define “assault,” Washington courts define assault in one of three ways: “(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.” *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006).

Here, as Officers Lane and Wiper escorted Hinzman out of the house, Hinzman clenched his hands into fists. Officer Lane instructed Hinzman to sit on a step outside. Hinzman replied, “I’m not your f***ing dog.” 4 VRP (Dec. 11, 2015) at 323 (jury trial). Hinzman was focused on Officer Lane and continued to clench his fists. Officer Lane instructed Hinzman to sit for a second time. Hinzman replied, “F*** you, Lane.” 2 VRP (Dec. 10, 2015) at 209 (jury trial). Officer Lane then told Hinzman he was under arrest. As Officer Lane attempted to handcuff Hinzman, Hinzman pulled away and spun to the right. Each officer then took one of Hinzman’s arms.

Officer Wiper attempted to push Hinzman to the wall so he could handcuff him. Hinzman was very strong and struggled violently. Hinzman pulled his arm away from Officer Wiper, causing Officer Wiper to lose control of his handcuffs. Hinzman then kicked Officer Lane multiple times in the right knee and shin. The officers attempted to control Hinzman. Hinzman “violently resist[ed],” continuing to twist and kick the officers. 2 VRP (Dec. 10, 2015) at 213 (jury trial).

Hinzman grabbed Officer Wiper's wrist and pulled it. Because Hinzman had taken control of Officer Wiper's arm, Officer Wiper was concerned he would not be able to protect his firearm. Officer Wiper was able to get his wrist out of Hinzman's grasp and deploy his taser, but the use of the taser angered Hinzman more. Hinzman "fought more violently" against the officers. 2 VRP (Dec. 10, 2015) at 217 (jury trial).

On the ground, Hinzman attempted to kick Officer Lane off of him. Hinzman kicked Officer Lane in the shin, knee, pelvis area, and collarbone. Hinzman then grabbed the taser out of Officer Wiper's hand and pointed it at Officer Wiper. Officer Wiper was able to grab the taser back. The taser was activated and shocked Officer Wiper as he grabbed it back.

Officer Lane then deployed his taser on Hinzman. Hinzman went down but was able to roll to his back and reach for Officer Lane's holster. Hinzman pulled down the lower half of Officer Lane's holster. When Captain Kirk arrived on the scene, Hinzman told him, "[Y]ou're lucky you came, Captain, or I would have kicked their a**es." 3 VRP (Dec. 10, 2015) at 272 (jury trial).

As a result of the incident, Officer Lane suffered a torn medial meniscus of his right knee. He needed surgery to repair the damage to his knee. Officer Lane had limited mobility, was unable to work patrol, and was placed on light duty.

Viewing the evidence in a light most favorable to the State, the evidence is sufficient to prove assault of both officers beyond a reasonable doubt. Hinzman attempted to intentionally inflict bodily injury on Officer Lane by kicking him multiple times and on Officer Wiper by grabbing his wrist, pulling it, and eventually grabbing the taser out of Officer Wiper's hands and

pointing it at Officer Wiper. Officer Lane suffered a torn medial meniscus in his right knee that required surgery. And Hinzman activated and shocked Officer Wiper with the taser. The evidence also amounted to an unlawful touching of the officers and putting them in apprehension of harm. The evidence is also sufficient for a rational fact finder to find beyond a reasonable doubt that Hinzman assaulted Officer Wiper in the course of disarming him by taking his taser.

Hinzman argues he only intended to resist arrest not to assault the officers. *State v. Craven*, 67 Wn. App. 921, 841 P.2d 774 (1992) is instructive. There, Craven challenged the sufficiency of the evidence supporting his assault conviction for kicking a police officer who was arresting him. After Craven was informed by police he was under arrest, two officers struggled to place Craven in handcuffs and all three of them fell to the ground. *Id.* at 923. As the officers struggled on the ground with Craven, a third officer observed that Craven’s legs were “flopping around and kicking.” *Id.* at 924. The officer knelt down on Craven’s legs to restrain him. *Id.*. The officer “caught one of [Craven’s] feet on the right side of [his] head” causing an abrasion behind his ear and nearly knocking his glasses off. *Id.* Taken in the light most favorable to the State, the court held that this evidence was sufficient to support an assault of the officer, stating that “[a] reasonable factfinder could conclude that Craven knew someone was trying to restrain his legs, and that he kicked with the intent to evade arrest *and also* [to] touch or strike that person.” *Id.* at 929 (emphasis added).

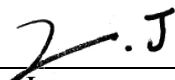
Similarly, here, Hinzman cannot avoid responsibility for assault just because the ultimate purpose may have been to avoid apprehension. Thus, when all reasonable inferences are drawn in favor of the State, there was sufficient evidence for the jury to find beyond a reasonable doubt that Hinzman was guilty of assault in the second degree against Officer Lane, assault in the second degree against Officer Wiper, and assault in the third degree against both officers.

C. APPELLATE COSTS

Hinzman asks that we decline to impose appellate costs if the State prevails on appeal. If the State makes a request for appellate costs, Hinzman may challenge that request before a commissioner of this court under RAP 14.2.

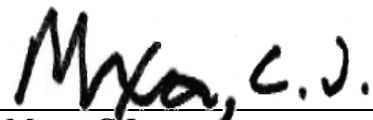
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

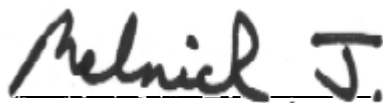


Lee, J.

We concur:



Maxa, C.J.



Melnick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 48494-3-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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WASHINGTON APPELLATE PROJECT

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