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Court of Appeals
Division III
State of Washington

No. 30805-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KIRT ANTHONY McPHERSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Kirt McPherson drove his pickup truck into the driver's side door of another truck in an attempt to get the driver to leave the scene. There was no evidence that Mr. McPherson was aware there were two children in the truck or that he intended to injure or scare them. Yet he was convicted of a separate count of second degree assault for each child. Because the State did not prove Mr. McPherson specifically intended to assault the two children, those convictions must be reversed and the charges dismissed.

In addition, the State did not prove second degree malicious mischief beyond a reasonable doubt because the State presented no evidence of the dollar value of the damage caused to the other truck. Finally, Mr. McPherson must be resentenced because (1) the trial court erroneously included an out-of-state conviction in the offender score and (2) the court did not impose a fixed term of community custody.

B. ASSIGNMENTS OF ERROR

1. The State did not prove second degree assault as charged in count III beyond a reasonable doubt.

2. The State did not prove second degree assault as charged in count IV beyond a reasonable doubt.

3. The State did not prove second degree malicious mischief beyond a reasonable doubt.

4. The trial court erred in including an out-of-state conviction in the offender score.

5. The trial court erred in not imposing a fixed term of community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove second degree assault with a deadly weapon as charged in counts III and IV, the State was required to prove beyond a reasonable doubt that Mr. McPherson specifically intended to assault each of the two passengers who were inside the truck that he hit with his own truck. Did the State fail to prove the elements of the crime where the State presented no evidence to show Mr. McPherson was aware there were two passengers inside the truck?

2. To prove second degree malicious mischief, the State was required to prove beyond a reasonable doubt that Mr. McPherson caused damage to the victim's truck in an amount exceeding $750. Did the State fail to prove the elements of the crime where the State presented no evidence of the dollar amount of the damage caused?

3. The trial court may not include an out-of-state conviction in the offender score unless the State proves the conviction is comparable to a Washington offense that would have been included in the offender score. Did the court err in including an Oregon conviction in the offender score where the State did not prove comparability?

4. When a person is convicted of second degree assault, the Sentencing Reform Act (SRA) requires the court to impose a fixed 18-month term of community custody. Did the trial court err in not imposing a fixed term of community custody for Mr. McPherson's conviction for second degree assault?

D. STATEMENT OF THE CASE

Danielle Tuck and Kirt McPherson had a romantic relationship. 4/04/12RP 34. In January 2012, Ms. Tuck spent two nights visiting at the home of her friend Kendra Demintieff in Glenwood. 4/04/12RP 33-35. In the morning at the end of the visit, Mr. McPherson came to pick her up. 4/04/12RP 35.

That afternoon, Ms. Tuck called Ms. Demintieff and asked her to come and pick her up; she said she was standing on the side of the highway. 4/04/12RP 36-37. Ms. Demintieff agreed. 4/04/12RP 37.

She put her two children, K.H., who was six years old, and P.H.[1], in her truck and drove down Mt. Adams Highway. 4/04/12RP 37.

Ms. Demintieff saw Ms. Tuck standing on the side of the road next to a fence. 4/04/12RP 38. She also saw Mr. McPherson sitting in his truck nearby. 4/04/12RP 39. Ms. Tuck was waving at Ms. Demintieff. 4/04/12RP 39. Ms. Demintieff was afraid to approach Ms. Tuck, so she turned onto Ladiges Road and drove about a quarter mile. 4/04/12RP 40, 45. Then she turned around and returned to Mt. Adams Highway. 4/04/12RP 40. Ms. Tuck was still standing on the side of the road waving her arms and beckoning to Ms. Demintieff to come and pick her up. 4/04/12RP 44-45. Mr. McPherson was still sitting in his truck nearby. 4/04/12RP 43-44.

Mr. McPherson drove toward Ms. Demintieff and stopped about 20 to 25 feet away. 4/04/12RP 46. He revved his motor and drove towards her and hit her truck on the front driver's side. 4/04/12RP 46. Then he backed up and told her to "get the hell out of there." 4/04/12RP 46. Neither Ms. Demintieff nor the children were hurt. 4/04/12RP 46. Ms. Demintieff left and drove home. 4/04/12RP 48.

Ms. Demintieff testified she was afraid when Mr. McPherson hit her truck. 4/04/12RP 46. But no one testified that the children were

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[1] The record does not reflect the age of P.H.

afraid.[2] Also, the State presented no evidence to show that Mr. McPherson was even aware there were any passengers in the truck.

Doneva Brown lives nearby on Mt. Adams Highway. 4/04/12RP 51. A short time after the incident, Ms. Tuck ran up her driveway and Ms. Brown's boyfriend let her into the house. 4/04/12RP 52. Ms. Tuck was upset and crying. 4/04/12RP 52. She said she had been on the road on foot because her boyfriend "Kirt" had kicked her out. 4/04/12RP 54. She said that, while she was walking down the road, Kirt had tried to hit her with his truck. 4/04/12RP 55. As Ms. Brown was talking to Ms. Tuck, she saw Mr. McPherson driving back and forth in front of her house in his truck; she recognized him because he lives nearby. 4/04/12RP 55, 77.

Ms. Demintieff's truck suffered damage to the fender, bumper and tire. 4/04/12RP 47. "[T]here was a dent in the front of the fender, the bumper was shoved over and most of the impact was to the tire and bent the tie rod [sic]." 4/04/12RP 47. The State presented no evidence to show the dollar value of the damage caused.

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[2] Ms. Demintieff testified her son was "upset" while they were sitting in the truck after she drove down Ladiges, but that was before Mr. McPherson hit her truck. 4/04/12RP 45. There was no testimony about the children's reaction *after* the truck was hit.

The State charged Mr. McPherson with second degree assault with a deadly weapon of Ms. Tuck (count I); second degree assault with a deadly weapon of Ms. Demintieff (count II); second degree assault with a deadly weapon of K.H. (count III); second degree assault with a deadly weapon of P.H. (count IV); second degree malicious mischief (count V); and reckless driving (count VI). CP 68-70.

Ms. Tuck did not testify at the jury trial. The jury found Mr. McPherson guilty of all counts as charged. CP 101, 103-07.

Additional facts are included in the relevant argument sections.

E. ARGUMENT

1. THE STATE DID NOT PROVE SECOND DEGREE ASSAULT AS CHARGED IN COUNTS III AND IV BECAUSE THE STATE DID NOT PROVE MR. McPHERSON SPECIFICALLY INTENDED TO ASSAULT THE TWO PASSENGERS IN THE TRUCK

It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 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); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a conviction, the question 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. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

Here, Mr. McPherson was charged in counts III and IV with second degree assault with a deadly weapon for each of the two passengers in Ms. Demintieff's truck. CP 68-70; RCW 9A.36.021(1)(c). "[U]nder the common law, 'specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree.'" State v. Abuan, 161 Wn. App. 135, 154-55, 257 P.3d 1 (2011) (quoting State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). If the "to convict" jury instruction identifies a specific victim for each count of second degree

assault, the State must prove beyond a reasonable doubt that the defendant had a specific intent to create the apprehension of bodily harm or to cause bodily harm for each named victim. Id. at 156 (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (stating that "jury instructions not objected to become the law of the case")).

Here, the "to convict" instructions for counts III and IV each named a specific victim. To "to convict" instruction for count III stated the State must prove beyond a reasonable doubt that Mr. McPherson "assaulted [K.H.] with a deadly weapon." CP 83 (instruction number 10); RCW 9A.36.021(1)(c). Similarly, the "to convict" instruction for count IV stated the State must prove beyond a reasonable doubt that Mr. McPherson "assaulted [P.H.] with a deadly weapon."[3] CP 84 (instruction number 11); RCW 9A.36.021(1)(c).

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[3] The jury was also instructed on the following two common law definitions of assault:

> An assault is an act 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 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 85.

Thus, under the jury instructions in this case, the State bore the burden to prove beyond a reasonable doubt that (1) Mr. McPherson performed an act with the specific intent to inflict bodily injury on each of the two children (attempted battery) or, (2) even though he did not actually intend to inflict bodily injury, he performed an act with the specific intent to cause reasonable apprehension of bodily injury and (3) each child had a reasonable apprehension and imminent fear of bodily injury (fear in fact). Abuan, 161 Wn. App. at 155. The State did not bear its burden because the State did not prove Mr. McPherson was even aware that the two children were in the truck or that he intended to injure them or to cause them fear of injury.

In Abuan, the defendant was convicted of two counts of second degree assault with a deadly weapon after a drive-by shooting at a house where one brother was inside the house and the other was inside the garage. 161 Wn. App. at 141-42. Bullets hit only the garage. Id. at 154. The trial court provided separate "to convict" jury instructions for each brother, which instructed the jury they must find the defendant assaulted each victim. Id. at 145, 155. Under these circumstances, the State bore the burden to prove Abuan's specific intent to assault each victim. Id. at 155-56. But there was no evidence that Abuan knew

someone was inside the house or that he intended to fire the gun at him. Id. at 159. There was also no evidence that the brother inside the house experienced actual fear in fact. Id. Thus, the State did not bear its burden to prove the elements of assault for the brother who was inside the house. Id. at 159-60.

Abuan is indistinguishable from this case. As in Abuan, the trial court provided two separate "to convict" instructions for each of the two children inside the truck. CP 83-84. Therefore, the State bore the burden to prove beyond a reasonable doubt the elements of assault for each child. Abuan, 161 Wn. App. at 156. But the State presented no evidence to show Mr. McPherson was aware there were two children in the truck or that he intended to assault them. The State also presented no evidence to show the children experienced actual fear in fact. Thus, the evidence was insufficient to prove the elements of the crime and the convictions for counts III and IV must be reversed and the charges dismissed. Abuan, 161 Wn. App. at 159-60.

2. THE STATE DID NOT PROVE THE ELEMENTS OF SECOND DEGREE MALICIOUS MISCHIEF BECAUSE THE STATE PRESENTED NO EVIDENCE OF THE DOLLAR VALUE OF THE DAMAGE CAUSED TO MS. DEMINTIEFF'S TRUCK

As stated, the State bears the burden to prove every element of the crime beyond a reasonable doubt. Apprendi, 530 U.S. at 477; Winship, 397 U.S. at 364; U.S. Const. amend. XIV; Const. art. I, § 3.

To prove the crime of second degree malicious mischief as charged in this case, the State was required to prove beyond a reasonable doubt that Mr. McPherson knowingly and maliciously caused "physical damage" to Ms. Demintieff's truck "in an amount exceeding $750." CP 90-91; RCW 9A.48.080(1)(a).

Because "[t]he sum of the damage caused is precisely what determines the degree of the offense," it is "a true element that must be proved beyond a reasonable doubt." State v. Timothy K., 107 Wn. App. 784, 789, 27 P.3d 1263 (2001). To prove the element, the State must introduce some evidence of the actual dollar value of the damage caused. See State v. Newcomb, 160 Wn. App. 184, 192, 246 P.3d 1286 (2011). In Newcomb, for example, the State submitted a $7,000 estimate of the cost of repairing the damaged property. This was sufficient to prove beyond a reasonable doubt that Newcomb caused

damage to the property of another in excess of $1,500. Id. at 192-93; former RCW 9A.48.070 (1983).

Here, by contrast, the State submitted *no* evidence of the actual dollar amount of damage caused to Ms. Demintieff's truck. Ms. Demintieff provided only a general description of the damage. 4/04/12RP 47. She said the fender had a dent, the bumper was "shoved over," the tie rod was bent, and the tire was damaged. 4/04/12RP 47. There was no evidence of how much it would cost to repair this damage.

The deputy prosecutor blatantly admitted this deficiency during closing argument when she stated, "the State did not give you any evidence of the value, the dollar value of the damage to . . . [t]he truck that Ms. Demintieff was driving." 4/05/12RP 102. To make up for the deficiency of proof, the prosecutor invited the jury to "infer from your own experience whether [the damage described by Ms. Demintieff] was over or under $750." 4/05/12RP 102. But such a suggestion was improper. The State may not rely upon guess, speculation, or conjecture to prove an element of the crime. Colquitt, 133 Wn. App. at 796. In order to infer the dollar amount of the damage from only a

general description of the damage, the jury would have to rely on speculation and conjecture.

Because the State did not prove the dollar value of the damage caused, the conviction for second degree malicious mischief must be reversed. Timothy K., 107 Wn. App. at 789.

3. THE COURT ERRED IN INCLUDING THE PRIOR OREGON CONVICTION IN THE OFFENDER SCORE BECAUSE THE STATE DID NOT PROVE THE OFFENSE WAS COMPARABLE TO A WASHINGTON FELONY THAT WOULD HAVE BEEN INCLUDED IN THE OFFENDER SCORE

At sentencing, the State alleged Mr. McPherson's criminal history consisted of one 2004 conviction from Oregon for second degree assault. 4/16/12RP 125. Defense counsel objected, arguing the conviction was comparable only to a class C felony in Washington and therefore "washed out" and could not be included in the offender score. 4/16/12RP 125-27. The court overruled the objection and counted the conviction as two points in the offender score. 4/16/12RP 127; CP 109.

An out-of-state conviction may be included in the offender score only if it is comparable to a Washington offense that would be included in the offender score. RCW 9.94A.525(3) ("Out-of-state convictions

for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.").

Courts apply a two-part test to determine the comparability of an out-of-state conviction. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). First, the court compares the elements of the out-of-state crime with the comparable Washington offense. If the elements are comparable, the out-of-state conviction is equivalent to a Washington conviction and may be included in the offender score. Lavery, 154 Wn.2d at 254. If the elements of the out-of-state crime are different or broader, the sentencing court must examine the defendant's conduct underlying the prior conviction to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the out-of-state offense. State v. Lopez, 147 Wn.2d 515, 521-23, 55 P.3d 609 (2002); State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

Here, the State alleged Mr. McPherson had a prior 2004 conviction from Oregon for second degree assault. 4/16/12RP 125. At

the time of the prior offense, Oregon's second degree assault statute provided:

> (1) A person commits the crime of assault in the second degree if the person:
> (a) Intentionally or knowingly causes serious physical injury to another; or
> (b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or
> (c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

Or. Rev. Stat. § 163.175 (1977).

The elements of second degree assault in Oregon are broader than the elements of second degree assault in Washington because in Oregon a person can be convicted of second degree assault for "*knowingly* caus[ing] serious physical injury to another." Id. (emphasis added). In Washington, by contrast, second degree assault requires a higher degree of mental culpability. Washington's second degree assault statute provides:

> (1) 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) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by

> intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, assaults another; or
>
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
>
> (g) Assaults another by strangulation or suffocation.

RCW 9A.36.021.

Thus, in Washington, to prove second degree assault, the State must prove either that the defendant *intentionally* assaulted another or that he knowingly inflicted bodily harm with the design to "cause[] such pain or agony as to be the equivalent of that produced by torture." Id. In Oregon, by contrast, the State may prove the crime by proving only that the defendant "knowingly cause[d] serious physical injury to another." Or. Rev. Stat. § 163.175(1)(a) (1977). The *mens rea* of intent represents a higher degree of mental culpability than mere knowledge. RCW 9A.08.010. Thus, the Oregon statute covers a broader range of behavior than the Washington statute. The elements of the two statutes are not comparable. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255.

The State presented no documents to show Mr. McPherson's conduct underlying the prior offense. The State did not show whether he "knowingly caus[ed] serious physical injury to another." Or. Rev. Stat. § 163.175(1)(b) (1977). Therefore, the State did not prove the offense was comparable to second degree assault in Washington. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255.

At most, Oregon's second degree assault statute is comparable to Washington's statute for third degree assault. In Washington, a person commits third degree assault if he or she "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f). A person who acts "knowingly" also acts with "criminal negligence." RCW 9A.08.010(2). Thus, a person who "knowingly causes serious physical injury to another" in Oregon may also be guilty of acting with criminal negligence and causing bodily harm accompanied by substantial pain—and therefore guilty of third degree assault—in Washington.

But third degree assault is a class C felony in Washington. RCW 9A.36.031(2). Therefore, it "washes out" of the offender score if the offender spent five consecutive years in the community without

committing a crime after being released from confinement for a felony conviction. RCW 9.94A.525(2)(c).

Here, the State alleged Mr. McPherson was convicted and sentenced for second degree assault in Oregon in 2004. 4/16/12RP 125; CP 109. The current offense was committed in January 2012. The State presented no evidence to show Mr. McPherson did not spend five consecutive years in the community during that interim period without committing any crimes. Therefore, the prior Oregon offense "washed out" and should not have been included in the offender score. RCW 9.94A.525(2)(c).

When a defendant objects to the State's allegations about criminal history at sentencing and the State fails to respond with evidence of the prior convictions, then, if the offender score is reversed on appeal, the State is held on remand to the record as it existed at the sentencing hearing. Lopez, 147 Wn.2d at 520-21. Here, counsel disputed the State's allegations of Mr. McPherson's criminal history and disputed comparability of the Oregon conviction. 4/16/12RP 125-27. Because the State did not prove the prior conviction was comparable to a Washington conviction that would be included in the offender score, and because defense counsel objected, the offender

score must be reversed and the State may not have another opportunity to prove comparability on remand. Lopez, 147 Wn.2d at 520-21.

4. THE COURT ERRED IN NOT IMPOSING A FIXED TERM OF COMMUNITY CUSTODY

A trial court may impose a sentence only as authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

RCW 9.94A.701(2) provides: "A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." Second degree assault is a "violent offense" that is not considered a "serious violent offense." RCW 9.94A.030(54)(viii). Therefore, the court was authorized to impose only a fixed term of 18 months community custody. RCW 9.94A.701(2).

The court did not impose a fixed term of community custody but instead imposed a variable term. The judgment and sentence states:

> The defendant shall be on community custody for the longer of:
>
> (1) the period of early release. RCW 9.94A.728(1)(2); or
>
> (2) the period imposed by the court, as follows [18 months].

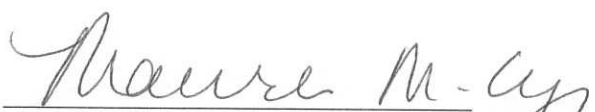
CP 111. The court was not authorized to impose a term of community custody that was equal to the period of earned early release. State v. Winborne, 167 Wn. App. 320, 328-29, 273 P.3d 454 (2012). Instead, the court was authorized to impose only a fixed 18-month term. Id.; RCW 9.94A.701(2).

The court exceeded its sentencing authority under the SRA and committed reversible error. Winborne, 167 Wn. App. at 330. Mr. McPherson must be resentenced. Id.

F. CONCLUSION

The State did not prove the elements of second degree assault for counts III and IV and those convictions must be reversed and the charges dismissed. The State also did not prove the elements of second degree malicious mischief and that conviction must also be reversed. Finally, Mr. McPherson must be resentenced because the court erred in including his prior Oregon conviction in the offender score and in not imposing a fixed term of community custody.

Respectfully submitted this 28th day of September, 2012.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30805-7-III
	)	
KIRT MCPHERSON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2012.

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