

FILED

NOV 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COA No. 30111-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JACOB STEPHEN BECK, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
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Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support Jacob Stephen Beck's conviction of second degree assault.

Issue Pertaining to Assignment of Error

1. Was the State's evidence insufficient to support a finding of guilt beyond a reasonable doubt for second degree assault? (Assignment of Error A).

II. STATEMENT OF THE CASE

On June 6, 2011, Mr. Beck was charged by second amended information with count 1: second degree assault involving Spencer Smith; count 2: third degree theft; count 3: second degree assault involving Sarah Hipkiss; count 4: attempt to elude a police vehicle; count 5: second degree assault involving Deputy Harold Whapeles; and count 6: failure to remain at the scene of an accident – attended vehicle. (CP 220-22). The case proceeded to jury trial.

The array of charges against Mr. Beck arose from a gas drive-off at the Zip Trip on Euclid and Market in Spokane. (RP 45). He drove away without paying for \$54.51 of gas. (RP 50, 53). As Mr. Beck accelerated out of the Zip Trip, he came about five feet

away from employee Sarah Hipkiss, who came out of the store after him. (RP 48,51).

A customer, Spencer Smith, had gone outside in an attempt to get Mr. Beck to come inside and pay. (RP 84). Mr. Smith pushed down on the car hood and tried to open the door handle when Mr. Beck backed out, flipped around, and took off. (*Id.*). Mr. Smith got his finger stuck in the car's grill for a short time. (RP 85, 86). As Mr. Beck drove away from the store lot, Mr. Smith got out of the way. (RP 88). Mr. Beck was driving a black Mercury Cougar, license plate 952ZDY. (RP 98).

Deputy Harold Whapeles was driving in the area of Havana and Sprague when he got a report of a city officer pursuing a black Mercury. (RP 123). He was in uniform in a marked Spokane Valley Police car. (RP 124, 125). At the intersection of Havana and Sprague, he blocked eastbound traffic on Sprague. (RP 125). Shortly thereafter, the deputy could hear sirens and see lights. (RP 126, 127). Mr. Beck was westbound on Sprague. Deputy Whapeles saw his patrol car was going to get hit in the front by him even though it looked like there was a clear lane going westbound. (RP 129, 131). Mr. Beck glanced off the patrol car's push bar on the front right passenger side. (RP 130). He sped off northbound

on Havana . (*Id.*). Deputy Whapeles followed him as did the other pursuing officer. (*Id.*). Mr. Beck ended up going south again and got over to 3rd Avenue. (RP 221).

Driving east, he struck the SUV of Kenneth Vanderburgh near Thierman. (RP 111-113). Mr. Beck was eventually taken into custody. (RP 149, 164, 167-169).

Mr. Beck testified in his own defense. As he was driving westbound on Sprague, he saw a patrol car blocking his way. (RP 218, 19). He wanted to turn south on Havana to get home, but he could not stop and hit the patrol car. (RP 219). Mr. Beck did not try to hit Deputy Whapeles' car. (RP 220). He was in full panic mode and was not thinking straight. (RP 222).

No exceptions were taken to the court's instructions. (RP 244). In closing argument, the defense conceded guilt for third degree theft, attempt to elude, and failure to remain at the scene of an accident – attended vehicle. (RP 273, 279, 282). The only offenses contested were the three counts of second degree assault. (RP 283). Mr. Beck was acquitted on the two counts of second degree assault involving Ms. Hipkiss and Mr. Smith. (CP 265, 267). He was found guilty of the second degree assault involving Deputy Whapeles. (CP 269). The jury also found Mr.

Beck guilty of third degree theft (a misdemeanor), attempt to elude (a felony), and failure to remain at the scene of an accident (a misdemeanor). (CP 266, 268, 270).

The court sentenced Mr. Beck to concurrent terms of 84 months on the second degree assault and 29 months on the attempt to elude. As it can do with misdemeanors not subject to the SRA, the court sentenced Mr. Beck to 365 days on the third degree theft and 365 days on the failure to remain at the scene of the accident, both to run consecutive to the 84 months imposed on the felonies and consecutive to each other for total confinement of 108 months. (CP 445-56; 458-62; 463, 464-65). This appeal follows. (CP 469).

III. ARGUMENT

A. The State's evidence was insufficient to support a finding of guilt beyond a reasonable doubt for second degree assault.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App.

179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

The essential element of second degree assault the State failed to prove beyond a reasonable doubt is intent. RCW 9A.36.021(1)(c). Mr. Beck was charged with second degree assault for intentionally assaulting Deputy Whapeles with a deadly weapon, that is, a car. (CP 221).

In instruction 7, the court instructed the jury that "[a] person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon." (CP 241). Instruction 9 defined assault:

An assault is an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, 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 243).

Instruction 11 defined intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. (CP 246).

Instruction 22 was the to-convict instruction and stated in pertinent part that an essential element of second degree assault that had to be proved beyond a reasonable doubt was “that on or about the 12th day of January, 2011, the defendant assaulted Deputy Harold Whapeles with a deadly weapon.” (CP 257). The court had instructed the jury in instruction 12 that a deadly weapon included “a vehicle which, under the circumstances in which it is used, is readily capable of causing death or substantial bodily harm.” (CP 247).

The defense admitted guilt on the charge of attempt to elude. (RP 279). Mr. Beck testified he was trying to run away from the police. (RP 217-18). It makes no sense, then, that he would also intentionally try to hit Deputy Whapeles. Mr. Beck tried to miss him. He had no intent to create apprehension or fear in the deputy or to hurt him. (RP 220). About fifty feet away from the intersection, he saw the patrol car pull around in front of him as he tried to go south on Havana. Mr. Beck just could not stop in the snow and ice as he was going too fast trying to run away from the

officer behind him. (RP 219-20, 232). Indeed, Mr. Beck glanced off the deputy's car, almost succeeding in missing it, and kept on trying to elude the police as he took off north on Havana. He accidentally hit the deputy's car just as he accidentally hit Mr. Vanderburgh's SUV. No assault charge was warranted for Mr. Beck's striking the SUV; it was a hit-and-run. Likewise, there was no assault against the deputy because the circumstances of this accident were exactly the same as the one involving Mr. Vanderburgh. The evidence failed to prove intent.

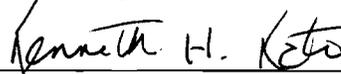
The state of mind that must be proved is intent to assault. *State v. Smith*, 74 Wn. App. 844, 849, 875 P.2d 1249 (1994), *review denied*, 125 Wn.2d 1017 (1995). This was no assault beyond a reasonable doubt. Rather, it was an accident, plain and simple. Even when viewing the evidence in a light most favorable to the State and admitting the truth of it, a rational trier of fact could not find intent by the requisite quantum of proof. By so finding, the jury necessarily resorted to speculation, guess, and conjecture. This, it cannot do. *See State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In these circumstances, the second degree assault conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Beck respectfully urges this Court to reverse his conviction of second degree assault and dismiss the charge.

DATED this 18th day of November, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on November 18, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Jacob S. Beck # 807420, PO Box 1899, Airway Heights, WA 99001-1899; and by e-mail, as agreed between counsel, on Mark E. Lindsey at kowens@spokanecounty.org.



Kenneth H. Kato