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Division II
State of Washington
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NO. 53024-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT LEWIS SHAW,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEVEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The evidence was sufficient to prove the Defendant's intent to assault John Gibson because only intent to do the act that constituted the battery is required to uphold the verdict.**

2. **The trial court did not waive the costs of community custody, or state that it meat to waive all waivable legal financial obligations.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Rather than recite the facts, the State encourages this Court to review Exhibit #1, a DVD containing a video which was admitted and played at trial. RP at 72-73; 83. This 7 minute 13 second video came from a "dashcam" or dashboard-mounted camera from the Defendant's own vehicle, seized from him the day of the incident. RP at 67-70. Because the video has sound, it includes the Defendant's statements, including his stated intention to ram the victim's car. It is a near complete depiction of the conduct that led to the charges the Defendant was eventually convicted of.

ARGUMENT

1. The evidence was sufficient to support the conviction for an intentional assault.

Intent to ram John Gibson's car is all that is required to uphold the court's verdict because specific intent is not required in the case of a battery. However, there is ample evidence of the Defendant's specific intent in the record.

Standard of review.

"[F]ollowing a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105–06, 330 P.3d 182, 185 (2014) (citing *State v. Stevenson*, 128 Wn.App. 179, 114 P.3d 699 (2005).) "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id*.

All evidence is viewed "in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *Id*. (citing *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009).)

The evidence was sufficient to prove the Defendant's intent to assault John Gibson.

Intent may be logically inferred from the facts. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Appellate courts defer to the finder of fact on drawing logical inferences from the evidence. *State v. Baker*, 136 Wn. App. 878, 882, 151 P.3d 237, 239 (2007) (citing *Bencivenga* at 709.)

"Three definitions of assault are recognized in Washington: (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, 442 (2009). "[A]ssault also includes the court implied element of intent." *State v. Davis*, 119 Wn.2d 657, 662, 835 P.2d 1039, 1042 (1992) (citing *State v. Robinson*, 58 Wn.App. 599, 606, 794 P.2d 1293 (1990), *review denied*, 116 Wn.2d 1003, 803 P.2d 1311 (1991).)

Assault by attempted battery requires specific intent to cause bodily injury, and assault by attempt to cause fear and apprehension of injury requires specific intent to cause such fear and apprehension, but assault by battery does not require specific intent. *State v. Daniels*, 87 Wn.App 149, 155, 940 P.2d 690 (1997). Rather, for a battery, "the intent

required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act." *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280, 1285 (2011) (citing *State v. Hall*, 104 Wn.App. 56, 14 P.3d 884 (2000).)

In the instant case, the Defendant clearly assaulted Mr. Gibson by battery when the Defendant rammed Mr. Gibson's car, so the only intent required to uphold the verdict is the intent to ram Mr. Gibson's car. Here, the Defendant's intent could hardly be more clear. The Defendant was obviously angry, as evidenced by his constant swearing at other drivers in the minutes leading up to the assault. *See* Exhibit #1. As the Defendant neared Mr. Gibson's car, he said, "C'mon. Don't go slow or I will push your fuckin' car, mother fucker." Exhibit #1 at 4:34. After Mr. Gibson activated his brakes, the Defendant said, "Hey, man, you wanna hit your brakes in the fast lane?" and then accelerated, striking Mr. Gibson's Subaru from behind. Exhibit #1 at 5:02. After Mr. Gibson manages to get away from the Defendant, veering to the left shoulder, the Defendant swears again, crosses two lanes of freeway traffic, and clearly places his truck in reverse to ram Mr. Gibson's car again. Exhibit #1 at 5:18.

The evidence here was overwhelming that the Defendant had specific intent to ram Mr. Gibson's car, as it was clear that the Defendant blamed Mr. Gibson for holding up traffic and delaying his journey.

Courts have previously found intent inferred from the use of a vehicle as a weapon in traffic.

The Defendant cites to *State v. Baker*, 136 Wn.App. 878, 151 P.3d 237 (2007). This is an excellent case to illustrate how a person's use of a vehicle as a weapon is sufficient to prove specific intent to assault, even if the defendant has an alternate explanation or motive for his actions.

In *Baker* the defendant was suspected of violating a no-contact order by the Spokane Police. *Baker* at 881. The defendant fled at a high speed in his vehicle, an SUV. *Id*. The police gave chase through the streets of Spokane at speeds reaching 80 MPH. *Id*. After an officer's attempt to stall the defendant's vehicle failed, the defendant put his car in reverse and rammed the police car, shattering several windows and damaging the side and tire. *Id*. The defendant then accelerated towards another police car, which had to take evasive action. *Id*. The defendant flipped the officer off, laughed, and drove off.

The defendant then drove straight towards another officer who was parked, but seated on his motorcycle. *Id*. at 882. The officer jumped off,

and the defendant swerved, but clipped the front end of the motorcycle. *Id*.

After a bench trial, the judge found that the defendant had assaulted the officer in the car with a deadly weapon and intent to cause great bodily harm, and found him guilty of Assault in the First Degree RCW 9A.36.011(1)(a). *Id*. The trial court also found that the defendant had assaulted the officer on the motorcycle with a deadly weapon, and convicted him of Assault in the Second Degree, RCW 9A.36.021(1)(c).[1] *Id*.

On appeal, the defendant argued that the trial court drew the wrong inferences from his actions, and instead argued that the court should have drawn the inference that his intent was to escape the police. *Id*. In rejecting this contention in unequivocal[2] language, the Court noted that the Defendant had laughed and flipped off one of the officers, which supported the factual inference that the defendant intended to strike the officers.

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[1] This is the same charge that the Defendant here was convicted of.

[2] "So a question before us is whether a reasonable trier of fact could have inferred from Mr. Baker's conduct that he intended to strike these officers or the vehicles they were in or near. To ask the question here is to answer it. Of course the judge could." *Baker* at 882.

The facts here are even less open to interpretation than in *Baker*. The Defendant stated that his intent was to "push [Mr. Gibson's] fuckin' car" before accelerating in a clear response to Mr. Gibson's brake lights, and ramming the car. The Defendant's swearing before the incident serves a similar purpose to Baker's laugh and flipping the officer off.

There is also precedent for inferring specific intent from a case of assault involving only causing apprehension of injury or battery. In *State v. Toscano* the defendant, in an apparent attempt to prevent a Grant County Sheriff's Deputy from apprehending her nephew for a traffic infraction, drove into the deputy's vehicle from the oncoming lane, requiring the deputy to take evasive action. *State v. Toscano*, 166 Wn.App 546, 549, 271 P.3d 912 (2012). Then, the defendant used her car to block an intersection and shined her high beams at the deputy, requiring the deputy to change course to avoid a collision. *Id*. at 549-50.

The State charged the defendant with two counts of Assault in the Second Degree and the jury convicted. *Id*. at 550. On appeal, the defendant argued, in relevant part, that the evidence was insufficient to prove she had a specific intention to cause apprehension of bodily injury because she was simply "in the way." *Id*. at 50.

Division 3 of this Court disagreed and found that "[t]he jury could have inferred that she drove in this manner because it was likely to cause a crash and would certainly make Deputy Voss afraid of crashing." *Id*. at 551.

The Defendant's alternate theories are not supported by the evidence.

The Defendant argues that the evidence is patently equivocal because the Defendant might have just been trying to cause Mr. Gibson's airbag to deploy so he could flee without fear of pursuit. Even if this wild conjecture was not patently inconsistent with the evidence, the State need not exclude a defendant's hypotheses consistent with innocence, whether reasonable or not. *See State v. Bridge*, 91 Wn.App. 98, 100, 955 P.2d 418 (1998).

Because "all reasonable inferences from the evidence are interpreted most strongly against the defendant,"[3] this Court should not even consider the Defendant's alternate theory of events, but instead expressly rule that the State need not disprove alternate theories in a sufficiency of the evidence challenge, and uphold this conviction.

[3] *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977).)

2. The did not find the Defendant indigent at sentencing or affirmatively waive the community supervision costs.

A term of 12 months of community custody was imposed upon the Defendant, as well as costs of that supervision, as determined by the Department of Corrections. The Defendant also assigns error to the trial court allowing the Department to recoup costs in this fashion. But this financial obligation was not waived by the trial court, and the record is silent as to whether the Department has actually assessed any costs to the Defendant.

RCW 9.94A.703 specifies four types of conditions that may be imposed on a defendant who is sentenced to a term of community custody: mandatory conditions, waivable conditions, discretionary conditions and special conditions. Supervision fees, as determined by the Department of Corrections are a *waivable* fee.

The Defendant argues that *State v. Lundstrom*, 6 Wn.App.2d 388, 429 P.3d 1116 (2018) stands for the proposition that a trial court must waive the fee unless it determines that the defendant can pay, like other legal financial obligations. This is not the case.

In *Lundstrom* the trial court had imposed fees that it was required to impose, but changes to the law, including Laws of 2018, ch. 269, § 17

and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2017), made those fees retroactively discretionary. This Court remanded the case back to the trial court for reconsideration of the legal financial obligations, and noted in a footnote, "We also note that, although the trial court intended to impose only mandatory LFOs, it imposed costs of community custody, which are discretionary LFOs...."

It appears that this Court was simply bringing this to the attention of the trial court so that it could consider it upon remand.

Unlike *Lundstrom*, the trial court here specifically stated that it believed the Defendant, although indigent, had the ability to pay some legal financial obligations.[4]

Finally, the Judgment & Sentence orders the Defendant to pay supervision fees as determined by DOC, but the record is silent as to whether the Department has actually decided to impose a fee that the Defendant cannot afford, or any fee at all. This Court should decline to reach this issue in the absence of any such indication.

However, if the Court does reach the issue, *Lundstrom* does not include supervision costs in the same class of legal financial obligation as

[4] The trial court stated, "To me the defendant remains indigent, so we'll just impose the - I think he has the ability to pay the DNA fee and the - any other required assessment." RP 12/3/2018 at 25.

the formerly mandatory court costs. In the absence of any indication the trial court wished to waive any possible legal financial obligation, this Court should leave the Judgment & Sentence undisturbed.

CONCLUSION

The Defendant here clearly rammed Mr. Gibson's car on purpose, and the evidence is strong enough to infer that he had specific intent to cause fear or apprehension of injury, claims of alternate theories notwithstanding.

The trial court was within its authority to allow DOC to impose community supervision fees. In the absence of any information they were actually imposed, however, this Court should defer on the issue. Even if the costs were imposed, the trial court did no express any intent to waive them.

This Court should uphold the convictions and leave the Judgment undisturbed.

DATED this _3rd_ day of September, 2019.

Respectfully Submitted,

BY: _____

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JFW/lh

GRAYS HARBOR PROSECUTING ATTORNEY

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