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Division II
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NO. 52789-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

MARK MICHAEL STREDICKE,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 17-1-03704-6

BRIEF OF RESPONDENT

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I. INTRODUCTION

During the early hours of September 25, 2017, Mark Stredicke led two Pierce County Deputies on an eight-minute, high speed, eleven-mile car chase. At one point during the chase, Stredicke swerved his vehicle directly at the deputies' vehicle, nearly striking it. The driver, Deputy Jankens, testified that the swerve was sudden and appeared intentional, classifying it as "fast and aggressive." Deputy Jankens testified that he believed he and his passenger were going to get hit and ultimately crash from the swerve, and he had to slam his brakes to avoid such a collision.

The jury found Stredicke guilty of assault in the second degree against Deputy Jankens, as well as attempting to elude a pursuing police vehicle with a special verdict sentencing enhancement. Stredicke challenges only the assault conviction. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence that proved beyond a reasonable doubt that Stredicke had the requisite intent to assault Deputy Jankens. Therefore, this Court should affirm the assault conviction.

II. RESTATEMENT OF THE ISSUES

- A. Viewing the evidence in the light most favorable to the State, does sufficient evidence prove Stredicke is guilty of assault in the second degree against Deputy Jankens?
- B. Should this Court remand to the trial court to strike the interest accrual language in the judgment and sentence?

III. STATEMENT OF THE CASE

A. Trial Testimony

On September 25, 2017, at around 4:30 AM, Pierce County Deputies Nicholas Jankens and Brendon Ossman were on patrol in a marked patrol vehicle with Deputy Jankens as the driver and Deputy Ossman as the passenger. RP 179, 313.¹ The defendant Mark Michael Stredicke (hereinafter, Stredicke) passed the deputies at 80-90 miles per hour, almost striking them as he ran a red light through an intersection. *See* RP 187-91; *see also* RP 322-23. Deputy Jankens avoided the collision after Deputy Ossman yelled at him to “wait” as Stredicke blew past the deputies. RP 187-88, 322-23. Deputy Jankens activated the vehicle’s emergency lights and sirens and pursued Stredicke, who increased his speeds, only slowing to 50 miles per hour to navigate difficult turns. *See* RP 189-91; *see also* RP 323. This quickly progressed into a high-speed chase that lasted approximately eight minutes and spanned approximately eleven miles through Pierce County. RP 225; *see also* RP 324.

During the pursuit, Stredicke maintained high speeds ranging from 50 to 120 miles per hour. RP 195-96; RP 206-07; RP 211-13; RP 366. Throughout the pursuit, Stredicke primarily used the oncoming lanes and

¹ Verbatim Report of Proceedings (RP) will be referred to by their page number. All relevant RPs are consecutively paginated.

nearly caused seven separate collisions. RP 356. Stredicke also blew through multiple stop signs and lights and came within feet of surrounding civilian vehicles while swerving around them to elude the deputies. *See* RP 196-97; RP 204-11; RP 325-30; RP 333-36; RP 346-47.

During the pursuit, the deputies received approval from their supervisor, Sergeant Robert Carpenter, to perform a Pursuit Intervention Technique (PIT) Maneuver. RP 203; RP 237-38. A PIT maneuver is a technique used by police officers to stop a pursuit of a vehicle.² RP 202-03; RP 237-38. Sergeant Carpenter testified that he gave the authorization because he “believed that the risk to the public was grave.” RP 238. As Sergeant Carpenter explained:

The deputies indicated that the vehicle had almost T-boned them at a high rate of speed. The vehicle was traveling over 100 miles an hour and was approaching an uncontrolled intersection at 128th and Waller where there was a stop sign, and the vehicle blew through that intersection at 100 miles an hour plus. Had there been someone coming into that intersection it would have been grave.

RP 238.

Deputy Jankens set up for the PIT Maneuver once he could see far enough ahead to determine that no civilians or obstacles were in the road

² Deputy Ossman explained a PIT maneuver, “You pull up on either side and place your front quarter panel on the rear quarter panel of the vehicle. You want to make very soft contact. You don’t want to ram at all. You want to do your best to just kind of ease into contact with the vehicle.[...] Generally, if it’s successful, it will stall a vehicle or disable it in some sense so we are able to box it in and keep it and stop the pursuit.” RP 202-03.

and he could safely start the maneuver. RP 337. While the deputies were getting into position for the PIT maneuver, Stredicke, travelling at approximately 70 miles per hour, swerved his vehicle directly at the deputies' patrol car. RP 214-15; RP 305; RP 337-38. This movement came within inches of their patrol vehicle. RP 215; RP 338. Deputy Jankens had to "slam on [his] brake pedal to avoid being hit." RP 337. Sergeant Carpenter relayed that when the deputies had attempted the PIT maneuver, they radioed that Stredicke "had intentionally tried to swerve into their vehicle[.]" RP 239-40.

Deputy Ossman testified that the vehicle was "probably" less than a foot away when Stredicke swerved at them. RP 215. Deputy Ossman testified that there were no obstacles in the roadway in front of Stredicke's vehicle when he swerved at the deputies. RP 215. He did not see any animals, people, or other vehicles in the roadway when Stredicke swerved at them. RP 215-16. Upon being asked what his reaction was when Stredicke swerved toward them, Deputy Ossman said, "I thought we were going to get hit, so I was a little shocked. It's a little hard not being in - - the one in control of the car in that circumstance. So yeah, it was surprising." RP 216. Deputy Ossman also stated that he probably shouted and may have sworn when Stredicke swerved toward them and that Deputy Jankens had braked "[p]robably as hard as he could" to avoid being struck by Stredicke's

swerve. RP 216. On cross-examination, Deputy Ossman conceded that he had “no idea” what Stredicke’s intention was when he swerved at their vehicle but said, “[a]ll I can go off is my observation of him swerving in front of us to the point where we had to brake in order to not be struck by his vehicle.” RP 295.

Deputy Ossman testified that he believed if Stredicke had been successful in hitting them at his speeds of 70 miles per hour, there was “a pretty good chance that we would have lost traction, and with how narrow the roadway is most likely have gone off the roadway.” RP 217; *see* RP 214-15. He further testified, “There’s a very good chance if we went off the roadway, [we] might have struck another object off the roadway or gone down the hill or something. [We] [c]ould have been very injured.” RP 217.

Deputy Jankens also confirmed that there was nothing in the roadway causing Stredicke to swerve, and additionally stated that the swerve “appeared intentional to us.” RP 338-40. He testified that the swerve was sudden and that he was not expecting it, classifying the swerve as “fast and aggressive.” RP 343. Deputy Jankens testified, “I thought we were going to crash. I thought for sure we were going to crash and that we would have to fire our way out of an airbag to take him into custody if we were able to.” RP 341. When asked what the result would have been if Stredicke

had hit them at those high speeds, Deputy Jankens said, "Probably injury at the very least." RP 341.

Eventually, Stredicke lost control of his vehicle and crashed through a barricade and over a fifteen-foot cliff into a ravine. RP 224; RP 348. Stredicke was still able to exit his vehicle and continue on foot immediately following the crash. RP 367; *see* RP 224, 226-27. Stredicke actively resisted arrest to the point where Deputy Jankens had to use force to take him into custody. RP 350-52; *see* RP 400.³

The State ultimately charged Stredicke with one count of assault in the second degree for Deputy Jankens, and one count of assault in the second degree for Deputy Ossman. The State also charged Stredicke with one count of attempting to elude a pursuing police vehicle, with a sentence enhancement stating that persons other than the pursuing police vehicle and the defendant were in danger due to the defendant's reckless driving when attempting to elude. CP 5-6.

After the State rested, Stredicke made a half-time motion to dismiss the two counts of assault in the second degree, claiming that the State failed

³ Stredicke claims that he was in a coma from the deputies' use of force. *See* Br. of Appellant at 4 (citing CP 76). But CP 76 is a sentencing memorandum and is not part of the evidence presented at trial for the jury's consideration. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (matters not included in the trial record will not be considered on direct appeal).

to prove the requisite intent. RP 401-02. The court denied this motion and Stredicke rested without presenting any witnesses or evidence. RP 418.

When denying the motion, the court concluded:

But assault is the act done with the intent to create in another apprehension or fear of bodily harm.

Certainly, at these speeds that certainly would create a fear if someone is swerving towards you somewhat rapidly or suddenly...when the police officers were on the left of that vehicle where the panels are close to each other....

...the evidence is quite clear that the officers, if you believe the officers, it did, in fact, create a reasonable apprehension and immediate fear of bodily harm.

Whether or not the actor intended to inflict bodily injury or not is a different issue. It's not necessary under the definition of assault that he actually intended to inflict bodily injury but that the intent to inflict the fear of bodily injury. And the facts do sustain that, at least the jury could find that's a reasonable inference.

RP 416-17.

B. Conviction and Sentencing

During deliberations, the jury submitted a question to the court. CP 47; RP 507. The question read: "In the event that we are unable to reach a consensus on two of three charges, how do we proceed?" CP 47; RP 507. After hearing arguments from both parties, the court instructed the jury to "[p]lease continue to deliberate." CP 47; RP 509-10. The jury reached a verdict the following morning. RP 513. The jury found Stredicke guilty of assault in the second degree against the driving deputy, Deputy Jankens. RP

518; CP 12. The jury found Stredicke not guilty of assault in the second degree against Deputy Ossman. RP 518; CP 13. The jury also found Stredicke guilty of attempting to elude a pursuing police vehicle, with the special verdict sentencing enhancement. RP 518-19; CP 14-15.

The court sentenced Stredicke to 84 months of confinement. CP 93. The court also found Stredicke indigent and imposed only a \$500 crime victim assessment fee. CP 90-91; RP 551. Stredicke timely appealed. *See* CP 103.

IV. ARGUMENT

A. Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Stredicke is guilty of assault in the second degree.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The applicable standard of review for sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

A challenge to the sufficiency of the evidence admits the truth of all of the State’s evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). And all reasonable inferences are drawn in favor of the State

and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Circumstantial and direct evidence are equally reliable. *Washington v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003); see *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (the weight of the evidence is determined by the fact finder and not the appellate court.)

Assault in the second degree is an alternative means crime. See *State v. Smith*, 159 Wn.2d 778, 790-92, 154 P.3d 873 (2007). “The second degree assault statute, RCW 9A.36.021, articulates a single criminal offense and currently provides seven separate subsections defining how the offense may be committed.” *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016); see RCW 9A.36.021(1)(a)-(g). To uphold a conviction involving alternative means, there must be sufficient evidence to support each separate means presented to the jury. *State v. Garcia*, 179 Wn.2d 828, 835-36, 318 P.3d 266 (2014).

Because “assault” is not defined by statute, Washington courts turn to three common law definitions: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). “These definitions are merely descriptive of the term assault and do not constitute additional alternative means of committing the crime of assault.” *Elmi*, 166 Wn.2d at 215-16; *State v. Smith*, 159 Wn.2d 778, 785, 154 P.3d 873 (2007).

The alternative means doctrine does not extend to the common law assault definitions when submitted as a separate definitional jury instruction. *Smith*, 159 Wn.2d at 792. Rather, the definitions of assault merely define an element of the charged crime, thereby giving rise to a “means within a means” scenario. *Id.* at 787. A “means within a means” scenario does not trigger jury unanimity protections. *Id.*; see also *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017) (the jury need not be unanimous as to which of the alternative means the defendant committed, only that each of the jurors believes the defendant committed the crime through at least one of the alternative means.) The reach of the alternative means doctrine is limited to those alternative means directly provided for by the assault statutes. *Id.* at 789-90.

“[S]pecific 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). Specific criminal intent may be inferred from conduct where “it is plainly indicated as a matter of logical probability.” *Goodman*, 150 Wn.2d at 781. Intent is rarely provable by direct evidence so one may infer intent from all the circumstances surrounding the event. *See State v. Giffing*, 45 Wn. App 369, 374, 725 P.2d 445 (1986).

1. The jury was provided with two alternative means of committing assault in the second degree.

The jury was instructed on the statutory definition of assault in the second degree that included two alternative means: “A person commits the crime of Assault in the Second Degree when he or she assaults another with a deadly weapon *or* assaults another with intent to commit a felony.” CP 28; *see* RCW 9A.36.021 (emphasis added). The jury was further instructed that to convict Stredicke of the crime of assault in the second degree as to Deputy Jankens, the State had to prove beyond a reasonable doubt that Stredicke assaulted Deputy Jankens (a) with a deadly weapon; or (b) with intent to commit attempting to elude a pursuing police vehicle. CP 29.

Because there is no statute defining “assault” the court provided the jury with a separate instruction defining assault:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also 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 33. These are not alternative means to committing assault rather they are only definitions of assault to supplement the jury's understanding.

The jury was also instructed on direct and circumstantial evidence:

The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonable infer something that is at issue in this case.

CP 21. The jury was further instructed that "[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." CP 21.

2. The Evidence Supports Each Alternative Mean Presented to the Jury.

Here, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the State proved beyond a reasonable doubt that Stredicke was guilty of assault in the second degree

through each of the presented alternative means. *See Garcia*, 179 Wn.2d at 835-36 (to uphold a conviction using alternative means there must be evidence for each alternative means presented to the jury). The State presented sufficient evidence that Stredicke assaulted Deputy Jankens (1) with a deadly weapon; and (2) with intent to commit attempting to elude a pursuing police vehicle. Because Stredicke conceded below that he was attempting to elude a pursuing police vehicle and does not challenge this on appeal, we need only address the first alternative means presented. *See Br. Of Appellant* at 1.

There was direct and circumstantial evidence supporting the conclusion that Stredicke attempted but failed to inflict bodily injury to Deputy Jankens when he swerved at his vehicle. Deputy Jankens testified that Stredicke appeared to intentionally swerve at his vehicle. RP 339-40. Deputy Jankens also testified that when Stredicke swerved directly at him, he had to slam the brake pedal “pretty much down on the floor” in order to avoid being hit. RP 337-38, 340-41. Based on this testimony, the jurors could reasonably infer that Stredicke was trying to, and had the means to injure Deputy Jankens, but failed in doing so only because Deputy Jankens slammed on his brakes to avoid being hit.

There was also evidence that Stredicke intended to create apprehension and fear of bodily injury by intentionally swerving at Deputy

Jankens' vehicle. Both deputies testified that they believed they would be injured if Stredicke was successful in hitting them at the high speeds he was driving. RP 217; RP 337; RP 341. Deputy Jankens testified that when Stredicke swerved at him, he thought they were going to crash:

[Jankens]: I thought we were going to crash. I thought for sure we were going to crash and that we would have to fire our way out of an airbag to take him into custody if we were able to.

[State]: If the defendant had hit you at those speeds, what would the likely result have been?

[Jankens]: Probably injury at the very least.

[State]: Would there have been a collision?

[Jankens]: Yes.

RP 341.

The jurors through their own common sense and experiences could have easily found that such an interaction would inflict fear of injury or apprehension of bodily harm. It can be inferred that when someone intentionally swerves at you, coming within less than a foot of your vehicle in which you are driving and traveling at 70 miles per hour, you are placed in reasonable fear of injury or apprehension of bodily harm. *See Elmi*, 166 Wn.2d at 219 (where a reasonable inference can be drawn that victims were put in apprehension of bodily harm when bullets went through the room and into their television screen while they were watching the television); *see also* RP 337-41. Overall, when viewing this evidence in the light most

favorable to the State, the jury could have found Stredicke committed the assault by intending to create apprehension and fear of bodily injury on Deputy Jankens when he swerved at his vehicle, coming within inches of striking him at 70 miles per hour. *See Salinas*, 119 Wn.2d at 201 (all reasonable inferences are interpreted in favor of the State and against the defendant.)

When evaluating the evidence in the light most favorable to the State, the evidence shows that a rational trier of fact could have found Stredicke was guilty of assault in the second degree against Deputy Jankens. Accordingly, this Court should affirm Stredicke's assault conviction.

B. The doctrine of transferred intent is inapplicable in this case.

Stredicke argues in a footnote that the jury finding Stredicke guilty only of assault against Deputy Jankens and not Deputy Ossman is legally inconsistent. Br. of Appellant at 11, n.2. This argument is unfounded. First, arguments raised only in a footnote need not be considered. *State v. Harris*, 164 Wn. App. 377, 389 n. 7, 263 P.3d 1276 (2011). Second, the doctrine of transferred intent is inapplicable in this case because neither party requested a transferred intent jury instruction and the trial court did not give one. "When a jury instruction identifies a specific victim, it is the law of the case and there is no room for a transferred intent analysis without a transferred intent jury instruction." *State v. Abuan*, 161 Wn. App. 135, 156-58, 257 P.3d

1 (2011). Here, the State charged Stredicke with two separate counts of assault in the second degree—one naming Deputy Jankens as the victim and another naming Deputy Ossman as the victim. CP 29-30. The jury could have found that there was no evidence that Stredicke knew Deputy Ossman was a passenger in the car or that he specifically intended to assault Deputy Ossman. *See id.* at 159. Therefore, it logically follows that a jury could convict on assault in the second degree as to Deputy Jankens, but not Deputy Ossman, because someone had to be driving the vehicle.

C. This Court should remand to strike the interest accrual provision in the judgment and sentence.

Because Stredicke was found indigent at sentencing, the judgment and sentence should not have included an interest accrual provision for non-restitution legal financial obligations. *See* CP 90-92; *see also* RP 551. This Court should remand for the trial court to strike the interest accrual provision. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) amended the legal financial obligation (LFO) system in Washington State. The bill is now codified as RCW 10.82.090. Particularly, the amendment eliminated interest accrual on the non-restitution portions of the LFO's as of June 7, 2018. RCW 10.82.090.

Stredicke's judgment and sentence contains a provision that allows for interest accrual on unpaid LFOs. CP 92. The only legal financial obligation the court imposed was a \$500 crime victim assessment fee. CP

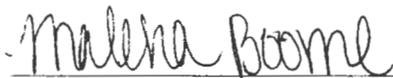
91. Here, Stredicke was convicted after this bill went into effect, so the judgment and sentence is subject to its provisions. Because the court found Stredicke was indigent at sentencing, this Court should remand for the trial court to strike the interest accrual provision in the judgment and sentence.

V. CONCLUSION

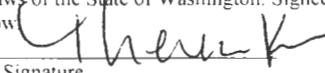
Viewing the evidence in the light most favorable to the State, the record demonstrates that there was sufficient evidence to convict Stredicke of assault in the second degree against Deputy Jankens. This Court should affirm Stredicke's convictions, but remand for the trial court to strike the interest accrual provision in the judgment and sentence.

RESPECTFULLY SUBMITTED this 27th day of September, 2019.

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PIERCE COUNTY PROSECUTING ATTORNEY

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