

FILED
Court of Appeals
Division II
State of Washington
10/28/2019 4:28 PM

No. 52789-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARK MICHAEL STREDICKE,

Appellant.

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

REPLY BRIEF OF APPELLANT

Jessica Wolfe
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

A. ARGUMENT 1

 1. There was no evidence Mr. Stredicke intended to cause Deputy
 Jankens bodily harm. 3

 2. There was no evidence Mr. Stredicke intended to create
 apprehension and fear of bodily injury in Deputy Jankens..... 4

B. CONCLUSION 8

TABLE OF AUTHORITIES

Cases

<i>State v. Abuan</i> , 161 Wn. App. 135, 257 P.3d 1 (2011).....	4, 5
<i>State v. Backman</i> , 2015 WL 7737706, 191 Wn. App. 1031 (Dec. 1, 2015) (unpublished)	7
<i>State v. Baker</i> , 136 Wn. App. 878, 151 P.3 237 (2007).....	6
<i>State v. Bland</i> , 71 Wn. App. 345, 860 P.2d 1046 (1993).....	5
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995)	1
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004)	1, 2
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.2d 1037 (1972).....	1
<i>State v. Prestegard</i> , 108 Wn. App. 14, 28 P.3d 817 (2001)	2
<i>State v. Smith</i> , 159 Wn. 2d 778, 154 P.3d 873 (2007).....	5
<i>State v. Toscano</i> , 166 Wn. App. 546, 271 P.3d 912 (2012).....	7
<i>State v. Utter</i> , 4 Wn. App. 137, 479 P.2d 946 (1971).....	3

A. ARGUMENT

There is only one issue at dispute in this case: whether the State proved beyond a reasonable doubt that Mr. Stredicke specifically intended to commit an assault. *Compare* Brief of Appellant at 8–11 *with* Brief of Respondent at 13–15. To satisfy the essential element of specific intent, the State was required to prove Mr. Stredicke swerved his car with either (1) the intent to cause bodily harm to Deputy Jankens; or (2) the intent to cause Deputy Jankens to fear bodily harm. *See State v. Byrd*, 125 Wn.2d 707, 712–13, 887 P.2d 396 (1995). Because there was no evidence presented considering Mr. Stredicke’s mental state, the State did not meet its burden and this Court should reverse the assault conviction.

In a case lacking direct evidence, specific intent may only be inferred from the defendant’s conduct “where it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (internal citations and quotation marks omitted). “[T]he existence of a fact cannot rest upon guess, speculation or conjecture.” *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Specific intent must be supported by “substantial” evidence, *i.e.*, it must “convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Id.* (citations omitted); *see also State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001) (citing *Hutton*).

Here, the State presented no evidence concerning Mr. Stredicke's mental state at the time of the swerve, and it certainly did not prove he possessed the specific intent to commit assault as a matter of "logical probability." *See Goodman*, 150 Wn.2d at 781. Instead, what the evidence shows is that Mr. Stredicke was swerving all over the road during the pursuit, including careening into the oncoming lane and straddling the center line. RP 379.

It was the deputies, not Mr. Stredicke, who closed the distance between the two vehicles, intending to run Mr. Stredicke off the road in a PIT maneuver. RP 214–15. Deputy Jankens conceded he may have been driving in Mr. Stredicke's blind spot. RP 379–80. As the deputies closed in, Mr. Stredicke continued to do what he was doing prior to the PIT maneuver; namely, he continued to swerve all over the road. RP 214–15, 379; *see also* 375 (Deputy Jankens testifying that during the swerve Mr. Stredicke "went into the oncoming lane *again*.") (emphasis added). Accordingly, the two vehicles came close to each other, nearly causing an accident. *See* RP 341. Rather than demonstrating Mr. Stredicke intended to assault the deputy, the evidence indicated he was simply driving erratically.

1. There was no evidence Mr. Stredicke intended to cause Deputy Jankens bodily harm.

The State's sole argument that Mr. Stredicke had the specific intent to cause bodily harm was Deputy Jankens' testimony the swerve "appeared intentional" and that Deputy Jankens had to slam on his brakes. RP 337–38, 339–40; *see also* Brief of Respondent at 13. As explained in the opening brief, this perception merely indicates Mr. Stredicke volitionally moved his car, *i.e.*, that the swerve was not the result of a temporary loss of control of the vehicle. *See* Brief of Appellant at 10–11; *see also* RP 336 (Deputy Jankens testifying that Mr. Stredicke "nearly lost control" of the vehicle at one point during the pursuit). Deputy Jankens' perception only speaks to the *actus reus* of second-degree assault, not specific intent. *See State v. Utter*, 4 Wn. App. 137, 140, 479 P.2d 946 (1971).

Further, the fact that Deputy Jankens had to slam on his brakes has no bearing on Mr. Stredicke's intent to cause bodily harm. *See* Brief of Respondent at 13. Deputy Jankens' reaction goes to the element of creating actual apprehension and fear of bodily injury, not to the element of Mr. Stredicke's specific intent. *See* CP 33; *see also State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011) (the State is required to prove both specific intent and "fear in fact" as elements of assault done with the intent

to create in another apprehension and fear of bodily injury). Additionally, this was a high speed chase—approximately 70 miles an hour—in which the deputies had closed in and were only about a foot away from Mr. Stredicke’s vehicle. RP 374. It is common sense that any sudden decrease in velocity or direction at such a speed by Mr. Stredicke would require the pursuing police vehicle to suddenly brake. The fact that Deputy Jankens assumed the risk of a collision by closing in on a high-speed, swerving vehicle is not, however, indicative of Mr. Stredicke’s assaultive intent towards Deputy Jankens.

2. There was no evidence Mr. Stredicke intended to create apprehension and fear of bodily injury in Deputy Jankens.

The State argues that the deputies feared a crash and this is sufficient to prove Mr. Stredicke had the specific intent to create apprehension and fear of bodily injury. *See* Brief of Respondent at 13–14. In doing so, the State again conflates the *mens rea* element with “fear in fact,” a separate element required to prove an assault done with the intent to create in another apprehension and fear of bodily injury. *See* CP 33; *Abuan*, 161 Wn. App. at 155. The deputies’ reaction to the swerve has no bearing on Mr. Stredicke’s specific intent in swerving. The State points to no other evidence evincing a specific intent to create apprehension and fear of bodily injury. Brief of Respondent at 13–15.

Additionally, the evidence concerning Deputy Jankens' apprehension and fear of bodily injury was lacking. At trial, Deputy Jankens testified he was merely "a little surprised" by the swerve and that he "probably wasn't real comfortable," but not that he feared bodily injury in the moment because he was "more focused on keeping up with the defendant." RP 340–41. To satisfy the element of apprehension and fear of bodily injury, the State was required to present evidence of Deputy Jankens' "worry and fear about the *future*; a *pre* sentiment of danger." *State v. Bland*, 71 Wn. App. 345, 356, 860 P.2d 1046 (1993) (emphasis in the original), *disapproved of on other grounds by State v. Smith*, 159 Wn. 2d 778, 154 P.3d 873 (2007). Nothing in the record suggests Deputy Jankens definitively feared bodily injury at the time of the swerve. Any conjecture of the potential consequences of a crash instead appears to have occurred in hindsight and upon repeated prompting by the prosecutor at trial. *See* RP 340–41.

In sum, the State is unable to point to any substantive evidence that Mr. Stredicke intended to assault Deputy Jankens. *See* Brief of Respondent 12–15. Here, Mr. Stredicke was swerving all over the road during the pursuit. RP 379. He never communicated with the deputies, made eye contact, or slammed on his brakes. RP 286. He never made any statements as to his intent after he was apprehended, and he didn't testify

at trial. Accordingly, Deputy Ossman predictably testified he had “no idea” what Mr. Stredicke’s intention was when he swerved. RP 295.

This case is in stark contrast to other cases involving second-degree assault by vehicle in which this Court upheld the sufficiency of the evidence on specific intent. In *State v. Baker*, for example, the defendant also led the police on a high-speed pursuit during which the police attempted to run him off the road. 136 Wn. App. 878, 881, 151 P.3d 237 (2007). However, after the police attempted the maneuver, the defendant in *Baker* reversed, accelerated, and slammed into one patrol car, shattering the windows. *Id.* He then accelerated towards the other patrol car, forcing it to take evasive action. *Id.* The defendant then “flipped off” the officer, laughed, and sped away. *Id.* He later drove into a police motorcycle. *Id.* This Court correctly recognized the defendant “intended to strike these officers,” pointing to the defendant’s rude gestures and laughing as evidence. *See id.*

Similarly, in *State v. Toscano*, the defendant drove head-on in the middle of the road towards a deputy’s patrol car, refusing to yield. 166 Wn. App. 546, 551, 271 P.3d 912 (2012). The defendant subsequently “darted” into an intersection with her high beams on “like she was going to hit” the deputy. *Id.* at 551. This Court held these actions were

sufficient to conclude the defendant intended to cause a crash with the patrol car, thus satisfying the element of specific intent. *See id.*

Finally, in *State v. Backman*, an officer approached a parked truck on foot while making eye contact with the defendant, who was sitting in the driver's seat. 2015 WL 7737706 at *1, 191 Wn. App. 1031 (Dec. 1, 2015) (unpublished).¹ The officer testified that when the defendant started the truck, the officer put his hands up and told the defendant to stop. *Id.* The defendant then drove the truck directly toward the officer, requiring the officer to quickly get out of the way to avoid being hit. *Id.* The officer further testified that he and the defendant “maintained eye contact until the truck passed by.” *Id.* This Court affirmed the second-degree assault conviction, relying primarily on the fact that the defendant maintained eye contact while driving towards the officer, thus indicating an intent to cause apprehension of bodily injury. *Id.* at *3.

Here, Mr. Stredicke's driving was erratic, but not assaultive. The State cannot point to any evidence in the record proving otherwise. Mr. Stredicke did not drive head-on towards the deputies, as in *Baker*, *Toscano*, and *Backman*. Mr. Stredicke did not make rude gestures, shine his high beams, or communicate with the deputies in any way, as in *Baker*

¹ Cited as nonbinding authority pursuant to GR 14.1.

and *Toscano*. See RP 364. He did not make eye contact, as in *Backman*; in fact, Deputy Jankens testified he never saw Mr. Stredicke's face at all during the pursuit. See RP 363. The only evidence presented at trial was that Mr. Stredicke was swerving all over the road during the pursuit, and that he continued to do so when the deputies closed in to run him off the road. Because there was no evidence of specific intent to assault Deputy Jankens, this Court should reverse the conviction.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the assault conviction. This Court should also accept the State's concession and strike the interest provision from the judgment and sentence.² See Brief of Respondent at 16–17.

DATED this 28th day of October, 2019.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-271

² In the opening brief, the appellant argued the interest accrual provision should be stricken “in the alternative” to reversal of the assault conviction. See Brief of Appellant at 12. This was in error. Mr. Stredicke was convicted of both attempting to elude and second degree assault, and thus this Court should strike the interest provision regardless of whether it reverses the second degree assault conviction. See CP 88.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52789-8-II
)	
MARK STREDICKE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF OCTOBER, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KRISTIE BARHAM, DPA [PCpatcecf@co.pierce.wa.us] [kristie.barham@piercecountywa.gov] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> MARK STREDICKE 763301 MCC-MMU PO BOX 7001 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF OCTOBER, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

October 28, 2019 - 4:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52789-8
Appellate Court Case Title: State of Washington, Respondent v Mark Michael Stredicke, Appellant
Superior Court Case Number: 17-1-03704-6

The following documents have been uploaded:

- 527898_Briefs_20191028162728D2231322_6983.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.102819-07.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20191028162728D2231322