



TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT..... 3

THE STATE FAILED TO PROVE MR. SMITH  
SPECIFICALLY INTENDED TO ASSAULT MS.  
WILKS AND MR. SUDDUTH..... 3

1. The State bears the burden of proving each of the essential  
elements of the charged offense beyond a reasonable doubt. .... 3

2. The State failed to prove beyond a reasonable doubt that Mr.  
Smith specifically intended to assault either Ms. Wilk or Mr.  
Sudduth. .... 4

3. Mr. Smith is entitled to reversal of his conviction with  
instructions to dismiss..... 6

E. CONCLUSION..... 6

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV ..... 3

FEDERAL CASES

*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 3

*Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)..... 6

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 3

*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)..... 4

WASHINGTON CASES

*Neel v. Henne*, 30 Wn.2d 24, 190 P.2d 775 (1948)..... 5

*State v. Byrd*, 125 Wn.2d 707, 887 P.2d 396 (1995)..... 4

*State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996)..... 6

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 4

*State v. Willis*, 40 Wn.2d 909, 246 P.2d 827 (1952) ..... 5

STATUTES

RCW 9A.36.021 ..... 4

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury verdict.

2. The State failed to prove Mr. Smith intended to assault Ms. Wilks and Mr. Sudduth.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Due process requires the State prove every essential element of the charged offense beyond a reasonable doubt. Second degree assault requires the State prove the defendant specifically intended to assault the victim. Where the State proved only that Mr. Smith struck Mr. Sudduth's car without more, and proving intent would require improperly pyramiding inference upon inference, did the State fail to prove beyond a reasonable doubt Mr. Smith specifically intended to hit Mr. Sudduth's car, thus entitling Mr. Smith to reversal of his conviction beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Kenneth Sudduth, Kerrie Wilks, and Perri Smith are long time residents of Vashon Island and knew each other. RP 117, 154, 214. Mr. Smith has known Mr. Sudduth as a casual acquaintance for approximately six years, and has known Ms. Wilks for approximately

eight years. RP 119, 158, 214. Mr. Sudduth and Ms. Wilks went to high school together where they met. RP 120.

Whether or not Mr. Smith and Ms. Wilks were in a dating relationship was in dispute, but on June 12, 2012, Mr. Smith drove Ms. Wilks into Seattle for her doctor's appointments. RP 159-63, 215-17. As the day progressed, the two continued to argue, which resulted in Ms. Wilks leaving Mr. Smith and taking the ferry back to Vashon alone. RP 163, 220.

Once on Vashon, at approximately 10:30 p.m., Ms. Wilks called Mr. Sudduth asking him to provide her a ride home. RP 126. Mr. Sudduth drove to the ferry terminal and saw Ms. Wilks walking alongside the road. RP 128. Mr. Sudduth pulled to the side of the road, stopped, and Ms. Wilks entered the car. RP 128. As he pulled into traffic at a slow speed, Mr. Sudduth was rear-ended by Mr. Smith. RP 131. Neither Ms. Wilks nor Mr. Sudduth was injured in the accident. RP 140-41, 177. Mr. Smith then passed Mr. Sudduth's car and went in the direction of town. RP 134. Mr. Sudduth called 911. RP 136. Mr. Sudduth gave a statement to the police but Ms. Wilks refused to cooperate with the police. RP 139, 176-77.

Mr. Smith was charged with one count of second degree assault, alleging in the single count that he assaulted Mr. Sudduth and Ms. Wilks with a deadly weapon, his pick-up truck. CP 1. Following a jury trial, Mr. Smith was convicted as charged. CP 25.

D. ARGUMENT

THE STATE FAILED TO PROVE MR. SMITH  
SPECIFICALLY INTENDED TO ASSAULT MS.  
WILKS AND MR. SUDDUTH

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 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). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable

inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State failed to prove beyond a reasonable doubt that Mr. Smith specifically intended to assault either Ms. Wilk or Mr. Sudduth. To prove the offense of second degree assault as charged here, the State was required to prove Mr. Smith assaulted Ms. Wilks and Mr. Sudduth with a deadly weapon, his truck. RCW 9A.36.021(1)(c). Because “assault” is not defined in the statute, courts look to the common law definitions. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). Under 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.” *Id.* at 713.

Mr. Sudduth had no interaction with Mr. Smith prior to the charged incident. Mr. Sudduth testified that once he picked up Ms. Wilks, he pulled into traffic and was just getting up to speed when Mr. Smith’s truck hit him from behind. RP 129-30. At best, Mr. Sudduth’s testimony indicates Mr. Smith’s striking the rear of Mr. Sudduth’s car was an accident when Mr. Sudduth suddenly pulled out from the side of the road in front of him when Mr. Smith was driving up the hill from the ferry terminal. RP 150.

Similarly, Ms. Wilks, who was a less than reliable witness, testified that she and Mr. Smith had been together that day and had argued throughout the day. RP 159-63, 215-17, 220. Ms. Wilks admitted that although she felt Mr. Smith's truck rear-end Mr. Sudduth's car, she could not provide "the details about [Mr. Smith's] driving, I can't give them to you." RP 202. The best that could be said about Ms. Wilks' testimony was that she could only testify that she felt Mr. Smith's truck hit Mr. Sudduth's car. RP 170-71.

While certainly, the jury was allowed to draw inferences from Mr. Sudduth's and Ms. Wilks' testimony, "[p]resumption[s] may not be pyramided upon presumption[s], nor inference[s] upon inference[s]." *State v. Willis*, 40 Wn.2d 909, 914, 246 P.2d 827 (1952), quoting *Neel v. Henne*, 30 Wn.2d 24, 37, 190 P.2d 775 (1948). The only thing these two witnesses could say was that Mr. Smith's truck struck Mr. Sudduth's but neither could testify that Mr. Smith specifically intended to strike the car. Thus, claiming that this testimony proved Mr. Smith's intent was to pyramid inference upon inference, which simply did not arise to proof beyond a reasonable doubt. The State failed to prove Mr. Smith specifically intended to assault Mr. Sudduth and Ms. Wilks when his truck struck Mr. Sudduth's.

3. Mr. Smith is entitled to reversal of his conviction with instructions to dismiss. Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Smith asks this Court to find the verdict was not supported and reverse his conviction.

DATED this 14<sup>th</sup> day of August 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)  
tom@washapp.org  
Washington Appellate Project – 91052  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 69834-6-I
	)	
PERRI LEE SMITH,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PERRI LEE SMITH 13074 SW MUKAI CIRCLE VASHON, WA 98070	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF AUGUST, 2013.

x \_\_\_\_\_ 

2013 AUG 14 PM 4:49  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA 98101

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710