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Division II  
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NO. 53685-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT M. LANE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA  
COUNTY

THE HONORABLE RANDALL KROG, JUDGE

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**BRIEF OF RESPONDENT**

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## **A. ISSUES PRESENTED**

- 1. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS THE EVIDENCE PRESENTED AT THE TRIAL SUFFICIENT TO ALLOW A FINDER OF FACT TO FIND THE APPELLANT GUILTY OF ATTEMPTED ASSAULT IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT?**
- 2. DID THE SENTENCE EXCEED THE STATUTORY MAXIMUM WHEN APPELLANT MAY EARN EARLY RELEASE CREDIT AND THUS HAVE TIME AVAILABLE PRIOR TO 120 MONTHS?**
- 3. SHOULD APPELLANT'S JUDGMENT BE AMENDED TO REMOVE THE INTEREST PROVISION OF HIS NON-RESTITUTION LFO'S?**

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL FACTS**

On March 4<sup>th</sup>, 2019, Appellant was charged by information in Skamania County Superior Court with the following criminal offenses: Three Counts of Attempted Assault in the First Degree – Firearm or Deadly Weapon naming three separate police officers as victims, and Unlawful Possession of a Firearm in the Second Degree. Clerk's Papers 1-3 [Hereinafter "CP"]. On May 8<sup>th</sup>, 2019, pursuant to CrR 2.1(d), the State filed an amended information adding a firearm enhancement to the three original counts of Attempted Assault in the First Degree pursuant to RCW 9.94A.533(3). Also, the amended information added three counts of

Assault in the Second Degree also with a firearm enhancement and naming as victims the same three officers previously named in counts 1-3. CP 71-75, 1<sup>st</sup> Report of Proceedings 56-57 [Hereinafter "1RP"].

Jury trial was held on May 13, 2019 through May 14, 2019. The appellant was found guilty by jury on May 14, 2019 of one count of Attempted Assault in the First Degree and of Unlawful Possession of a Firearm in the Second Degree. He was sentenced within the standard range on June 13, 2019. This appeal follows.

## **2. SUBSTANTIVE FACTS**

At trial, Skamania County Sheriff Office witnesses Sgt. Garique Clifford, Chief Deputy David Waymire, Deputy Will Helton, Detective Jeremy Schultz, Sergeant Detective Monte Buettner, and Appellant all testified to the following. For some time prior to the to the incident in question, Sgt. Garique Clifford of the Skamania County Sheriff's Office as well as other officers with the Sheriff's Office [hereinafter "SCSO"], were actively attempting to locate Appellant on an arrest warrant. 2<sup>nd</sup> Report of Proceedings 231-232 [hereinafter "2RP"]. Then on the morning of February 28<sup>th</sup>, 2019, Sgt. Clifford stopped by the Appellant's residence but was unable to speak with him. 2RP 233-234.

That same day, Sgt. Clifford spoke with Appellant's attorney, John Terry, who indicated that Appellant was home, had a firearm, was suicidal, and that Appellant thought the police were surrounding his house. 2RP 234-235. While speaking with Sgt. Clifford, Terry confirmed that Appellant was in his home armed with a shotgun. 2RP 235. After that, Sgt. Clifford attempted to speak with Appellant over the phone but was unable to sufficiently communicate with him. With that information in mind, Sgt. Clifford called in reinforcements from the SCSO, and the officers met in a parking lot near Appellant's residence. Then, Chief Deputy David Waymire, who had known Appellant for several years, began communicating with Appellant via telephone and text message in an attempt to have Appellant exit the house peacefully. 2RP 235-236.

Appellant eventually stopped communicating with the officers, and the officers made the decision to force entry into the house by kicking open a back door. The officers did not plan on initially entering the home, however, as they assumed Appellant was armed with a shotgun. 2RP 237. Appellant refused to come outside despite the repeated pleadings by the officers. 2RP 268.

A body worn camera video of the officers kicking open the door was played for the jury at trial. In the beginning of the video the officers are repeatedly heard saying, “[C]ome to the door” to Appellant. An officer then says “Bobby, come to the door or I’m going to kick the door. I do not want to hurt the dog. Let’s go.” 2RP 239. Sgt. Clifford then says “[H]e’ll hold that door and let’s kick this one in and just see what happens.” 2RP 239. As the door flies open, Appellant yells “There’s only one way this ends motherfuckers.” Sgt. Clifford responds, “Hey—oh shit, he’s got a gun.” Other officers are heard yelling “Gun, gun.” Appellant then yells “Fuck you Dave!” in reference to Chief Deputy David Waymire. 2RP 239-240.

Appellant continues to yell saying, “Don’t make me do something fucking stupid.” The officers then retreat from the entryway, and as they are backing up, Sgt. Clifford states, “Come on, gun. Come on.” Appellant states, “[F]uck off”. And Sgt. Clifford then states, “It’s a long gun, black” and then retreats to a safer area with other officers and reports, “He has a long gun in there. We kicked it fucking open and he’s like this is the only way it fucking ends. You guys fucking know it.” 2RP 240. After that, SCSO Undersheriff Pat Bond calls in the SWAT team. 2RP 241-242.

At trial, Sgt. Clifford further described the incident stating that as the door was kicked open, he then saw Appellant through the ambient light of the doorway, standing in the hallway of the residence, holding a long black firearm. 2RP 244. At that moment, Sgt. Clifford was afraid “something bad could really happen,” including being shot by Appellant. 2RP 245. As Sgt. Clifford yelled out “gun,” the officers closest to him jumped over a fence as they retreated to safety. Sgt. Clifford as well as Chief Deputy Waymire and Deputy Will Helton were all in the line of fire when the door was kicked open and Appellant was wielding the loaded shotgun. 2RP 247. The SCSO decided to clear the neighborhood after Sgt. Clifford saw the firearm. Around two hours later, after the SWAT team had arrived, Appellant shot the shotgun into the ceiling of his residence. 2RP 253.

Additionally, during the stand-off, Appellant stated via text, “I don’t want suicide by cop” but that “if they make entry and I’m still holding this shotty, that’s exactly what will happen.” 2RP 273. Also during the stand-off, Appellant mentioned to Chief Deputy Waymire that he wanted to trade guns because he did not want to make a mess in his mother’s house, that the shotgun had a “hair trigger”,

and that he had put the firearm together the day before. 2RP 278-279.

When Chief Deputy Waymire kicked the door open and Sgt. Clifford announced that he saw a gun, Chief Deputy Waymire's "thought at that time was how to get us out of there safely because I'm standing right in front of a window. He further stated at trial, "I've got a guy with a gun on the other side that is screaming and obviously upset—extremely angry-sounding and using my name, so I want everybody back and set up a perimeter so we stay safe." 2RP 275-276. The officer thought he would get shot because he was in a "fatal funnel", essentially a very dangerous position without a safe exit. 2RP 276. Deputy Will Helton, another officer right near the doorway, was also afraid he could be shot by Appellant. 2RP 291.

A 12-gauge shotgun loaded with a slug could cause a significant fatal injury to a person. 2RP 310. And all the necessary pieces of a functional 12-gauge shotgun were found in Appellant's residence during the execution of a search warrant, along with shotgun shells with slugs, and other pieces of firearms and ammunition. 2RP 327-328. Officers also found a hole in the ceiling

caused when Appellant shot the shotgun during the standoff. 2RP 329, 336, 338.

Appellant told the officers that the incident would only end one way, and Appellant testified that he felt like he was being “pushed to finish what [he] was trying not to do.” 2RP 375. Appellant found it odd the officers never entered his residence after they kicked open the door. 2RP 378. Appellant also had loaded the shotgun with a slug and fired it into the ceiling while inside the house. 2RP 379, 393. The shotgun was not safe to handle. 2RP 393.

### **C. ARGUMENT**

- 1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, A JURY COULD FIND DEFENDANT GUILTY BECAUSE HE POINTED A LOADED FIREARM AT THE OFFICERS AND YELLED AT THEM MENACINGLY WITH IMPLICIT THREATS TO CAUSE GREAT BODILY HARM.**

Appellant loaded a 12-gauge shot gun with a slug shell, pointed it at law enforcement officers, and yelled at them menacingly with implicit threats to cause great bodily harm when they kicked open his door. Despite this, Appellant challenges the guilty verdict on Count 1, on the grounds of sufficiency of the evidence, arguing that there was insufficient evidence he had the

intent to cause great bodily harm. Brief of Appellant at 15 [Herein after "BA"]. Under the definition of Assault in the First Degree, a person must assault another with a firearm or with any deadly weapon "with intent to inflict great bodily harm," pursuant to RCW 9A.36.011(1)(a), CP 217. Notably, because Appellant was charged with an attempted crime, the State only had to prove Appellant took a "substantial step" toward the commission of the crime with the required intent, under RCW 9A.28.020(1). See also CP 216.

Appellant has a heavy burden to establish that the evidence was insufficient to support a conviction:

In reviewing a challenge to the sufficiency of the evidence, the test 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. [citation omitted] "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." [citation omitted]

State v. Washington, 135 Wn. App. 42, 48-49, 143 P.3d 606 (2006), Petition for Review denied, 160 Wn.2d 1017, 161 P.3d 1028 (2007), quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Appellant argues that the State failed to prove that “Mr. Lane’s act of holding a gun, as described by Sgt. Clifford when he entered the house, was done with the intent to cause great bodily harm.” Appellant argues that his goal was not to hurt them but to commit suicide. BA 15. The trial record, however, proves quite the contrary.

Here, Appellant took several steps which indicate he intended great bodily harm on the officers. First, Appellant called an attorney and indicated to him that he was armed with a shotgun and was suicidal. 2RP 350. Any reasonable person would assume this would cause a police response, especially Appellant, who is the son of a police officer. 2RP 354. Then, while in his home, Appellant loaded a 12-gauge shotgun with a slug shell – a shell known to do extensive damage. Next, when officers kicked open the door Appellant yelled out, “[T]here’s only one way this ends motherfuckers,” while pointing a loaded shotgun at them with a hair-trigger. 2RP 239. Then, as the officers are attempting to retreat, Appellant yells “fuck you Dave”, specifically addressing one of the officers, whom he knew personally. 2RP 239-240. Later, Appellant fired the firearm from inside his home during the stand-off. RP2 310. He also said, “Don’t make me do something fucking

stupid.” And he mentioned to Chief Deputy Waymire that he wanted to trade guns because he did not want to make a mess in his mother’s house, that the shotgun had a “hair trigger”, and that he had put the firearm together the day before. 2RP 278-279. Finally, Appellant *himself* said on the witness stand he felt “pushed” by law enforcement “to finish what [he] was trying not to do.” .2RP 375.

These facts, when taken in the light most favorable to the State, support the proposition that Appellant intended great bodily harm on whomever was staring down the barrel of the gun. And based on Appellants actions noted above, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the standard outlined in Washington, supra. And again, the State only needed to prove Appellant took a substantial step toward committing the crime. 9A.28.020(1). All of these acts: loading the gun, pointing the gun, yelling menacingly with implied threats, and firing the gun, should be considered a substantial step toward committing the crime and having the requisite mental state (intent to commit great bodily harm), RCW 9A.36.011(1).

Despite this, Appellant argues that the State did not present sufficient evidence of the required mental state of specific intent to cause apprehension in Sergeant Clifford or any of the law

enforcement officers present. BA 16. No other outcome would be expected, however, when one points a firearm at someone and shout this only ends one way. Any law enforcement officer would take that as credible threat, and Officers Helton, Waymire and Clifford, all with varying levels of experience, all testified that they were in fear of being shot.

The required mental state is “intent to inflict great bodily harm,” RCW 9A.36.011 (1), however, not intent to cause apprehension of harm. As referenced by Appellant, criminal intent “may be inferred from the conduct [of the accused] if it is plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). If a reasonable trier of fact hears that a person wielded a loaded shot gun, pointed it at law enforcement officers and states that this only ends one way, and “Don’t make me do something fucking stupid,” the logical inference from that conduct is that the person wanted to shoot and cause great bodily harm to the officer.

The fact that the appellant *could* have been bluffing is irrelevant because the evidence must be looked at “in the light most favorable to the State” with “all reasonable inferences from the evidence” . . . “drawn in favor of the State and interpreted most

strongly against the defendant,” Washington, 135 Wn. App. at 48-49, 143 P.3d 606. Thus, Appellant’s actions were clearly those of a person intending great bodily harm because he loaded the firearm with a slug, pointed it at the officers, yelled at them menacingly with implied threats, and later fired the firearm during the stand-off.

**2. APPELLANT MAY EARN EARLY RELEASE CREDITS WHILE IN PRISON AND THUS THE SENTENCE ON MAY NOT EXCEED THE STATUTORY MAXIMUM SENTENCE.**

Undeniably, with an 84 month sentence for attempted first degree assault, and a 36 month firearm enhancement, the 36 months of community custody ordered may exceed the Statutory maximum for a Class B Felony pursuant to RCW 9A.20.021(1)(b). That said, “prisoners who earn early release credits, and transfer to community custody status in lieu of earned early release, have not yet served the maximum.” State v. Sloan, 121 Wash App. 220, 223, 87 P.3d 1214 (2004), citing State v. Vanoli, 86 Wash.App. 643, 655, 937 9.2d 1166 (1997). Therefore, Appellant’s Judgement and Sentenced should be amended to read something to the effect of: Defendant shall be sentenced to community custody for any remaining available time if he earns early release credit, not to exceed the statutory maximum.

**3. THE JUDGMENT SHOULD BE AMENDED TO REMOVED THE INTEREST ACCRUAL PROVISION TO NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS.**

The State concedes that the Judgment should be amended to remove the interest accrual provision of the non-restitution legal financial obligations.

**D. CONCLUSION**

For the above reasons, this Court should uphold the appellant's conviction, and amend the Judgment and Sentence as outlined above.

DATED this 10<sup>th</sup> day of April, 2020.

RESPECTFULLY submitted,

By: \_\_\_\_\_

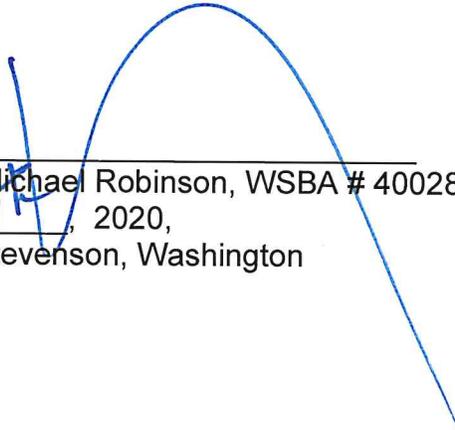
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**CERTIFICATE OF SERVICE**

Electronic service of the original brief was effected on April 10<sup>th</sup> 2020 via the Division II upload portal upon opposing counsel. On April 10<sup>th</sup> 2020 the brief was again served by email attachment.

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## Transmittal Information

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