No. 89852-9
COA No. 69834-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PERRI LEE SMITH,

Petitioner.

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

The Honorable Bruce W. Hilyer

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Perri Smith 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Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Perri Lee Smith*, No. 69834-6-I (December 30, 2013). A copy of the decision is in the Appendix at pages A-1 to A-4.

C. ISSUE PRESENTED FOR REVIEW

Due process requires the State prove every essential element of the charged offense beyond a reasonable doubt. Second degree assault requires the State prove the defendant specifically intended to assault the victim. Is a significant question of law under the United States and Washington Constitutions, presented where the State proved only that Mr. Smith struck Mr. Sudduth's car without more, and proving intent would require improperly pyramiding inference upon inference, thus failing to prove beyond a reasonable doubt Mr. Smith specifically intended to Mr. Sudduth or Ms. Wilks?

D. STATEMENT OF THE CASE

Kenneth Sudduth, Kerrie Wilks, and Perri Smith are long time residents of Vashon Island and knew each other. RP 117, 154, 214. Mr. Smith has known Mr. Sudduth as a casual acquaintance for approximately six years, and has known Ms. Wilks for approximately eight years. RP 119, 158, 214. Mr. Sudduth and Ms. Wilks went to high school together where they met. RP 120.

Whether or not Mr. Smith and Ms. Wilks were in a dating relationship was in dispute, but on June 12, 2012, Mr. Smith drove Ms. Wilks into Seattle for her doctor's appointments. RP 159-63, 215-17. As the day progressed, the two continued to argue, which resulted in Ms. Wilks leaving Mr. Smith and taking the ferry back to Vashon alone. RP 163, 220.

Once on Vashon, at approximately 10:30 p.m., Ms. Wilks called Mr. Sudduth asking him to provide her a ride home. RP 126. Mr. Sudduth drove to the ferry terminal and saw Ms. Wilks walking alongside the road. RP 128. Mr. Sudduth pulled to the side of the road, stopped, and Ms. Wilks entered the car. RP 128. As he pulled into traffic at a slow speed, Mr. Sudduth was rear-ended by Mr. Smith. RP 131. Neither Ms. Wilks nor Mr. Sudduth was injured in the

accident. RP 140-41, 177. Mr. Smith then passed Mr. Sudduth's car and went in the direction of town. RP 134. Mr. Sudduth called 911. RP 136. Mr. Sudduth gave a statement to the police but Ms. Wilks refused to cooperate with the police. RP 139, 176-77.

Mr. Smith was charged with one count of second degree assault, alleging in the single count that he assaulted Mr. Sudduth and Ms. Wilks with a deadly weapon, his pick-up truck. CP 1. Following a jury trial, Mr. Smith was convicted as charged. CP 25.

On appeal, Mr. Smith unsuccessfully argued the State failed to prove that he specifically intended to assault Mr. Sudduth and Mr. Wilks when his truck struck Mr. Sudduth's car. Decision at 4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER THE STATE FAILED TO PROVE MR. SMITH SPECIFICALLY INTENTED TO ASSAULT MS. WILKS AND MR. SUDDUTH

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 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).

To prove the offense of second degree assault as charged here, the State was required to prove Mr. Smith assaulted Ms. Wilks and Mr. Sudduth with a deadly weapon, his truck. RCW 9A.36.021(1)(c). Under the common law of assault, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *State v. Byrd,* 125 Wn.2d 707, 713, 887 P.2d 396 (1995).

Mr. Sudduth had no interaction with Mr. Smith prior to the charged incident. Mr. Sudduth testified that once he picked up Ms. Wilks, he pulled into traffic and was just getting up to speed when Mr. Smith's truck hit him from behind. RP 129-30. At best, Mr. Sudduth's testimony indicates Mr. Smith's striking the rear of Mr. Sudduth's car was an accident when Mr. Sudduth suddenly pulled out from the side of

the road in front of him when Mr. Smith was driving up the hill from the ferry terminal. RP 150.

Similarly, Ms. Wilks, who was a less than reliable witness, testified that she and Mr. Smith had been together that day and had argued throughout the day. RP 159-63, 215-17, 220. Ms. Wilks admitted that although she felt Mr. Smith's truck rear-end Mr. Sudduth's car, she could not provide "the details about [Mr. Smith's] driving, I can't give them to you." RP 202. The best that could be said about Ms. Wilks' testimony was that she could only testify that she felt Mr. Smith's truck hit Mr. Sudduth's car. RP 170-71.

While certainly, the jury was allowed to draw inferences from Mr. Sudduth's and Ms. Wilks' testimony, as the Court of Appeals found, but "[p]resumption[s] may not be pyramided upon presumption[s], nor inference[s] upon inference[s]." *State v. Willis*, 40 Wn.2d 909, 914, 246 P.2d 827 (1952), *quoting Neel v. Henne*, 30 Wn.2d 24, 37, 190 P.2d 775 (1948). The only thing these two witnesses could say was that Mr. Smith's truck struck Mr. Sudduth's but neither could testify that Mr. Smith specifically intended to strike the car. Thus, claiming that this testimony proved Mr. Smith's intent was to pyramid inference upon inference, which simply did not arise to

proof beyond a reasonable doubt. The State failed to prove Mr. Smith specifically intended to assault Mr. Sudduth and Ms. Wilks when his truck struck Mr. Sudduth's.

Mr. Smith asks this Court to grant review and find the State failed to prove he specifically intended to assault Ms. Wilks, and Mr. Sudduth.

F. CONCLUSION

For the reasons stated, Mr. Smith asks this Court to grant review and reverse his conviction with instructions to dismiss.

DATED this 27th day of ~~January 2014~~.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PERRI SMITH, Appellant.	)	No. 69834-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 30, 2013

PER CURIAM. Perri Lee Smith appeals his conviction for second degree assault with a deadly weapon, arguing that the State presented insufficient evidence for the jury to find the requisite element of intent. We affirm.

In June 2012, Smith, Kerrie Wilks, and Kenneth Sudduth lived on Vashon Island. Smith had romantic feelings for Wilks, but Wilks was not interested in a romantic relationship with him. Wilks and Sudduth were close friends.

On June 12, 2012, Smith and Wilks drove from Vashon Island to Seattle. They argued throughout the day. At one point, Wilks kicked and cracked the windshield of Smith's truck. By the time they returned to the ferry terminal in Seattle that evening, Wilks no longer wished to remain in Smith's car. She took her belongings and waited nearby for a later ferry to Vashon. Smith boarded an earlier ferry.

Wilks phoned Sudduth and asked him to pick her up at the ferry terminal on Vashon. When she arrived at the Vashon terminal, Wilks saw Smith's truck parked by the side of the road. As she walked past Smith's truck, she told him, "[G]et away from me or I am calling the police." She proceeded to Sudduth's car, which was parked a short distance away.

Sudduth pulled into traffic and was driving about 20 or 25 miles per hour when he heard a revving engine and saw Smith's truck in his rearview mirror. Smith's truck then struck Sudduth's car twice from behind.[1] Sudduth's car sustained damage. Smith then passed Sudduth and Wilks, yelling something as he went by. Sudduth called 911.[2] Later that night, police arrested Smith at his home.

The State charged Smith with second degree assault with a deadly weapon. RCW 9A.36.021(1)(c). At trial, Wilks and Sudduth testified to the facts recited above. Wilks also testified that Smith at some point told her "what he was going to do [ ] if he saw [her] get in [Sudduth's] car."

Smith, the defense's sole witness, testified to a different version of the incident. He admitted that he liked Wilks but understood that they could not have a romantic relationship and was not jealous of her relationship with Sudduth. He testified that when he arrived on Vashon Island on the evening in question, he initially went home, but then returned to the ferry terminal to look for Wilks because he "was concerned [about] how

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[1] Wilks, who suffers from posttraumatic stress disorder, could not recall all of the details of the collision and did not give a statement to police.

[2] The tape of Sudduth's conversation with the dispatcher was played for the jury.

she was going to get home." As Wilks walked by his truck, Smith asked if she wanted a ride home and she said no.

Smith then fell asleep in his truck because he was exhausted from the long day in Seattle. He was not sure how long he slept, but he eventually woke up and started to drive home. As he turned a corner, he ran into Sudduth's car.

Smith testified that he did not intentionally hit Sudduth's car and that he did not see it in time to stop—"[I]t was just a horrible timing situation . . . ." Smith also testified that the second impact was caused by Sudduth's car moving backwards into his truck—"I can't say that he deliberately backed into me or he . . . shifted incorrectly in all the excitement . . . ." Smith left right away because he did not want to "have an incident" with Sudduth, considering that Sudduth was "kind of volatile" and "an intimidator . . . of people."

The jury found Smith guilty as charged. He appeals.

DECISION

The sole issue on appeal is whether the State presented sufficient evidence to prove that Smith intended to cause or create apprehension of bodily injury as required by the trial court's instruction 7.

When the sufficiency of evidence is challenged, this court considers "whether, after viewing the evidence in the light most favorable to the State, 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). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. "We defer to the trier of fact on issues of conflicting testimony, credibility

of witnesses, and the persuasiveness of [the]evidence." State v. Manion, 173 Wn. App. 610, 633, 295 P.3d 270 (2013). Circumstantial evidence and direct evidence carry equal weight, State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), and criminal intent may be inferred "from conduct that plainly indicates such intent as a matter of logical probability." State v. Abuan, 161 Wn. App. 135, 155, 257 P.3d 1 (2011).

Viewing the facts in the light most favorable to the State, we conclude that a rational trier of fact could have found the element of intent proven beyond a reasonable doubt. See Salinas, 119 Wn.2d at 201. The State presented evidence that Wilks did not return Smith's romantic feelings for her, that they argued throughout the day of the incident, that Wilks broke Smith's windshield during the arguments, that Smith "told [Wilks] what he was going to do [ ] if he saw [her] get in [Sudduth's] car," that Smith revved his truck's engine before hitting Sudduth's car, and that Smith "rammed" Sudduth's car twice in rapid succession. From this evidence, a rational trier of fact could infer, as a matter of logical probability, that Smith intended to either cause or create apprehension of bodily injury.

Affirmed.

FOR THE COURT:

Becker, J.

Appelwick, J.

Spearman, A.C.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. 69834-6-I**, 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 or residence address as listed on ACORDS:

☒ respondent Mari Isaacson, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 27, 2014