No. 97184-6

Court of Appeals No. 49592-9-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER WALLACE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Petitioner Tyler Wallace asks this Court to accept review of the opinion of the Court of Appeals in *State v. Wallace*, 49592-9-II pursuant to RAP 13.4.

B. OPINION BELOW

In an opinion contrary to this Court opinions in *State v. Bryd*, 125 Wn.2d 707, 887 P.2d 396 (1995) and *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017) the Court of Appeals concluded the State was not required to prove the crime in the manner in which the jury was instructed.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove each essential element of an offense beyond a reasonable doubt. The State must prove the elements of the offense in the manner in which the jury was instructed. Here, the jury was instructed that to find Mr. Wallace assaulted another he had to have acted with an intent to cause fear but not an intent to harm. Although the State's evidence did not prove this element must

D. STATEMENT OF THE CASE

Mr. Wallace and his girlfriend, Kimberly Nolan, lived together with their children at Mr. Wallace's grandmother's home. 10/17-18/16 RP 27-29. One day they were arguing and as the argument became more heated Mr. Wallace slapped Ms. Nolan. *Id*. at 36.

When Ms. Nolan said she would call police, Mr. Wallace said "I'm going to kill you." *Id* at 39. Mr. Wallace retreated to the kitchen and returned holding a knife at his side but pointed toward her. *Id*. at 41. As Mr. Wallace continued walking toward her Ms. Nolan opened the front door knowing there were people in front of the home that could hear her if she needed help. *Id*. Ms. Nolan then called police.

The State charged Mr. Wallace with second degree assault. CP 1-3. A jury convicted him as charged. CP 42-44.

Mr. Wallace appealed his convictions and counsel was appointed in October 2016. In April 2017, appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87

S. Ct. 1396, 18 L. Ed. 2d 493 (1967) asserting there were no nonfriovlous issues and asking to withdraw as counsel. However, shortly after filing the *Anders* brief in this case, and eight months before his motion to withdraw was granted, appointed counsel took a position as a deputy prosecuting attorney.

The Court of Appeals granted previously appointed counsel's motion to withdraw and dismissed Mr. Wallace's appeal. After, various *amici curiae* filed a motion to reconsider, this Court appointed new counsel, granted counsel's motion to reconsider and withdrew its prior opinion.

Counsel then filed a brief contending the State failed to prove the crime as charged in the jury instructions.

The Court of Appeals again affirmed Mr. Wallace's conviction. Opinion at 1.

E. ARGUMENT

Contrary to several opinions of this Court, the Court of Appeals opinion excused the State of the failure to prove the offense of second degree assault, as submitted to the jury beyond a reasonable doubt.

1. The State must prove each element of an offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Hummel*, 196 Wn. App. 329, 353, 383 P.3d 592, *review denied*, 187 Wn.2d 1021 (2016).

Where additional elements are added to the "to convict" instruction, and the State does not object, the additional element becomes the "law of the case" and must be proved

beyond a reasonable doubt. *Johnson*, 188 Wn.2d at 756. If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. *Id*.

2. Based upon the jury instruction, the State was required to prove Mr. Wallace acted with an intent to cause fear but not an intent to harm.

In a prosecution, such as this, for assault by intentional infliction of fear:

> the State bears the burden of proving [the defendant] acted with an intent **either** to create in [the victim's] mind a reasonable apprehension of harm **or** to cause bodily harm.

Byrd, 125 Wn.2d at 714, 887 P.2d 396 (1995) (emphasis added). The Court explained:

> [A]n assault is "committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm."

Id. at 713 (quoting *State v. Frazier,* 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)).

Thus, the common law definition permits a conviction where a person possesses either or both an intent to injure or

an intent to cause fear. This common law definition is "an essential element of assault in the second degree." *Byrd*, 125 Wn.2d at 713. As required by *Byrd*, the trial court instructed the jury on the creation of fear. CP 24. But rather than instruct the jury that it could find an intent to cause fear "whether or not" it found an intent to cause harm, Instruction 5 told the jury it needed to find Mr. Wallace acted with the intent to create fear of bodily injury "even though [Mr. Wallace] did not actually intend to inflict bodily injury." CP 24. This instruction permitted the jury to find Mr. Wallace assaulted Ms. Nolan only if the jury found Mr. Wallace did not intend to inflict bodily injury. This is a narrower definition of intent.

The law of the case doctrine requires the State to prove the charge in the manner in which the jury is instructed. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). "The doctrine refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. *Johnson*, 188 Wn.2d at 755

(Internal quotations and citations omitted.) Moreover, the doctrine reflects the common theory that juries are presumed to follow the court's instructions.

Having not objected to the narrower instruction on an essential element provided in Instruction 5, the State was required to prove Mr. Wallace possessed only the intent to cause fear but not an intent to cause harm. In short, the State was required to prove the negative. The State offered no such proof.

Nonetheless, the Court of Appeals refused apply the law of the case doctrine as set forth most recently by *Johnson*. The court reasoned "the legal authority [Mr. Wallace] does provide predates the current form of WPIC 35.50." First, the "legal authority" the Court of Appeals dismisses is this Court's opinion in *Byrd*. Second, the fact that it predates the current version of the pattern instruction is wholly irrelevant. Pattern instructions are not the law. Instead, pattern instructions reflect only what committees of lawyers and judges believe the law to be. The opinions of such committees,

informed or otherwise, certainly cannot override controlling precedent of this Court. Third, the "Notes on Use" for WPIC 35.50 say that an instruction such as Instruction 5 should be given "in cases in which there is evidence that the actor's intent was not to inflict bodily injury but only to create the apprehension or fear of bodily injury in the victim." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th Ed). Thus, the WPIC committee agrees with Mr. Wallace's contention that this instruction requires the State prove there is no intent to harm but only an intent to cause fear.

The Court of Appeals opinion concludes "[n]otably, [*Byrd*] did not hold the State must prove the actor did not actually intend to inflict bodily injury." Opinion at 6. But that's the point. While *Byrd* does not require the State prove either an intent to harm **or** merely an intent to scare Instruction 5 does. The instruction uses language that differs from *Byrd* and in doing so creates and obligation on the State's part to prove a negative; that Mr. Wallace acted only with an intent to cause harm and not an intent to cause fear.

Pursuant to *Johnson* and under the law of this case, the State was required to prove Mr. Wallace did not have an intent to harm Ms. Nolan, but had only an intent to cause fear. The opinion of the Court of Appeals is contrary to *Johnson* and *Byrd*. This Court should grant review pursuant to RAP 13.4.

3. The State did not prove Mr. Wallace acted only with an intent to cause fear.

While the State's evidence established Mr. Wallace did not in fact harm Ms. Nolan that is not the same as establishing he did not intend to. In fact according to Ms. Nolan, Mr. Wallace stated he wanted to kill her and then went to the kitchen to obtain the knife. 10/17-18/16 RP 39. Ms. Nolan testified Mr. Wallace returned with the knife pointed towards her. *Id*. at 40-42.

A challenge to the sufficiency of the evidence requires this Court to examine the evidence in its best light and presume the factfinder resolved credibility determinations in favor of the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 264, 401 P.3d 19 (2017). Thus, the court must view Ms.

Nolan's testimony, presented by the State, as establishing that Mr. Nolan did intend to harm her. But that prevents the State from establishing Mr. Wallace did **not** intend to harm her and only intended to cause fear.

The State did not prove the offense as charged to the jury.

F. CONCLUSION

For the reasons above this Court should grant review in this matter.

Respectfully submitted this 9th day of May, 2019.

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Filed
Washington State
Court of Appeals
Division Two

April 9, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER MOREY WALLACE, Appellant.	No. 49592-9-II UNPUBLISHED OPINION

LEE, A.C.J. — Tyler M. Wallace appeals his second degree assault conviction based on an incident where he slapped Kimberly Nolan and then threatened her with a knife. Wallace argues he was denied due process because the State failed to prove each element of second degree assault as instructed to the jury. We affirm.

FACTS

Wallace and Nolan lived together with their son and Nolan's child from a prior relationship. One day Wallace and Nolan were arguing, and Wallace slapped Nolan's cheek. At the time, Nolan was holding the parties' child and her other child was by her side.

When Nolan threatened to call the police, Wallace told her, "I'm going to kill you." Verbatim Report of Proceedings (VRP) (Oct. 17, 2016) at 39. Wallace went to the kitchen and returned holding a butcher knife at his side with the blade facing Nolan. Wallace was approximately "five, six feet" away from Nolan. VRP (Oct. 17, 2016) at 42.

Wallace continued walking toward Nolan. Wallace put the knife down when Nolan opened the front door. Nolan called the police and later went outside with the children. While she was outside, the police arrived.

The State charged Wallace with second degree assault–domestic violence. During trial, Nolan testified that, when Wallace had the knife, she felt fearful that he was going to "hurt [Nolan] . . . [a]nd the kids." VRP (Oct. 17, 2016) at 47. Nolan opened the front door because she "didn't feel safe" and she wanted the neighbors to hear her if she screamed. VRP (Oct. 17, 2016) at 42. Nolan also testified that she called the police because she "didn't feel safe. Like, I didn't know what he was going to do." VRP (Oct. 17, 2016) at 44. Nolan further testified that before the police came, Wallace followed her outside and got into the car. She asked Wallace to get out of the car because she "[didn't] feel safe being . . . with [him]." VRP (Oct. 17, 2016) at 45.

The trial court instructed the jury that to convict Wallace of second degree assault:

> [E]ach 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.

Clerk's Papers (CP) at 23 (Jury Instruction No. 4). The trial court also instructed the jury that "[a]n 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 at 24 (Jury Instruction No. 5); *accord* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (4th ed. 2016) (WPIC).

A jury found Wallace guilty as charged. Wallace appeals.

ANALYSIS

Wallace contends he was denied his due process rights because the State failed to prove all elements of second degree assault beyond a reasonable doubt. We disagree.

A. LEGAL PRINCIPLES

Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Evidence is sufficient if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). Courts must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence receives the same weight as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). We defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *Id.* at 874-75. Our review is de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

The "'law of the case' doctrine . . . requires the State to prove every element in the to-convict instruction beyond a reasonable doubt." *State v. Johnson*, 188 Wn.2d 742, 762, 399 P.3d

507 (2017). "[J]ury instructions not objected to become the law of the case." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The State "'assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction.'" *State v. Dreewes*, ___ Wn.2d ___, 432 P.3d 795, 800 (2019) (quoting *Hickman*, 135 Wn.2d at 102).

B. SECOND DEGREE ASSAULT

Wallace argues there is insufficient evidence to support his second degree assault conviction because the State failed to prove Wallace assaulted Nolan with a lack of intent to cause bodily injury. We disagree.

Under RCW 9A.36.021(1)(c), "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree[,] . . . [a]ssaults another with a deadly weapon." The term "assault" is not statutorily defined; Washington courts apply the three common law definitions of assault.[1] *State v. Stevens*, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006).

1. Lack of Intent to Inflict Bodily Injury

The trial court instructed the jury that to convict Wallace of second degree assault it must find that he intentionally assaulted Nolan with a deadly weapon by intending to "create in [her] apprehension and fear of bodily injury, and which in fact create[d] in [her] a reasonable

[1] Washington recognizes three common law definitions of "assault": (1) an unlawful touching; (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it; and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Although the jury was instructed on two of the three common law definitions of assault, Wallace only challenges the "apprehension of harm" definition.

apprehension and imminent fear of bodily injury even though [Wallace] did not actually intend to inflict bodily injury." CP at 24 (Jury Instruction No. 5). This instruction follows WPIC 35.50.

Wallace argues that the State had the additional burden to prove beyond a reasonable doubt that Wallace did not actually intend to inflict bodily injury, which, he argues, the State failed to prove. But the instruction does not create an essential element requiring the State to prove a negative (i.e., that Wallace did not intend to inflict bodily injury). Instead, the instruction focuses on whether Wallace intended to create apprehension and fear of bodily injury and whether he actually created apprehension and fear of bodily injury regardless of his intent to inflict bodily injury.

Wallace cites no persuasive legal authority to support his contention that the State must prove a negative element. And the legal authority he does provide predates the current form of WPIC 35.50, which the relevant instruction followed. Specifically, Wallace relies on *State v. Byrd*, 125 Wn.2d 707, 715-16, 887 P.2d 396 (1995). There, the Supreme Court reversed an assault conviction on the ground that former WPIC 35.50 (1977), relieved the State of the burden of proving an element of its case because the jury was not instructed that it had to find that the defendant acted with the specific intent to cause apprehension or fear of bodily harm. *Byrd*, 125 Wn.2d at 715-16. The relevant paragraph of former WPIC 35.50 at the time of Byrd's trial provided, "An assault is also an intentional act, with unlawful force, which creates in another a reasonable apprehension and fear of bodily injury, even though the actor did not actually intend to inflict bodily injury." *Id.* at 710.

This paragraph in former WPIC 35.50 was deemed to be an erroneous statement of the law because it allowed a jury to find only that the defendant acted intentionally and the result of the

act was the creation of a reasonable apprehension and fear of bodily injury, rather than the defendant acted with the intent to create this apprehension or fear. *Byrd*, 125 Wn.2d at 715. Notably, the court did not hold that the State must prove the actor did not actually intend to inflict bodily injury as an essential element of second degree assault. Accordingly, we find Wallace's argument that the State was required to prove a negative—that Wallace lacked intent to inflict bodily harm—unpersuasive.

2. Due Process Satisfied

The evidence shows Wallace and Nolan were arguing when Wallace slapped Nolan's cheek. Nolan was holding the parties' child and her other child was by her side. When Nolan threatened to call the police, Wallace told her, "I'm going to kill you." VRP (Oct. 17, 2016) at 39. Wallace retreated to the kitchen and returned holding a butcher knife at his side with the blade facing Nolan. He got approximately "five, six feet" away. VRP (Oct. 17, 2016) at 42. Wallace continued walking toward Nolan. Wallace put the knife down after Nolan opened the front door. Nolan called the police and later went outside with the children. While she was outside, the police arrived.

Nolan testified that when Wallace had the knife she felt fearful that he was going to "hurt [Nolan] . . . [a]nd the kids." VRP (Oct. 17, 2016) at 47. Nolan also testified that she opened the front door because she "didn't feel safe" and she wanted the neighbors to hear her if she screamed. VRP (Oct. 17, 2016) at 42. Nolan further testified that she called the police because she "didn't feel safe. Like, I didn't know what he was going to do." VRP (Oct. 17, 2016) at 44. Before the police came, Wallace followed her outside and got into her car. She asked Wallace to get out because she "[didn't] feel safe being here with [him]." VRP (Oct. 17, 2016) at 45.

Viewing this evidence in the light most favorable to the State, a rational trier of fact can find beyond a reasonable doubt that Wallace assaulted Nolan with a deadly weapon by intending to create in Nolan apprehension and fear of bodily injury, and in fact caused Nolan to have reasonable apprehension and imminent fear of bodily injury regardless of whether Wallace actually intended to inflict bodily injury. Accordingly, Wallace was not denied his due process rights because the evidence was sufficient to convict Wallace of second degree assault.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, A.C.J.

We concur:

Sutton, J.

Nevin, J.P.T.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 49592-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Jessica Blye, Lewis County Prosecuting Attorney [appeals@lewiscountywa.gov][Jessica.Blye@lewiscountywa.gov]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 9, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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