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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
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No. 41432-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON TIMOTHY WEISS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-00362-4
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt all the elements of the crime of second degree assault.
2. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Appellant intended to use his car as a deadly weapon, which is required to support a conviction for second degree assault in this case.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence showed that the police officer initiated physical contact with Appellant by grabbing Appellant's arm, that Appellant twisted away from the officer, that the officer was unable to free his hands from Appellant's arm, and Appellant began to drive away while the officer was still attached to Appellant's arm, did the State fail to present sufficient evidence to prove beyond a reasonable doubt that Appellant intended to assault the officer by using his car as a deadly weapon? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Jason Timothy Weiss in Pierce County Superior Court with: (1) first degree assault with a deadly weapon

(RCW 9A.36.011); (2) third degree assault (RCW 9A.36.031); (3) attempting to elude a pursuing police vehicle (RCW 46.61.024); and (4) reckless endangerment (RCW 9A.36.050). (CP 9-11) The State alleged two aggravating sentencing factors: (1) that the first degree assault was committed against a law enforcement officer (RCW 9.94A.535(3)(v)); and (2) that the remaining crimes were committed shortly after being released from incarceration RCW 9.94A.535(3)(t). (CP 9-11)

Weiss requested and was granted permission to represent himself at trial. (RP 19-11, 29-31; CP 12-27, 28-29) The jury found Weiss guilty of second degree assault rather than first degree assault, and found that the assault was committed against a law enforcement officer who was performing his official duties. (CP 155, 156, 160; RP 566-67) The jury also convicted Weiss of the remaining charges. (CP 157-59; RP 567)

Before the jury heard the State's evidence in support of the "rapid recidivism" aggravator, Weiss moved to dismiss the aggravator. The trial court agreed that the aggravator did not apply under the circumstances of this case. (CP 31-33; RP 573, 582, 587-88)

The trial court sentenced Weiss to an exceptional sentence

totaling 60 months of confinement, based on the law enforcement aggravator. (CP 247-48; RP 609) This appeal timely follows. (CP 164)

B. SUBSTANTIVE FACTS

Tacoma Police Officers Eric Barry and Dean Waubanasum were on duty and driving in their marked patrol vehicle shortly after midnight on January 23, 2010. (RP 141, 142, 188) Their attention was drawn to a dark colored Acura Integra because of its high rate of speed and the loud noise it made as it drove out of a 7-11 store parking lot on 96th Street and Pacific Avenue. (RP 142, 143, 144-45, 189) The Officers followed the Acura and determined that it was traveling 48 miles per hour in what was a 35 mile per hour zone. (RP 143, 144, 189)

The Officers initiated a traffic stop, and the Acura pulled over to the side of the road. (RP 145, 191) Officer Barry approached the driver, and Officer Waubanasum stood on the passenger side of the Acura. (RP 145, 191) Officer Waubanasum noticed that a young boy was asleep in the front passenger seat, but the boy was not secured in a child safety seat. (RP 192-93)

Officer Barry requested the driver's documentation, but the driver, Jason Weiss, said that his license had been suspended.

(RP 145) Because it is illegal to drive without a valid license, and because Officer Barry thought he smelled alcohol coming from inside the Acura, he asked Weiss to turn off the engine and exit the Acura. (RP 145, 146) Weiss turned off the engine, but refused to exit the car or hand over the keys to Officer Barry. (RP 146)

Officer Barry told Weiss that he was under arrest, but Weiss restarted the car's engine. (RP 146) Officer Barry reached into the car and tried to take the keys out of the ignition. (RP 146) According to Officer Barry, Weiss grabbed his arm and tried to push it out of the car to prevent him from getting the keys. (RP 146, 147) Officer Barry told Weiss to stop and tried to pull Weiss out of the car, but Weiss continued to push Officer Barry away. (RP 147)

Officer Waubanasum walked around to the driver's side of the Acura to assist Officer Barry. (RP 148) He testified that he saw Weiss reaching towards Officer Barry's neck and chest area, so he grabbed Weiss' arm.¹ (RP 195) According to Officer Waubanasum, Weiss then bent his own arm and pulled it back into the Acura, then turned his body towards the interior of the car.

¹ Officer Barry never claimed that Weiss grabbed at his chest or neck, just that Weiss grabbed at his arm and hands to try to keep the Officer away from the car keys. (RP 147) Officer Barry also testified that he backed away from the car as Officer Waubanasum reached in to grab Weiss. (RP 148)

(RP 196, 199) Officer Waubanasum's arms and upper body were pulled into the Acura at the same time because, according to Officer Waubanasum, he was unable to free either of his hands from Weiss' one bent arm.² (RP 197, 201, 241)

Officer Waubanasum felt the Acura start to move, and he told Weiss to stop and to let him go, but Weiss continued to accelerate. (RP 201, 202) Officer Waubanasum ran alongside the car and tried to free his hands, but he was afraid that he might fall and get run over by the Acura, so he pulled his knees up so his feet were off the ground. (RP 202) He was then able to get both of his hands free, and Weiss sped away. (RP 205, 208)

Officer Barry watched Officer Waubanasum's interaction with Weiss, and thought his partner might get dragged or run over by the Acura, so he called for backup. (RP 150-51, 153, 154) Then, once Weiss drove away, he and Officer Waubanasum returned to their patrol vehicle and followed Weiss' Acura. (RP 154, 159)

A prolonged high-speed chase ensued, with Weiss reaching speeds of 90-100 miles per hour. (RP 162-63, 215) The Acura

² Officer Barry testified that Weiss wrapped his arm around Officer Waubanasum's back, but Officer Waubanasum specifically testified that Weiss did not do that. (RP 232)

eventually became stuck in a Sound Transit construction zone. (RP 225, 425, 427) Washington State Patrol Officer Eric Wickman joined in the pursuit, and was behind Weiss' Acura when it became stuck. (RP 415, 427) He saw Weiss exit the Acura, run to the passenger side of the car, take the boy out of the car, and run away. (RP 427, 431)

According to Officer Wickman, Weiss dragged the boy with him then "threw" him over a fence. (RP 423) Weiss then climbed over the fence himself, and continued to run with the boy. (RP 434) Weiss was eventually surrounded by police officers from several jurisdictions, and was taken into custody without further incident. (RP 336, 371-72, 434) When asked by Officer Waubanasum why he drove away from the traffic stop, Weiss replied that he did not want to go back to jail. (RP 227)

IV. ARGUMENT & AUTHORITIES

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvone, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the

prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The jury convicted Weiss of second degree assault against Officer Waubanascum. (CP 155; RP 566) To support the second degree assault conviction, the State was required to prove beyond a reasonable doubt that Weiss assaulted Officer Waubanascum with a deadly weapon. (CP 20) See also RCW 9A.36.021(1)(c).

The jury was instructed on the three alternative definitions of assault: (1) an intentional touching or striking of another person that is harmful or offensive; (2) an act done with intent to inflict bodily injury upon another; or (3) an act done with the intent to create in another apprehension and fear of bodily injury. (CP 126) See also State v. Aumick, 73 Wn. App. 379, 382, 869 P.2d 421 (1994); State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

A “deadly weapon” includes 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 harm.” RCW 9A.04.110(6).³ Thus, unlike a firearm, a vehicle is not per se deadly; rather, it is the vehicle's “inherent capacity” and the circumstances under which it is used that determine whether it is a deadly weapon. State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). The circumstances include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” Shilling, 77 Wn. App. at 171 (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

In this case, the State failed to present sufficient evidence to prove that Weiss intended to use his car as a deadly weapon against Officer Waubanasum. The State did not prove that Weiss intentionally touched or struck Officer Waubanasum with the car. The State did not prove that Weiss intended to use the car to inflict bodily injury upon Officer Waubanasum. And the State did not prove that Weiss intended to use the car to create in Officer Waubanasum apprehension and fear of bodily injury.

Officer Waubanasum initiated the contact with Weiss when

³ Substantial bodily harm is “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

he grabbed Weiss' arm. (RP 195) Weiss then bent his arm and turned away from Officer Waubanascum, and Officer Waubanascum was unable to free his hands until after Weiss began to drive away. (RP 196, 197, 199, 205) If Weiss even intended to prolong his contact with Officer Waubanascum, the only intentional touching or striking done by Weiss was with his arms. He did not use his car to intentionally touch or strike Officer Waubanascum.

Moreover, the fact that Weiss' actions had the effect of pulling Officer Waubanascum closer to and then into the car does not in itself prove that Weiss intended to use the car to either injure Officer Waubanascum or to cause Officer Waubanascum to fear injury from the car. Rather, the evidence showed that Weiss was trying to get the officers away from him and away from his car. Officer Barry testified that Weiss kept trying to push his arm out of the car. (RP 147) After Officer Waubanascum grabbed Weiss' arm, Weiss pulled his arm and twisted his body away from the Officer. (RP 197, 199) Weiss did not move toward Officer Waubanascum and did not reach for or grab Officer Waubanascum. (RP 232) Weiss was clearly trying to get his arm and his body away from Officer Waubanascum's grip so that he

could flee. No reasonable juror could infer that Weiss was trying to pull Officer Waubanascum against the car so that he could drag or run over the Officer, when it was undisputed that Weiss wanted to flee because he “did not want to go back to jail.” (RP 227)

The evidence, and the reasonable inferences that can be drawn from the evidence, do not support a conclusion that Weiss intended to use his car to assault Officer Waubanascum.

V. CONCLUSION

That the result of Weiss’ actions led to the potential for serious injury to Officer Waubanascum is not sufficient to support a conviction for second degree assault. The State was required to prove that by acting as he did, Weiss intended to cause his car to either strike Officer Waubanascum, cause injury to Officer Waubanascum, or cause a fear of injury in Officer Waubanascum. The State did not make that showing in this case. Accordingly, Weiss’ second degree assault conviction, and its corresponding sentencing aggravator, must be reversed and dismissed.

DATED: March 25, 2011



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Jason Timothy Weiss

CERTIFICATE OF MAILING

I certify that on 03/25/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Jason T. Weiss, DOC# 329072, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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