

NO. 30805-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

KIRT ANTHONY MCPHERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 12-1-00029-0

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

The facts and procedural history recited in The Brief of Appellant are sufficient to give the Court an outline of the conduct of Mr. McPherson which resulted in the jury convicting him of four counts of Assault in the Second Degree - Deadly Weapon, Malicious Mischief in the Second Degree, and Reckless Driving. Additional facts are added to supplement when necessary.

B. ARGUMENT

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNTS III AND IV AND FOR MALICIOUS MISCHIEF IN THE SECOND DEGREE.

A challenge to the sufficiency of the evidence will be denied if, considering 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. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in the prosecution's favor, and the evidence is interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333,339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The court assumes the truth of the State's evidence and all inferences that the trier of fact could reasonably draw from it. *State v. Wilson*, 71 Wn. App. 880, 891, 863 P.2d

116 (1993), *rev'd on other grounds*, 125 Wn.2d 212, 883 P.2d 320 (1994).

Assault in the Second Degree

The elements of the crime of “Assault in the Second Degree – Deadly Weapon” are 1) That the defendant assaulted the victim with a deadly weapon, and 2) That the act occurred in the State of Washington. WPIC 35.19. In second degree assault cases that involve attempted battery or assault by attempt to cause fear and apprehension of injury, specific intent is a third, non-statutory, element. *State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995); *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1993), *rev denied*, 133 Wn.2d 1031 (1998). The jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving that 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.

Mr. McPherson claims there was insufficient evidence for convictions on Counts III and IV involving Ms. Demintieff’s two children, Kyler and Paityn Henderson. He incorrectly alleges that because there was no proof that he was aware that the children were in the truck, no rational trier of fact could have found that he specifically intended injure them or that he intended to cause them fear of injury. His claim must be denied because sufficient evidence was presented at trial for convictions on both counts.

The uncontested trial evidence was that Mr. McPherson and Ms. Demintieff were familiar with each other. Ms. Demintieff was close friends with Mr. McPherson's live-in girlfriend, Danielle Tuck, another victim in the case. RP at 33-34. Ms. Demintieff testified that on at least one occasion, Mr. McPherson came to her home when her children were present to pick up his daughter, Tiffany, from a play date with Ms. Demintieff's daughter, Paityn. RP at 35.

Ms. Demintieff testified that on the afternoon of January 27, 2012, Ms. Tuck called her asking for a ride. RP at 36. Ms. Demintieff testified that she was afraid to go to the location Ms. Tuck was calling from. RP at 37. She asked Ms. Tuck start walking down the road and promised to pick her up in about fifteen minutes. RP at 37. She then put her children in her pickup truck and started driving towards Ms. Tuck's location. *Id.* As she approached the intersection of Ladiges Road and Mt. Adams Highway, Ms. Demintieff could see Ms. Tuck on the shoulder next to a fence and Mr. McPherson sitting in his truck on the road next to Ms. Tuck. RP at 38-39. Ms. Tuck was waving hysterically and screaming at Ms. Demintieff. RP at 38, 44. As she approached, Mr. McPherson drove towards her, passed her vehicle, and turned aggressively down a side road behind her. RP at 39-40. Concerned by Mr. McPherson's aggression, Ms. Demintieff turned left onto Ladiges road instead of continuing towards Ms. Tuck. RP at 39. She drove

the length of the road before turning around, hoping that Ms. Tuck would have moved closer to her. RP at 40. She stopped when she again reached the intersection with Mt. Adam's Highway. RP at 40, 44. Mr. McPherson was now north of her vehicle facing south on Mt. Adams highway. RP at 44. Ms. Tuck had barely moved and was still waving Ms. Demintieff towards her, screaming at her to come get her and that Mr. McPherson was trying to run her over. RP at 45. Ms. Demintieff could hear Mr. McPherson revving his engine and yelled to Ms. Tuck that she would go get help. RP at 44-45. She testified that she was too afraid to go any closer to pick up Ms. Tuck because her children, Kyler and Paityn, were in the car with her. *Id.* Before she could move, Mr. McPherson drove towards them, stopping his pickup twenty to twenty five feet from her truck. RP at 45-46. He began revving his engine again, and Ms. Demintieff could hear him yelling but couldn't make out what he said. RP at 46. Before she could react, Mr. McPherson drove towards them and hit their truck. *Id.* After hitting the truck, he backed up and yelled "get the hell out of [here]." *Id.* Ms. Demintieff left and drove home, trying to call her boyfriend on the way, too afraid to call 9-1-1. RP at 48. She told her children "that's what happens when the roads are icy" because she "didn't want them to know the truth." *Id.*

"In the sufficiency context, [reviewing courts] consider circumstantial evidence as probative as direct evidence." *State v. Abuan*, 161 Wn. App.

135, 155, 257 P.3d 1 (2011) (citing *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004)). “We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability.” *Id.* Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Here, the jury was instructed that

The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 78. The evidence summarized above makes clear that the jury knew that Mr. McPherson was familiar with Ms. Demintieff and knew she had children. The evidence was also clear that Mr. McPherson engaged with Ms. Demintieff and her children several times in the moments leading up to the assaults, driving past them, stopping near them, and revving his engine before finally slamming into their vehicle, backing up, and yelling at them to leave. It was clear that he had ample opportunity to see who was inside the truck. Mr. McPherson does not assert that he did not recognize Ms. Demintieff, and offers no explanation as to why he would not have noticed the children, children he knew. The jury believed that Kyler and Paityn were in the truck with Ms. Demintieff and believed her testimony about Mr. McPherson’s actions in the moments leading up to the assaults. That Mr. McPherson was

fully aware of the presence of the children is a reasonably permissible inference to be drawn from these facts. It is also reasonable to infer from the aggressive nature of his acts that Mr. McPherson demonstrated an intent to either injure the children or make them fear they would be injured, just as he did with their mother.

Mr. McPherson's reliance on *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011), is misplaced. Review of the *Abuan* facts distinguishes that case from this. *Abuan* involved two brothers, Francis and Fomai Leoso, who were members of a gang. *Abuan*, 161 Wn. App. at 141. One night, Francis was in the garage of the house the two brothers lived in. *Id.* The garage door was fully open. *Id.* Fomai was inside the house on the telephone. Because the front of the house was almost completely covered by the garage, he was unable to see anything that happened in front of the garage. *Abuan*, 161 Wn. App. at 142, 159. Around midnight, Francis heard a car driving by outside the garage. *Abuan*, 161 Wn. App. at 141. Someone shouted, "N-G-C, cuz" and gunfire erupted. *Abuan*, 161 Wn. App. at 141-142. *Abuan*, a rival gang member, was eventually arrested for the shooting. *Abuan*, 161 Wn. App. at 144. He was charged with, and ultimately convicted of, two counts of Assault in the Second Degree, one against Francis and one against Fomai. *Abuan*, 161 Wn. App. at 145-146. *Abuan* did not appeal his conviction for the assault against Francis but did appeal the assault against Fomai. *Abuan*,

161 Wn. App. at 154. The court reversed the Fomai conviction, holding

Viewing the evidence in the light most favorable to the State, no trier of fact could have found that Abuan specifically intended to assault Fomai. There is no evidence that Abuan knew Fomai was at the house or that Abuan intended to fire the gun at Fomai. Francis, his younger brother, and his uncle were in the garage. The attached garage covered most of the front of the house and, when shots were fired, Fomai was in the house on the telephone and could not see the shooting. No shots hit the house, although bullets hit the garage. A crime scene technician detected bullet damage only to the garage frame and door . . . no trier of fact could have found all the elements of the crime beyond a reasonable doubt.

Abuan, 161 Wash. App. at 159-160.

Underlying the *Abuan* court's reasoning is the reality that all evidence in that case led to an inference that Abuan would have been *unable* to see Fomai. Additionally, there was no evidence to suggest that, despite the fact that he couldn't see him, Abuan somehow knew Fomai was in the house. Because of these facts, no inference could be made as to a specific intent to assault him. The fact that Abuan fired only at the garage made it even less likely that Abuan either knew Fomai was in the house or intended to assault him.

Kyler and Paityn Henderson's situation is not that of Fomai Leoso. It is almost identical to that of his brother Francis, who was visible in the garage. All evidence presented in this case indicates that, like Francis, Kyler and Paityn were in a position to have been seen by Mr. McPherson. The jury reasonably and correctly inferred that he intended to assault them along with their mother.

Malicious Mischief in the Second Degree

Mr. McPherson alleges that because there was no direct evidence of the monetary value of the damage caused to the truck Ms. Demintieff was driving, there was insufficient evidence for the jury to convict Mr. McPherson of Malicious Mischief in the Second Degree. Because there was sufficient evidence of damage presented for the jury to draw a reasonable inference that the monetary amount of the damage was greater than seven hundred and fifty dollars, his claim must be denied.

The elements of Malicious Mischief in the Second Degree are knowingly and maliciously causing physical damage to the property of another in an amount exceeding seven hundred and fifty dollars. RCW 9A.48.080. Knowing and malicious damage less than seven hundred and fifty dollars is Malicious Mischief in the Third Degree. RCW 9A.48.090.

Here, the jury was instructed on both Malicious Mischief in the Second Degree and the lesser included offense of Malicious Mischief in the Third Degree. CP 90-93. Testimony regarding the damage to the truck Ms. Demintieff was driving clearly showed fairly extensive damage: a dent in the fender, misplaced bumper, and a bent tie rod. RP at 47. The jury was given a picture of the damaged vehicle taken by law enforcement the day after the

assault. *Id.* The officer who took the picture, Sheriff's Deputy Danielle Moszeter, described the picture to the jury, again describing that "the front driver's side bumper appeared it had been pushed in and up. There was also damage to the front wheel well and there was paint transfer and a dent to the top right about here." RP at 64.

The jury was instructed that circumstantial and direct evidence are equally reliable. Courts are to consider circumstantial evidence equally to direct evidence in determining whether sufficient evidence exists for a conviction, *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (citing *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975)), and must draw all reasonable inferences from the evidence in the favor of the prosecution. Circumstantial evidence is evidence from which, based on common sense and experience, a reasonable inference may be drawn about something that is at issue. WPIC 5.01. The jury was given the choice to convict Mr. McPherson of Malicious Mischief in the Third Degree if they were unable to determine that the damage presented to them was less than seven hundred and fifty dollars. They did not make that choice. Their common sense and experience combined with the evidence of damage presented to them led them to the reasonable inference that the damage caused was greater than seven hundred and fifty dollars. This Court should deny Mr. McPherson's request that his conviction on Count V be reversed.

In the alternative, if this Court determines there was insufficient evidence provided for the jury to determine that the damage to the truck was in excess of seven hundred and fifty dollars, the proper remedy is remand for reversal of the Malicious Mischief in the Second Degree Conviction and entry of a judgment and sentence for Malicious Mischief in the Third Degree. *State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (If evidence insufficient to convict of crime charged, but sufficient to support lesser degree, court may remand for entry of judgment and sentence on lesser degree). The evidence in this case clearly supports a conviction on that charge.

2. IT WAS ERROR TO INCLUDE MR. MCPHERSON'S OREGON CONVICTION IN HIS OFFENDER SCORE.

The State concedes that Oregon's Assault in the Second Degree statute is broader than that of Washington and that the record before the sentencing court was insufficient to prove that the conduct underlying the Oregon offense would have violated Washington's Assault in the Second Degree statute. Remand for resentencing is appropriate.

3. THE COURT ABUSED ITS SENTENCING DISCRETION IN IMPOSING MR. MCPHERSON'S COMMUNITY CUSTODY.

"Under RCW 9.94A.701, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned

release but instead, it must determine the precise length of community custody at the time of sentencing.” *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). The State concedes that it was error for the court to sentence Mr. McPherson to an indeterminable amount of community custody based on his period of earned release. Per RCW 9.94A.701, the correct term of custody for Mr. McPherson’s convictions is eighteen months. Remand is appropriate for resentencing as to the community custody portion of the sentence.

C. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm Mr. McPherson’s convictions and remand for resentencing.

Respectfully submitted this 14th day of December, 2012.

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COURT OF APPEALS OF WASHINGTON
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STATE OF WASHINGTON,

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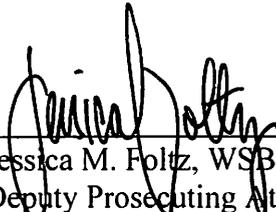
COURT OF APPEALS NO. 30805-7-III

DECLARATION OF MAILING

I, Jessica M. Foltz, state that on December 14, 2012, I sent a copy of the Brief of Respondent to: David L. Donnan at wapofficemail@washapp.org. Email service was per agreement.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14 day of December, 2012.



Jessica M. Foltz, WSBA No.41866
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5 COURT OF APPEALS OF WASHINGTON
6 DIVISION III

7 STATE OF WASHINGTON,

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DECLARATION OF MAILING

10 KIRT ANTHONY MCPHERSON,

11 Appellant.

12 I, Shirley James, state that on December 14, 2012, I deposited in the United States mails
13 by first class mail, proper postage affixed a copy of the State's Brief of Respondent to: Kirt
14 McPherson.

15 I certify under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct.

17 DATED this 14 day of December, 2012.

18 

19 Shirley James
20 Administrative Assistant to
21 Jessica M. Foltz, Deputy Prosecuting Attorney