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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER MORRY WALLACE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

JESSICA L. BLYE, WSBA No. 43759
Deputy Prosecuting Attorney

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

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I. ISSUE

- A. Did the State present sufficient evidence to sustain Wallace's conviction for Assault in the Second Degree?

II. STATEMENT OF THE CASE

On April 7, 2016, during an argument between Tyler Wallace and his girlfriend Kimberly Nolan, Wallace walked up to Nolan and slapped her in the face with an open hand. RP 34-36. After Nolan said she was going to call the police, Wallace went into the kitchen, grabbed a knife, and told Nolan he was going to kill her. RP 39-40. Wallace held the knife at his side, pointed at Nolan, and walked toward Nolan. RP 40-41. Nolan testified that when Wallace had the knife pointed at her, Nolan was fearful Wallace would hurt her or her children. RP 47.

Wallace was charged with Assault in the Second Degree – Domestic Violence. CP 1-2. A jury found Wallace guilty of Assault in the Second Degree and returned a Special Verdict finding Wallace and Nolan were family or household members. CP 42-43. Wallace now appeals.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO FIND WALLACE GUILTY OF ASSAULT IN THE SECOND DEGREE.

Wallace argues the State did not present sufficient evidence to sustain the jury's guilty verdict for Assault in the Second Degree. Brief of Appellant. The State presented sufficient evidence to sustain the jury's verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The Jury Instruction Defining Assault Did Not Add An Element To The Charge Of Assault In The Second Degree Or Elevate The State's Burden.

In criminal cases, when otherwise unnecessary elements are included without objection in the "to convict" instruction, the State assumes the burden of proving the additional elements under the "law of the case" doctrine. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998) (citations omitted).

Here, the jury 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 *Hickman* 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.

The State is required to prove every *element* of the charge beyond a reasonable doubt. The assault definitions contained in Jury Instruction 5 do 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, beyond a reasonable doubt.

3. The State Proved Each Element Beyond A Reasonable Doubt, As Required, And Therefore Presented Sufficient Evidence To Sustain The Jury’s Verdict For Assault In The Second Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v.*

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Wallace of Assault in the Second Degree the State was required to prove, beyond a reasonable doubt, that on or about

April 7, 2016, Wallace intentionally assaulted Kimberly Nolan with a deadly weapon. RCW 9A.36.021(1)(c); CP 23. The State was required to prove Wallace acted with the intent to create apprehension and fear of bodily injury and Kimberly Nolan did in fact feel reasonable apprehension and imminent fear. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (citations omitted); CP 24.

The State presented evidence that on April 7, 2016, during an argument between Wallace and Kimberly Nolan, Wallace walked up to Nolan and slapped her in the face with an open hand. RP 34-36. After Nolan said she was going to call the police, Wallace went into the kitchen, grabbed a knife, and told Nolan he was going to kill her. RP 39-40. Wallace held the knife at his side, pointed at Nolan, and walked toward Nolan. RP 40-41. Nolan testified that when Wallace had the knife pointed at her, Nolan was fearful Wallace would hurt her or her children. RP 47.

From this evidence, a reasonable jury could find Wallace used a deadly weapon with the intent to cause Nolan to fear imminent bodily injury. A reasonable jury could find Nolan in fact felt fear and this fear of injury was reasonable in light of the previous slap, the statement Wallace made about killing Nolan, and the actions Wallace took after obtaining a knife. The jury was in the best position

to determine witness credibility and evaluate conflicting evidence, and the jury found there was proof beyond a reasonable doubt to convict Wallace. The evidence presented was sufficient to support this determination.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Wallace committed Assault in the Second Degree, and this Court should affirm his conviction.

IV. CONCLUSION

Jury Instruction 5, which provided two common law definitions of assault, did not elevate the State's burden. The State provided sufficient evidence for a jury to find Wallace guilty of Assault in the Second Degree. Therefore, Wallace's conviction and sentence should be affirmed.

RESPECTFULLY submitted this 16th day of October, 2018.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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