FILED
SUPREME COURT
STATE OF WASHINGTON
6/6/2019 11:39 AM
BY SUSAN L. CARLSON
CLERK

No. 97184-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 49592-9-II)

STATE OF WASHINGTON,

Respondent,

vs.

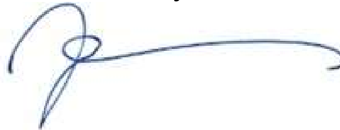
TYLER WALLACE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

JONATHAN MEYER
Lewis County Prosecuting Attorney



By: ______________________________
Deputy Prosecuting Attorney
WSBA No. 43759

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

A. COURT OF APPEAL DECISION...1

B. COUNTERSTATEMENT OF THE ISSUES..............................1

C. STATEMENT OF FACTS..1

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED..1

1. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *BYRD* OR *JOHNSON* 2

2. WALLACE'S CASE DOES NOT PRESENT A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW 6

E. CONCLUSION..8

TABLE OF AUTHORITIES

Washington Cases

State v. Byrd., 125 Wn.2d 707, 887 P.2d 396 (1995) 1, 2, 3, 6

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)...............5, 6

State v. Johnson., 188 Wn.2d 742, 399 P.3d 507
(2017) 1, 2, 3, 4, 5, 6

Other Rules or Authorities

RAP 13.4(b) 1, 2, 6, 7

WPIC 35.50 ....1, 2

A. COURT OF APPEALS DECISION

The Petitioner, Tyler M. Wallace, seeks review of the unpublished court of appeals decision filed on April 9, 2019 in Division Two of the Court of Appeals.

B. COUNTERSTATEMENT OF THE ISSUES:

1. Is the decision of the Court of Appeals in conflict with this Court's decision in *State v. Byrd.*, 125 Wn.2d 707, 887 P.2d 396 (1995) or *State v. Johnson.*, 188 Wn.2d 742, 399 P.3d 507 (2017)?

2. Does Wallace's case involve a significant question of law under the Constitutions of the State of Washington or United States?

C. STATEMENT OF FACTS

The substantive facts of Wallace's case can be found in the unpublished Court of Appeals decision, attached for the Court's convenience as Appendix A.

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The State respectfully requests this Court decline review of the decision of the Court of Appeals because the decision is well-supported by the trial record and applicable law and none of the RAP 13.4(b) considerations governing acceptance of review have been met in this case. The decision of the Court of Appeals in this case involved sufficiency of the evidence and the law of the case doctrine. The Court of Appeals held that the current WPIC 35.50 does not add

an essential element to Assault in the Second Degree requiring the State to prove a negative – that the defendant *did not* intend to actually inflict bodily injury. This decision is not in conflict with this Court's decision in *State v. Byrd.*, 125 Wn.2d 707, 887 P.2d 396 (1995) or *State v. Johnson.*, 188 Wn.2d 742, 399 P.3d 507 (2017). Wallace's case does not present a significant question under the Constitution of the United States or the Washington State Constitution.

1. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *BYRD* OR *JOHNSON.*

This Court may accept review of a Court of Appeals decision if it is in conflict with a decision of this Court. RAP 13.4(b)(1). Contrary to Wallace's arguments, the Court of Appeals decision is entirely consistent with previous case law, including this Court's decision in *Byrd* and in *Johnson.*

In *Byrd*, the State's theory of the case was that the defendant committed Assault in the Second Degree by creating "apprehension of bodily harm." 125 Wn.2d at 712. The jury was given a definition of assault consistent with Former WPIC 35.50 (1977). *Id*. at 710.[1] The

[1] "An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury, even though the actor did not actually intend to inflict bodily injury.

Court held that "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *Id*. at 713. The Court also held that the definition contained in Former WPIC 35.50 (1977) "impermissibly removed the element of intent" from the jury. *Id*. at 716. The Court reasoned that a jury would be permitted to return a guilty verdict if it only found the defendant acted intentionally and the result of the act was the creation of a reasonable apprehension and fear of bodily injury, rather than also requiring a finding that the defendant intended to create this apprehension or fear. *Id*. at 715-16.

Here, unlike in *Byrd*, the jury was instructed that it needed to find Wallace acted with intent to create apprehension and fear of bodily injury. The instruction did not remove any essential elements included in the crime of assault in the second degree. *Byrd* did not address any issues regarding the law of the case doctrine.

In *Johnson*, the defendant was charged with second degree theft of an access device for taking a purse that contained credit cards. 188 Wn.2d at 747-48. The "to-convict" instruction included as one of its four elements that the defendant "intended to deprive the other person *of the access device*." *Id*. at 749 (emphasis added). The Court held that specific intent to steal an access device was not an

essential element of second degree theft of an access device. *Id*. at 754. Under the theft statute, the State was required to prove the separate elements of intent to take property and that the nature of the property taken was of the type required by statute. *Id*. at 752-53. However, the Court held that because the "to-convict" instruction included specific intent to steal an access device as an element, the State was required to prove that element under the law of the case doctrine. *Id*. at 756. The Court found sufficient evidence to prove the added element of specific intent to steal an access device and affirmed the conviction. *Id*. at 764.

Here, the Court of Appeals decision is not in conflict with *Johnson*. The jury in Wallace's trial was given the following to-convict instruction, Jury Instruction 4:

> To convict the defendant of the crime of Assault in the Second Degree, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 7, 2016, the defendant did intentionally assault Kimberly A. Nolan with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence you have a reasonable doubt as to any of

> these elements, then it will be your duty to return a verdict of not guilty.

CP 23. The jury was also instructed on two of the three common law definitions of assault. CP 24. Jury Instruction 5 read:

> An 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 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 24. Wallace argues because the second definition in Jury Instruction 5 included the phrase "even though the actor did not actually intend to inflict bodily injury" the State had the additional burden to prove beyond a reasonable doubt that Wallace, although intending to create apprehension and fear, did not in fact intend to inflict bodily injury. Wallace cites *Johnson* and *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) to support this argument, but this reliance is misplaced. The *Hickman* Court held that the State will assume the burden of proving *elements* included in a "to convict" instruction if not objected to, even if they are not truly elements of the

charge. *Hickman*, at 99. As discussed above, in *Johnson*, the Court continued to apply the law of the case doctrine, requiring the State to prove additional elements included in the to-convict instruction.

The State is required to prove every *element* of the charge beyond a reasonable doubt. The assault definitions contained in Jury Instruction 5 did not add an additional element to the charge of Assault in the Second Degree and did not elevate the State's burden. The State proved each element contained in Jury Instruction 4, the to-convict instruction, beyond a reasonable doubt.

The Court of Appeals decision is not in conflict with this Court's decision in *Byrd* or *Johnson*.

2. WALLACE'S CASE DOES NOT PRESENT A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

This Court may accept review of a Court of Appeals decision if it involves a significant question of law under either the Constitution of the State of Washington or the United States Constitution. RAP 13.4(b)(3).

The Court of Appeals correctly decided Wallace's direct appeal. Wallace raises one issue for discretionary review: he asks this Court to review whether there was sufficient evidence to prove each element of Second Degree Assault as submitted to the jury.

This Court only accepts review if a case meets the following standards:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Wallace's case meets none of these criteria.

The Court of Appeals applied the correct standard in holding a rational trier of fact could find beyond a reasonable doubt that Wallace assaulted Nolan with a deadly weapon by intending to create in Nolan apprehension and fear of bodily injury, and in fact caused Nolan to have reasonable apprehension and imminent fear of bodily injury regardless of whether Wallace actually intended to inflict bodily injury. Appendix A. There is no significant question of law under the constitutions of the State of Washington or of the United States that results from the Court of Appeals decision.

E. <u>CONCLUSION</u>

The State respectfully requests this Court not accept review on the issue Wallace raises in his petition for review. If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 6th day of June, 2019.

JONATHAN MEYER
Lewis County Prosecuting Attorney

by:______________________________
JESSICA L. BLYE, WSBA 43759
Attorney for Respondent

Appendix A

Unpublished Opinion

State v. Wallace, Court of Appeals, Division II

Cause Number 49592-9-II

Filed
Washington State
Court of Appeals
Division Two

April 9, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER MOREY WALLACE, Appellant.	No. 49592-9-II UNPUBLISHED OPINION

LEE, A.C.J. — Tyler M. Wallace appeals his second degree assault conviction based on an incident where he slapped Kimberly Nolan and then threatened her with a knife. Wallace argues he was denied due process because the State failed to prove each element of second degree assault as instructed to the jury. We affirm.

FACTS

Wallace and Nolan lived together with their son and Nolan's child from a prior relationship. One day Wallace and Nolan were arguing, and Wallace slapped Nolan's cheek. At the time, Nolan was holding the parties' child and her other child was by her side.

When Nolan threatened to call the police, Wallace told her, "I'm going to kill you." Verbatim Report of Proceedings (VRP) (Oct. 17, 2016) at 39. Wallace went to the kitchen and returned holding a butcher knife at his side with the blade facing Nolan. Wallace was approximately "five, six feet" away from Nolan. VRP (Oct. 17, 2016) at 42.

Wallace continued walking toward Nolan. Wallace put the knife down when Nolan opened the front door. Nolan called the police and later went outside with the children. While she was outside, the police arrived.

The State charged Wallace with second degree assault–domestic violence. During trial, Nolan testified that, when Wallace had the knife, she felt fearful that he was going to "hurt [Nolan] . . . [a]nd the kids." VRP (Oct. 17, 2016) at 47. Nolan opened the front door because she "didn't feel safe" and she wanted the neighbors to hear her if she screamed. VRP (Oct. 17, 2016) at 42. Nolan also testified that she called the police because she "didn't feel safe. Like, I didn't know what he was going to do." VRP (Oct. 17, 2016) at 44. Nolan further testified that before the police came, Wallace followed her outside and got into the car. She asked Wallace to get out of the car because she "[didn't] feel safe being . . . with [him]." VRP (Oct. 17, 2016) at 45.

The trial court instructed the jury that to convict Wallace of second degree assault:

> [E]ach of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 7, 2016, the defendant did intentionally assault Kimberly A. Nolan with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 23 (Jury Instruction No. 4). The trial court also instructed the jury that "[a]n assault is 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 at 24 (Jury Instruction No. 5); *accord* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (4th ed. 2016) (WPIC).

A jury found Wallace guilty as charged. Wallace appeals.

ANALYSIS

Wallace contends he was denied his due process rights because the State failed to prove all elements of second degree assault beyond a reasonable doubt. We disagree.

A. LEGAL PRINCIPLES

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Evidence is sufficient if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). Courts must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence receives the same weight as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *Id.* at 874-75. Our review is de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

The "'law of the case' doctrine . . . requires the State to prove every element in the to-convict instruction beyond a reasonable doubt." *State v. Johnson*, 188 Wn.2d 742, 762, 399 P.3d

507 (2017). "[J]ury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State "'assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction.'" *State v. Dreewes*, ___ Wn.2d ___, 432 P.3d 795, 800 (2019) (quoting *Hickman*, 135 Wn.2d at 102).

B. SECOND DEGREE ASSAULT

Wallace argues there is insufficient evidence to support his second degree assault conviction because the State failed to prove Wallace assaulted Nolan with a lack of intent to cause bodily injury. We disagree.

Under RCW 9A.36.021(1)(c), "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree[,] . . . [a]ssaults another with a deadly weapon." The term "assault" is not statutorily defined; Washington courts apply the three common law definitions of assault.[1] *State v. Stevens*, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006).

1. Lack of Intent to Inflict Bodily Injury

The trial court instructed the jury that to convict Wallace of second degree assault it must find that he intentionally assaulted Nolan with a deadly weapon by intending to "create in [her] apprehension and fear of bodily injury, and which in fact create[d] in [her] a reasonable

---

[1] Washington recognizes three common law definitions of "assault": (1) an unlawful touching; (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it; and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Although the jury was instructed on two of the three common law definitions of assault, Wallace only challenges the "apprehension of harm" definition.

apprehension and imminent fear of bodily injury even though [Wallace] did not actually intend to inflict bodily injury." CP at 24 (Jury Instruction No. 5). This instruction follows WPIC 35.50.

Wallace argues that the State had the additional burden to prove beyond a reasonable doubt that Wallace did not actually intend to inflict bodily injury, which, he argues, the State failed to prove. But the instruction does not create an essential element requiring the State to prove a negative (i.e., that Wallace did not intend to inflict bodily injury). Instead, the instruction focuses on whether Wallace intended to create apprehension and fear of bodily injury and whether he actually created apprehension and fear of bodily injury regardless of his intent to inflict bodily injury.

Wallace cites no persuasive legal authority to support his contention that the State must prove a negative element. And the legal authority he does provide predates the current form of WPIC 35.50, which the relevant instruction followed. Specifically, Wallace relies on *State v. Byrd*, 125 Wn.2d 707, 715-16, 887 P.2d 396 (1995). There, the Supreme Court reversed an assault conviction on the ground that former WPIC 35.50 (1977), relieved the State of the burden of proving an element of its case because the jury was not instructed that it had to find that the defendant acted with the specific intent to cause apprehension or fear of bodily harm. *Byrd*, 125 Wn.2d at 715-16. The relevant paragraph of former WPIC 35.50 at the time of Byrd's trial provided, "An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury, even though the actor did not actually intend to inflict bodily injury." *Id.* at 710.

This paragraph in former WPIC 35.50 was deemed to be an erroneous statement of the law because it allowed a jury to find only that the defendant acted intentionally and the result of the

act was the creation of a reasonable apprehension and fear of bodily injury, rather than the defendant acted with the intent to create this apprehension or fear. *Byrd*, 125 Wn.2d at 715. Notably, the court did not hold that the State must prove the actor did not actually intend to inflict bodily injury as an essential element of second degree assault. Accordingly, we find Wallace's argument that the State was required to prove a negative—that Wallace lacked intent to inflict bodily harm—unpersuasive.

2. Due Process Satisfied

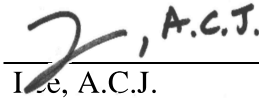
The evidence shows Wallace and Nolan were arguing when Wallace slapped Nolan's cheek. Nolan was holding the parties' child and her other child was by her side. When Nolan threatened to call the police, Wallace told her, "I'm going to kill you." VRP (Oct. 17, 2016) at 39. Wallace retreated to the kitchen and returned holding a butcher knife at his side with the blade facing Nolan. He got approximately "five, six feet" away. VRP (Oct. 17, 2016) at 42. Wallace continued walking toward Nolan. Wallace put the knife down after Nolan opened the front door. Nolan called the police and later went outside with the children. While she was outside, the police arrived.

Nolan testified that when Wallace had the knife she felt fearful that he was going to "hurt [Nolan] . . . [a]nd the kids." VRP (Oct. 17, 2016) at 47. Nolan also testified that she opened the front door because she "didn't feel safe" and she wanted the neighbors to hear her if she screamed. VRP (Oct. 17, 2016) at 42. Nolan further testified that she called the police because she "didn't feel safe. Like, I didn't know what he was going to do." VRP (Oct. 17, 2016) at 44. Before the police came, Wallace followed her outside and got into her car. She asked Wallace to get out because she "[didn't] feel safe being here with [him]." VRP (Oct. 17, 2016) at 45.

Viewing this evidence in the light most favorable to the State, a rational trier of fact can find beyond a reasonable doubt that Wallace assaulted Nolan with a deadly weapon by intending to create in Nolan apprehension and fear of bodily injury, and in fact caused Nolan to have reasonable apprehension and imminent fear of bodily injury regardless of whether Wallace actually intended to inflict bodily injury. Accordingly, Wallace was not denied his due process rights because the evidence was sufficient to convict Wallace of second degree assault.

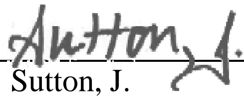
We affirm.

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, A.C.J.

We concur:



Sutton, J.

Nevin, J.P.T.

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

June 06, 2019 - 11:39 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97184-6
Appellate Court Case Title:	State of Washington v. Tyler Morey Wallace
Superior Court Case Number:	16-1-00177-1

The following documents have been uploaded:

- 971846_Answer_Reply_20190606113826SC245542_7913.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Wallace Answer Pet for Rev.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- greg@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov
Filing on Behalf of: Jessica L Blye - Email: Jessica.Blye@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20190606113826SC245542