

NO. 34476-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TOR KILDAL KNIGHT, APPELLANT

FILED
COURT OF APPEALS
DIVISION II
09 DEC 22 PM 2:46
STATE OF WASHINGTON
BY *SS*
CLERK

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 03-1-03695-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
TODD A. CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Was there sufficient evidence for a rational trier of fact to conclude that the defendant was guilty of two counts of second degree assault where every element for each offense was proven beyond a reasonable doubt? (Appellant’s Assignment of Error No. 1)..... 1

 2. Did the trial court properly exercise its discretion when it denied defendant’s proposed jury instruction regarding the crime of resisting arrest? (Appellant’s Assignment of Error No. 2)..... 1

 3. Did the trial court properly exercise its discretion when it denied defendant’s proposed jury instruction that evidence of his “felony arrest” is not evidence of his guilt? (Appellant’s Assignment of Error No. 3)..... 1

B. STATEMENT OF THE CASE 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 17

 1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO CONVICT DEFENDANT OF SECOND AND THIRD DEGREE ASSAULT. 17

 2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED DEFENDANT’S PROPOSED INSTRUCTIONS..... 21

D. CONCLUSION. 26

Table of Authorities

State Cases

<u>Herring v. Department of Social and Health Servs.</u> , 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)	22
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	17
<u>State v. Berlin</u> , 133 Wn.2d 541, 548, 947 P.2d 700 (1997).....	23
<u>State v. Birdwell</u> , 6 Wn. App. 284; 297, 492 P.2d 249 (1972).....	22
<u>State v. Brown</u> 140 Wn.2d 456; 467, 998 P.2d 321 (2000).....	24
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	18
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	18
<u>State v. Dana</u> , 73 Wn.2d 533, 439 P.2d 403 (1968)	22
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	18
<u>State v. Fernandez-Medina</u> , 94 Wn. App. 263, 266, 971 P.2d 521, overruled on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000)	22
<u>State v. Griffin</u> , 100 Wn.2d 417, 420, 670 P.2d 265 (1983)	21
<u>State v. Hall</u> , 104 Wn. App. 56, 63, 14 P.3d 884 (2000).....	18
<u>State v. Hoffman</u> , 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).....	21
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)	17
<u>State v. Hughes</u> , 106 Wn.2d 176, 191, 721 P.2d 902 (1986)	21
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	17
<u>State v. Lane</u> , 4 Wn. App. 745, 484 P.2d 432 (1971).....	22

<u>State v. Lucky</u> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by <u>State v. Berlin</u> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)	21
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988)	17
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	17
<u>State v. Passafero</u> , 79 Wn.2d 495, 487 P.2d 774 (1971)	22
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	17
<u>State v. Staley</u> , 123 Wn.2d 794, 803, 872 P.2d 502 (1994)	22
<u>State v. Stringer</u> , 4 Wn. App. 485, 481 P.2d 910 (1971)	22
<u>State v. Thomas</u> , 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)	18
<u>State v. Tilton</u> , 149 Wn.2d 775, 786, 72 P.3d 735 (2003)	17
<u>State v. Tocki</u> , 32 Wn. App. 457, 462, 648 P.2d 99, review denied, 98 Wn.2d 1004 (1982)	18
<u>State v. Walker</u> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998)	21
<u>State v. Williams</u> , 132 Wn.2d 248, 259, 937 P.2d 1052 (1997)	21
<u>State v. Workman</u> , 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)	23

Statutes

Former RCW 9A.36.021	18
RCW 10.93.020	23
RCW 9A.36.011(1)(a)	1
RCW 9A.36.031(1)(a)	24
RCW 9A.36.031(1)(g)	1, 23
RCW 9A.76.040	23

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for a rational trier of fact to conclude that the defendant was guilty of two counts of second degree assault where every element for each offense was proven beyond a reasonable doubt? (Appellant's Assignment of Error No. 1).
2. Did the trial court properly exercise its discretion when it denied defendant's proposed jury instruction regarding the crime of resisting arrest? (Appellant's Assignment of Error No. 2).
3. Did the trial court properly exercise its discretion when it denied defendant's proposed jury instruction that evidence of his "felony arrest" is not evidence of his guilt? (Appellant's Assignment of Error No. 3).

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Tor Kildah Knight, hereinafter, "defendant," with first degree assault (Counts I and II)¹ and third degree assault.² CP 47-48.

¹ RCW 9A.36.011(1)(a).

² RCW 9A.36.031(1)(g).

Prior to trial, the parties agreed to several restrictions regarding the admission of evidence. CP 67-68, 390-92, RP 8-9, 09-14-04.³ Following this agreement, the Court ordered “that the State shall not refer to the nature and quality of any felony conviction by the defendant but the State shall be allowed to show he was on community supervision.” CP 391, RP 9, 09/14/04. On this issue, the parties stipulated that the State could elicit testimony that “On August 3, 2003, Pierce County Sheriff’s deputies were attempting to serve an arrest warrant on Tor Knight for failing to comply with directives of a community corrections officer.” CP 67-68.

On May 31, 2005, the Honorable Stephanie A. Arend heard pre-trial motions. RP 5-61. On June 1, 2005, trial commenced. RP 66. During trial, Deputy Tompkins testified that he and Deputy Darby were aware that defendant had an outstanding felony warrant. RP 100-01. Defense Counsel Woods objected to this testimony. RP 101. After a side bar conference, the court indicated that this testimony “was stricken” and instructed the jury to disregard Tompkins’s statement. RP 101. The court permitted the prosecutor to use leading questions to clarify Tompkins’s statement. RP 104. The prosecutor then established that the warrant was

³ The verbatim Report of Proceedings for the pre-trial proceedings, the trial, and post trial proceedings are not sequentially paginated. For clarification, the State adopts the Appellant’s form of reference and will refer to the Verbatim Report of Proceedings for the trial as “RP” and will refer to the other Verbatim Reports by “RP” followed by the date of the proceeding.

for defendant's failure to follow the directives of a community custody officer and that Deputy Tompkins had confirmed the status of the warrant. RP 101.

The defendant moved for a mistrial arguing that Tompkins's reference to a "felony warrant" violated the pre-trial stipulation and was highly prejudicial. RP 104-05. The court agreed with the prosecution that the witness did not mention defendant's criminal history or convictions. RP 108. The trial court concluded that the State clarified the phrase felony warrant, which made it consistent with the stipulation. RP 108. The court noted that it had instructed the jury to disregard the statement and presumed the jury would follow this instruction. RP 109. The court denied defendant's motion. RP 108-09.

On June 8, 2005, the jury returned guilty verdicts on the lesser offenses of second degree assault (Counts I and II) and a guilty verdict for third degree assault (Count III). CP 158-160, RP 579-80.

On January 27, 2006, the court imposed 43 months incarceration on Counts I and II and 22 months on Count III. CP 290-302. The court imposed these sentences concurrently. CP 290-302. This timely appeal followed.

2. Facts

On August 3, 2003, Pierce County Sheriff's Deputy Mark Tompkins was working routine patrol for the Peninsula Detachment. RP

93. Tompkins was in full uniform and was driving a fully marked patrol car. RP 94-95. As part of his training, Tompkins was familiar with the use of force continuum, which begins with the police officer presence, proceeds with verbal commands, and ends with the use of force. RP 97. The use of deadly weapons is the last resort on this continuum. RP 98. In his six years as a deputy, Tompkins had never fired his gun in the line of duty. RP 98.

At about midnight, Deputy Tompkins observed a blue Chevrolet pass his location and turn onto the street where defendant resided.⁴ RP 99. A records check revealed the Chevrolet belonged to Lisa Caskin. Deputy Tompkins was not familiar with the vehicle but was aware defendant had an outstanding probation warrant. RP 99-100. Tompkins called his partner, Deputy Darby to determine whether Darby was familiar with the Chevrolet. RP 100. The deputies believed Caskin, who was a friend of the defendant, would lead them to the defendant. RP 100, 251.⁵

The deputies obtained information of defendant's whereabouts from a female at his residence. RP 133. Based on this information, the deputies traveled a series of dirt trails off a side road from 38th Street. RP 134, State's Exhibit 17. It was almost 1:00 a.m. in the morning and the

⁴ There were only two houses on this street, which came to a dead end. One belonged to the defendant. The other house belonged to his parents. RP 99.

⁵ The deputies drove separate cars down 38th Street to serve the warrant on the defendant. RP 101-02.

only source of light came from the four wheel drive Tahoe that the deputies were now driving.⁶ RP 135. The deputies reached a clearing and observed some vehicles, including the blue Chevrolet Cavalier Tompkins had seen earlier. RP 136. Lisa Caskin was standing next to this vehicle. RP 136-40.

After speaking with Caskin, the deputies began searching the area with flashlights for the defendant. RP 140. While Tompkins was searching some of the vehicles, he heard Darby scream out out, “Tor ... show me your hands, show me your hands, show me your hands.” RP 140-41. Tompkins, who was standing about 20 feet away, ran to help Darby. RP 141. Darby was standing near the driver’s side back door of a Ford quad-cab. RP 142. Tompkins observed Darby shining a flashlight into the truck toward the floorboard. RP 142. As he got close to the truck, Tompkins could see defendant coming up from the floorboard area of the pickup truck. RP 143. Defendant looked at the deputies and started yelling and screaming back at them. RP 143. He twice said “fuck you guys” and “screw you guys.” RP 143. Defendant moved back and forth and ultimately crawled over the seat to the front of the vehicle. RP 143-44. Defendant continued to ignore Darby’s verbal commands to show his

⁶ The deputies decided to travel together in the Tahoe as it was more suited for the terrain. RP 253.

hands. RP 145.⁷ By this time, Tompkins was on Darby's left side and was closer to the front of the quad-cab than Darby. RP 144.

Darby tried unsuccessfully to open the rear passenger door. RP 145.

Tompkins positioned himself in front of the quad-cab while defendant was down under the dashboard. RP 145, 147. The truck was backed up to a tree line and the rear area of the truck was unnavigable because of the brush. RP 146. Defendant was lying with his legs pointing towards the driver's seat and his head was facing the front passenger door. RP 146. Expecting defendant to flee from the front passenger side of the truck, Tompkins moved toward that side. RP 146-47.

At that point, defendant sat up behind the steering wheel and started the truck. RP 148. Defendant peered at Tompkins through the windshield. RP 153. Concerned the defendant could use the truck as a weapon, Tompkins started to retreat in the direction of his partner. RP 148. As Tompkins took three steps to his right, defendant accelerated the truck. RP 153. Tompkins was eight to ten feet from the truck and still in its pathway. RP 151, 153. After defendant started the truck, Tompkins drew his handgun and held it over the top of his flashlight toward the

⁷ The tape recording of the radio communication between dispatch and the deputies was played for the jury. RP 173. At this point during the incident, Tompkins asked dispatch, "Can we have beeper?" RP 173. Tompkins explained this is a radio tone that notifies other units that there is an emergency. RP 172. Police officers from other agencies including Gig Harbor, Lakewood, Puyallup, and University Place responded to the beeper. RP 190, 273.

defendant. RP 150. Tompkins began retreating while moving to his right. RP 151. He remained in the path of the truck. RP 151. The truck headlights were on. RP 151.

Defendant kept his left hand on the steering wheel and looked directly at Tompkins,⁸ before he leaned down below the dashboard. RP 153. As he was leaning down, defendant turned the steering wheel and swerved the truck at Tompkins. RP 153-54, 212-13. As Tompkins continued to retreat, he worried about falling as he could feel brush, sticks, and logs behind his feet. RP 154. With a grouping of trees behind him, Tompkins felt “pinned.”⁹ RP 154, 156. Seeing the defendant ducking for cover, Tompkins fired one shot from his 9 mm handgun.¹⁰ RP 154. He took another step to his right and fired three more rounds before the truck began traveling back toward the right. RP 155-56, State’s Exhibits Nos. 17, 18, 27. Tompkins also heard Darby’s gunfire at that time. RP 155. The truck resumed its original course a short distance before colliding with an embankment with some trees. RP 156¹¹, State’s Exhibit Nos. 8, 9.

⁸ Tompkins testified that defendant was focused on Tompkins’s body movement as defendant’s eyes followed the deputies’ movements. RP 152. The truck had a large side mirror that was at shoulder height. Tompkins was also concerned that this mirror could cause him serious injury if he was struck while the truck was moving. RP 237-38.

⁹ A crime scene video showing the dense vegetation behind Tompkins was admitted as evidence and played for the jury. RP 194.

¹⁰ Glock Model 17. RP 96.

¹¹ During cross-examination, Tompkins explained that defendant was traveling fast before “making a big impact with something.” RP 222-23. The impact caused the lights of the truck move up and down. RP 222.

At that point, Tompkins ran up to the driver's side of the vehicle as the defendant was exiting through the passenger side of the vehicle. RP 157. Tompkins chased defendant through a heavily wooded area before reaching a clearing on a road where defendant fell. RP 160. Using his flashlight, Tompkins could see defendant had nothing in his hands. RP 161. Defendant started to get off the ground and pivot toward Tompkins. RP 161. Tompkins pointed his firearm and flashlight toward the defendant. RP 162. While defendant was on his knees, he reached out toward Tompkins while flailing and punching at Tompkins. RP 162, 242. At one point defendant reached toward Tompkins's firearm. RP 162. Tompkins pulled his firearm closer to his body and struck defendant with his flashlight. RP 162-63. Defendant stood up while continuing to swing his arms. RP 163, 243. At that point, Tompkins holstered his firearm and tried to take defendant into custody. RP 163. Tompkins testified that defendant put up a barrage of swings and throws while he flailed. RP 163-64, 242. One of these blows struck Tompkins's left brow causing his glasses to fall off his face. RP 164.

Defendant took off running. Leaving his glasses behind, Tompkins chased defendant and apprehended him after defendant jumped a fence. RP 165. Darby arrived and helped Tompkins take defendant into custody. RP 165. As the deputies tried to control defendant to make the arrest, defendant continued to kick, scream and flail. Defendant tried to prevent the deputies from handcuffing him by locking his arms under his

body. RP 166. With the assistance of a third deputy, they were able to place defendant into a patrol car. RP 167. Tompkins observed blood on defendant's thigh and requested the deputy call for medical aid. RP 167.

Deputy Darby testified the was driving a fully marked Chevrolet Tahoe sport utility vehicle. RP 245-46. His jumpsuit style uniform displayed a the words "sheriff's department," shoulder patches, and a cloth badge. RP 245. Darby carried .45 caliber service pistol,¹² OC spray, flashlight, and a baton. RP 246.

After confirming defendant was not at his residence, Darby and Tompkins walked next door to Defendant's parent's residence. RP 252. Seeing the lights were all out, they chose not to disturb defendant's parents and drove to a nearby wooded location. RP 253. Upon seeing the female next to the blue Cavalier, Darby pulled the Tahoe behind her car to prevent her from backing out. RP 256. As Tompkins spoke with the female, Darby walked along a tree line looking for the defendant. RP 257. Darby observed two Ford pickup trucks and started his search. RP 258. After finding no one inside the smaller pickup, he went to the larger four-door pickup. RP 258. Darby spotted the defendant hiding on the rear passenger floor. RP 259. Darby yelled, "Tor, police, Get up. Let me see your hands." RP 260. Defendant immediately jumped up from the

¹² This gun was modified with a more powerful 19 pound recoil spring to aid casing ejection. RP 247.

floorboard, exclaimed, “Fuck you, fucking guys,” and climbed over the bench seat into the driver’s compartment. RP 260. Darby kept yelling, “Let me see your hands. Get out of the truck,” and tried to get away from the truck. RP 261. Defendant continued to yell, “Fuck you, fucking guys.” as Darby retreated. RP 261-62.

Defendant turned on the truck headlights before starting the truck’s diesel engine. RP 262. At this point, Darby stood directly in front of the driver’s side headlight. RP 262. Using his flashlight, Darby observed defendant looking at him while he reached up and grabbed the shift lever, shift gears, accelerate the vehicle, and laid back down onto the bench seat. RP 263. As Darby heard the engine noise get louder, he noticed the defendant driving at him. RP 263. Darby was standing a couple of feet from his Tahoe. RP 276. Darby believed defendant was going to drive over Darby and Tompkins or pin Darby between the Tahoe and a tree. RP 263, 278. Darby’s footing was unstable as he backed into a stand of trees and could not continue into the brush. RP 264. At that point, Darby shot his firearm three times¹³ at the truck and screamed, “Stop, Get out of the truck, Tor get out of the truck. Stop” several times. RP 265. Darby heard glass shattering after his first shot and heard the “bop, bop, bop, bop” sound of Tompkins’s firearm as Darby continued to fire his gun. RP

¹³ This was the only time in Darby’s six year career as a sheriff’s deputy that he fired his gun in the line of duty. RP 274.

266, 277.¹⁴ The truck veered to Darby's left and crashed into an embankment. RP 266, State's Exhibit Nos. 8,9, 17.

Darby could not see Tompkins as Darby ran toward the truck. RP 267. He thought Tompkins was underneath the truck. RP 267. Meanwhile defendant crawled out the passenger side door. RP 267. After confirming Tompkins was not under the truck, he heard Tompkins yelling somewhere down the road. RP 268. Darby caught up to Tompkins at the time Tompkins was trying to take defendant into custody. RP 269. Defendant was wrestling with Tompkins as Tompkins was trying to get control of defendant's left arm. RP 269. Darby attempted to gain control of defendant's right arm. RP 270. Darby struck defendant several times with his flashlight as defendant braced himself a few times in his effort to get away. RP 270, 279. Eventually, the deputies cuffed defendant's hands. RP 270. At that point, defendant yelled for his parents but did not complain of any pain. RP 270. When defendant calmed down, Tompkins informed defendant that defendant had been shot. RP 271.

Kip Hocking, an accident reconstructionist, created a scale diagram of the scene of defendant's crimes. RP 30, State's Exhibit No. 17. Hocking diagramed the position of the shell casings and could determine the path of defendant's truck by examining the tire tracks in the dust. RP

¹⁴ Deputy Darby testified that he did not receive special training on how to stop a moving vehicle. He was trained, however, to stop the perceived threat, not shoot out the tires of an oncoming vehicle. RP 276-277.

302-03. Hocking noted a “relatively gentle change in [the truck’s] direction, but did not observe signs that the truck swerved or tore up the dirt from sudden acceleration. RP 307.

Steven Wilkins, lead forensic investigator for Pierce County, arrived at the scene at 3:00 a.m. RP 313. He videotaped and photographed the scene. RP 315, State’s Exhibit Nos. 3-13. He collected three spent .45 caliber shell casings and five spent 9 mm casings. RP 316. He observed broken glass at the scene. RP 319. Wilkins collected the deputies’ firearms and shot them to determine the ejection pattern for each gun. RP 319-20. Wilkins was not aware of the firing position each deputy used to fire their handguns. RP 323. Numerous other variables affect the ejection pattern. Wilkins opined that one could drop a casing a thousand times and the spent casing is never going to land in the same spot. RP 325. The center of the firearm and whether the shooter’s stance is rigid or relaxed during the shooting cycle affects the ejection pattern. RP 326-27. Wilkins testified that the landscape and the obstacles at the scene could affect the placement of the casings. RP 344.

Wilkins determined that the 9 mm had a minimum ejection distance of five feet ten inches and a maximum distance of nine feet six inches. RP 343. The .45 caliber gun had a minimum ejection distance of 11 feet six inches and a maximum of 21 feet. RP 343. From trajectory analysis, Wilkins was able to determine that the deputies shot at the truck as the truck traveled past them. RP 355, State’s Exhibit Nos. 27, 30.

Wilkins determined that a .45 caliber bullet passed through the windshield into the passenger seat. RP 357. State's Exhibit Nos. 9, 11. Based on x-ray films, he was unable to determine the caliber of the bullet lodged in defendant's leg. RP 370. Wilkins could not determine the calibers of the other bullet fragments because they shattered on impact. RP 356-558. A hole in the rear view mirror appeared to be from a 9 mm bullet. RP 358. This bullet appeared to have been shot by someone standing in front of the truck. RP 372.¹⁵ Wilkins did not observe evidence suggesting defendant made any sudden turns with the truck. RP 371.

Defendant's father testified the he owned the Ford diesel 350 crew cab pick-up that defendant drove during the incident. RP 383. This truck weighs about 9,000 pounds and is longer and larger than the average pickup. RP 384. The front seats are bucket style seats and the rear seats are bench style. RP 384. Because the truck has a diesel motor, one has to first turn the key to engage the glow plug, wait seven seconds for the glow plug to turn off, then turn the key again to start the engine. RP 386-87. 387. It is possible for the truck to start without waiting for the glow plug to go out. RP 387, 393. The latter method can take as long a four seconds. The truck does not accelerate very well. RP 389. The driver's side rear view mirror extends out 18 inches from the truck. RP 391.

¹⁵ The angle was 40 degrees right to left. RP 372. Though five 9 mm rounds were fired, only four were holes in the truck were attributed to a 9 mm bullet. RP 370.

Kay Sweeney, a forensic scientist, testified on behalf of the defendant. RP 434. Sweeney opined that at the time of the shooting, the closest either deputy came to the truck was within the range of 10 feet. RP 452. The truck traveled 97 feet. RP 453. Sweeney relied on Wilkins's data for his analysis. RP 439, 446. Sweeney used averages of the ejection test pattern for each gun and the average distance of the shell casings to get an approximate location where the bullets were fired. RP 458-59. His calculations did not include a 9 mm casing that was next to the road where the truck traveled. RP 459.

Sweeney determined that the one bullet that passed through the driver's side door was a .45 caliber round. RP 440. By looking at X-ray films of defendant's leg, Sweeney opined the caliber of the bullet lodged there was a .45 caliber. RP 441, 456-57.

Defendant testified in his own defense. Defendant was sleeping on the back floor of his dad's truck with his head under the reclined driver's seat. RP 395, 397. He testified that he awoke to the sound of yelling and lights in his eyes. RP 395. Defendant's head was facing the driver's side of the truck. RP 396. When he awoke, he started to crawl out over the reclined driver's seat. RP 396. The back doors were locked so defendant got into the front seats. RP 398. Defendant testified that it did not take very long to move from the back seat to the front seat and start the engine. RP 399. The headlights came on when he engaged the ignition switch.

RP 399. Defendant could see the officers' lights in his eyes. RP 400. He testified that after he started the truck "the world exploded." RP 400.

When counsel asked defendant to explain this statement, defendant said, "The truck started, I fell to my right, hit nose in the dirt pile. I had no control after that point or before that point or whatever." RP 402. Defendant claimed he was not in control of the truck during the incident. RP 405. After he exited the truck, defendant ran toward his parent's house. RP 402. He denied assaulting the sheriff's deputies. RP 403. When defense counsel asked if defendant "intend[ed] to hit anyone and knock glasses off or hit them in the face," defendant testified that he did not fight anybody. RP 405. According to defendant, the deputies stepped on his ankles causing him pain. RP 404.

On cross-examination, defendant admitted he was hiding from the police, that he had fallen asleep while waiting for a ride from Caskin, and that he wanted to turn himself in to the jail the next day. RP 408-410. Defendant claimed he was unaware that Caskin had arrived or that the police were speaking with her while he was in the truck. RP 409. After he awoke, defendant tried to get out of the truck, "because I was aware that I had been caught before I could turn myself in." RP 411. Defendant did not recall one of the deputies yelling at defendant to show his hands. RP 411. Defendant did recall yelling at the deputies that he was trying to "get the fuck out of the back" of the truck. RP 412.

According to defendant, the deputies were never in front of the truck. RP 418. Defendant turned the on the ignition to illuminate the truck cabin because he was “night blinded.” RP 413. Defendant testified that he did not make a conscious decision to drive the truck forward, put the truck into gear, or step on the gas pedal. RP 418-19. Defendant claimed he was standing while holding the steering wheel, the truck started, the world exploded, and the truck went forward.¹⁶ RP 419. Defendant was no longer trying to exit the truck when it started. RP 417. According to defendant, “something picked [him] up off the seat and smashed his face into the steering wheel and [he] dropped back in the seat.” RP 421. But defendant stated this did not occur when the truck came to a stop. RP 422. Defendant testified that he panicked and did not know the police were trying to arrest him when he exited the truck and ran away. RP 422. He claimed to know at the time of trial that he fled because he did not want to turn himself in on the warrant, but at the time of the incident, he “had been shot probably twice and [he] had a concussion.” RP 423.

¹⁶ Prior to this statement, defendant testified that there was only room to crouch, not stand in the front seat. RP 415.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR A RATIONAL JURY TO CONVICT DEFENDANT OF SECOND AND THIRD DEGREE ASSAULT.

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. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003), State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965). All reasonable inferences from the evidence must be 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).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, courts must defer to the trier of fact on issues of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, review denied, 98 Wn.2d 1004 (1982).

“Washington recognizes three means of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having the apparent present ability to inflict such injury; and (3) assault by placing the victim in reasonable apprehension of bodily harm.” State v. Hall, 104 Wn. App. 56, 63, 14 P.3d 884 (2000).¹⁷ To convict defendant of second degree assault, the State must prove that under circumstances not amounting to assault in the first degree defendant assaults another with a deadly weapon. Former RCW 9A.36.021. CP 144, Instruction No. 12. The jury was instructed that a deadly weapon

¹⁷ The court’s instructions are consistent with this definition of assault. CP 136, Instruction No. 4.

means any weapon, device, instrument, substance, or article including a vehicle, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury. CP 147, Instruction No. 15.

Here the stated adduced the following evidence: (1) Deputies Tompkins and Darby attempted to serve a warrant on defendant. RP 99-100; (2) the deputies are in full uniform and they parked a fully marked patrol SUV. RP 94, 245-460; (3) Darby spotted defendant hiding in the back seat of the truck, RP 259, (4) Darby screamed at defendant to show his hands and to exit the truck. RP 140-41, 260; (5) Defendant jumped into the front seat and yelled “Fuck you, fucking guys,” several times. RP 260-62; (6) During the assault, Tompkins and Darby were positioned in front of the truck. RP 145-47, 153, 262, 372; (7) Defendant started the truck, looked directly at the deputies, put the truck into gear, gassed the engine, and accelerated toward the deputies while ducking toward the passenger door to avoid being shot. RP 148, 153-54, 262-63, 278; (8) Both deputies retreated before shooting at the truck. RP 148-49, 264; (9) The deputies fired at defendant to stop the threat of being run over. RP 154, 276-77; (10) The exit route was hazardous and confined, which contributed to the deputies’ peril. RP 154, 156, 263-64, 278; (11) The deputies also feared being struck by the large driver’s side mirror. RP 237-38; (12) The truck veered to the left of the deputies before crashing into an embankment. RP 266; and (13) The truck weighed 9,000 pounds.

RP 384. Based on these facts, a rationale jury could reasonably conclude defendant intended to use the truck as a weapon to assault the officers and avoid being arrested on his warrant.

Although much focus was placed on the deputies' shooting event at trial, defendant's use of the truck to assault the deputies primarily occurred before the first shot was fired. The value of the forensic evidence was that it merely demonstrated multiple possibilities where points of origin move in relation to a moving target. Such a fluid event suggest that eyewitness testimony was the best evidence of what occurred on August 3, 2003, not forensic analysis. By convicting defendant of the lesser charge of second degree assault, the jury clearly believed defendant did not intend to inflict great bodily harm. Most likely, the jury was convinced beyond a reasonable doubt that defendant intended to inflict bodily injury but failed and/or intended to create in each deputy apprehension and fear of bodily harm. Defendant succeeded in creating this fear. These are both recognized means of assault in Washington.

Defendant claimed he panicked and could not offer a rational explanation on how he started the truck, put it into gear, gassed the engine, or why he did not remain sitting in the driver's seat as the truck moved forward. Defendant claimed the deputies were never in front of the truck. The jury chose not to believe him. CP 158-60. While deferring to the jury issues of conflicting testimony, credibility determinations, and the persuasiveness of the evidence, this court should find this evidence is

sufficient to permit a rational trier of fact to find defendant committed second and third degree assault.

2. THE TRIAL COURT PROPERLY EXERCISED
ITS DISCRETION WHEN IT DENIED
DEFENDANT'S PROPOSED INSTRUCTIONS.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by, State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id. A defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991). Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997); citing State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to so instruct is reversible error. Williams, 132 Wn.2d at 259, citing State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, overruled on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions must be considered as a whole, and it is not error for the trial court to refuse to give a requested instruction when the other instructions given adequately and correctly state the law. State v. Birdwell, 6 Wn. App. 284; 297, 492 P.2d 249 (1972)(citing State v. Passafero, 79 Wn.2d 495, 487 P.2d 774 (1971); State v. Stringer, 4 Wn. App. 485, 481 P.2d 910 (1971)). "While a defendant is entitled to argue his theory based on the instructions given by the court, he is not entitled to put his argument into the court's instructions." Birdwell, 6 Wn. App at 297; citing State v. Lane, 4 Wn. App. 745, 484 P.2d 432 (1971); State v. Dana, 73 Wn.2d 533, 439 P.2d 403 (1968). A trial court has broad discretion in determining the number and wording of jury instructions. Dana, 73 Wn.2d at 536.

a. Defendant's proposed instruction on resisting arrest.

In the instant case, defendant requested that the trial court instruct the jury on resisting arrest as a lesser included offense of third degree assault (Count III). CP 104-123, RP 493. The trial court denied the defendant's request. RP 503. A two-part test determines whether an offense is lesser included: [F]irst, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). Appellate courts apply the lesser included analysis to the greater offense as specifically charged and prosecuted, rather than to every statutory alternative means of the greater offense as they appear in the statute. Berlin, 133 Wn.2d at 548. To prove third degree assault as charged in the information, the State was not required to prove that defendant resisted a 'peace officer,' an element of resisting arrest. RCW 9A.76.040.¹⁸ Nor was the State required to prove under RCW 9A.36.031(1)(g), that defendant knew that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault. State

¹⁸ This statute provides: "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." See also RCW 10.93.020 (defining 'peace officer').

v. Brown 140 Wn.2d 456; 467, 998 P.2d 321 (2000). Thus, resisting arrest is not a lesser included offense of third degree assault, RCW 9A.36.031(1)(a). Moreover, defendant testified that he did not know the police were trying to arrest him when he exited the truck and ran, that he did not fight with the officers, that he was pinned against a fence, and that the officers held him down by standing on his ankles. Thus, there is insufficient evidence to establish defendant resisted arrest. Accordingly, the trial court did not err in denying the instruction.

b. Evidence of arrest instruction.

Defendant also requested that the trial court instruct the jury that his arrest was not evidence of guilt. CP 106. Specifically, defendant asserts that his instruction was necessary to “combat the prejudice caused to Mr. Knight by Deputy Tompkins’ highly prejudicial and false statement that there was a felony arrest warrant for Mr. Knight.” Appellant’s Opening Brief at 20. This instruction was not necessary and the court acted within its sound discretion by refusing to give it.

First, the jury did not hear evidence that the defendant was arrested on his “felony warrant.” Without such evidence, defendant is not entitled to this instruction.

Second, the proposed instruction does little to quell any potential prejudice resulting from the use of the phrase “felony warrant.” Defendant stipulated that he was wanted on a warrant for violating his

conditions of probation. CP 67-68. Consistent with the court's order, Tompkins did not testify regarding defendant's criminal history. The fact that defendant was wanted on the warrant was clearly the reason defendant chose to flee. At trial, defendant admitted this fact. RP 409, 411. This fact was critical to the State's theory of the case. Whatever prejudice may have emerged from the words "felony warrant" evaporated when defendant was later arrested for assaulting the deputies. Furthermore, a review of the record reveals that no evidence was presented to the jury that defendant was eventually arrested on his probation warrant. Accordingly, the defendant did not suffer any prejudice from this statement.

Third, the court "stuck" this portion of Tompkins's testimony and instructed the jury to disregard the statement. RP 101. Juries are presumed to follow the court's instructions. Through the testimony of Tompkins and Darby, the prosecutor clarified Tompkins's testimony by establishing that the warrant was for defendant's failure to follow the directives of a community custody officer. RP 101, 250. The defendant did not offer a Washington Pattern Jury Instruction to support his argument to the trial court and the trial judge was not aware of such an instruction. Accordingly, the court did not abuse its discretion as its decision was not based on untenable grounds.

D. CONCLUSION.

For the foregoing reasons, the state asks this court to affirm defendant's convictions for second degree assault (two counts) and third degree assault.

DATED: DECEMBER 22, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Todd A. Campbell by K. Procter
TODD A. CAMPBELL 14811
Deputy Prosecuting Attorney
WSB # 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/22/06 *E. Johnson*
Date Signature

FILED
COURT OF APPEALS
DIVISION II
06 DEC 22 PM 2:46
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY