

FILED
Court of Appeals
Division II
State of Washington
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No. 49592-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYLER WALLACE,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

In violation of due process, Tyler Wallace's conviction was obtained in the absence of proof beyond a reasonable doubt of each essential element of the offense.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove each essential element of an offense beyond a reasonable doubt. The State must prove the elements of the offense in the manner in which the jury was instructed. Here, the jury was instructed that to find Mr. Wallace assaulted another he had to have acted with an intent to cause fear but not an intent to harm. Where the State's evidence did not prove this element must this Court reverse Mr. Wallace's conviction?

C. STATEMENT OF THE CASE

Mr. Wallace and his girlfriend, Kimberly Nolan, lived together with their children at Mr. Wallace's grandmother's home. 10/17-18/16 RP 27-29. One day they were arguing and as the argument became more heated Mr. Wallace slapped Ms. Nolan. *Id.* at 36.

When Ms. Nolan said she would call police, Mr. Wallace said "I'm going to kill you." *Id.* at 39. Mr. Wallace retreated to the kitchen and returned holding a knife at his side but pointed toward her. *Id.* at

41. As Mr. Wallace continued walking toward her Ms. Nolan opened the front door knowing there were people in front of the home that could hear her if she needed help. *Id.* Ms. Nolan then called police.

The State charged Mr. Wallace with second degree assault. CP 1-3. A jury convicted him as charged. CP 42-44.

Mr. Wallace appealed his convictions and counsel was appointed in October 2016. In April 2017, appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) asserting there were no nonfrivolous issues and asking to withdraw as counsel. However, shortly after filing the *Anders* brief in this case, and eight months before his motion to withdraw was granted, appointed counsel took a position as a deputy prosecuting attorney.

This Court granted previously appointed counsel's motion to withdraw and dismissed Mr. Wallace's appeal. After, various *amici curiae* filed a motion to reconsider, this Court appointed new counsel, granted counsel's motion to reconsider and withdrew its prior opinion.

D. ARGUMENT

The State did not prove the offense of second degree assault, as submitted, to the jury beyond a reasonable doubt.

1. The State must prove each element of an offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 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). Evidence is sufficient only if, in the light most favorable to the prosecution, a 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); *State v. Hummel*, 196 Wn. App. 329, 353, 383 P.3d 592, *review denied*, 187 Wn.2d 1021 (2016).

Where additional elements are added to the “to convict” instruction, and the State does not object, the additional element becomes the “law of the case” and must be proved beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. *Id.*

2. *The State was required to prove Mr. Wallace acted with an intent to cause fear but not an intent to harm.*

In a prosecution, such as this, for assault by intentional infliction of fear:

the State bears the burden of proving [the defendant] acted with an intent **either** to create in [the victim's] mind a reasonable apprehension of harm **or** to cause bodily harm.

State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995) (emphasis added). The Court explained:

[A]n assault is “committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.”

Id. at 713 (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)).

Thus, the common law definition permits a conviction where a person possesses either or both an intent to injure or an intent to cause fear. This common law definition is “an essential element of assault in the second degree.” *Byrd*, 125 Wn.2d at 713. As required by *Byrd*, the trial court instructed the jury on the creation of fear. CP 24. But rather than instruct the jury that it could find an intent to cause fear “whether or not” it found an intent to cause harm, Instruction 5 told the jury it

needed to find Mr. Wallace acted with the intent to create fear of bodily injury “even though [Mr. Wallace] did not actually intend to inflict bodily injury.” CP 24. This instruction permitted the jury to find Mr. Wallace assaulted Ms. Nolan only if the jury found Mr. Wallace did not intend to inflict bodily injury. This is a narrower definition of intent.

The law of the case doctrine requires the State to prove the charge in the manner in which the jury is instructed. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). “The doctrine refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. *Johnson*, 188 Wn.2d at 755 (Internal quotations and citations omitted.) Moreover, the doctrine reflects the common theory that juries are presumed to follow the court’s instructions.

Having not objected to the narrower instruction on essential element provided in Instruction 5, the State was required to prove Mr. Wallace possessed only the intent to cause fear but not an intent to cause harm. In short, the State was required to prove the negative. The State offered no such proof.

3. The State did not prove Mr. Wallace acted only with an intent to cause fear.

While the State's evidence established Mr. Wallace did not in fact harm Ms. Nolan that is not the same as establishing he did not intend to. In fact according to Ms. Nolan, Mr. Wallace stated he wanted to kill her and then went to the kitchen to obtain the knife. 10/17-18/16 RP 39. Ms. Nolan testified Mr. Wallace returned with the knife pointed towards her. *Id.* at 40-42.

A challenge to the sufficiency of the evidence requires this Court to examine the evidence in its best light and presume the factfinder resolved credibility determinations in favor of the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 264, 401 P.3d 19 (2017). Thus, the court must view Ms. Nolan's testimony, presented by the State, as establishing that Mr. Nolan did intend to harm her. But that prevents the State from establishing Mr. Wallace did **not** intend to harm her and only intended to cause fear.

The State did not prove the offense as charged to the jury.

4. The Court must reverse and dismiss Mr. Wallace's conviction.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *State v. Green*, 94

Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial on a charge such as this where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State did not prove Mr. Wallace acted only with the intent to cause fear and not with an intent to harm the State failed to prove the assault charge and the Court must reverse and dismiss the conviction.

F. CONCLUSION

For the reasons above this Court should reverse and dismiss Mr. Wallace's conviction.

Respectfully submitted this 24th day of August, 2018.



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STATE OF WASHINGTON,)	
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v.)	NO. 49592-9-II
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TYLER WALLACE,)	
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WASHINGTON APPELLATE PROJECT

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