IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON TIMOTHY WEISS, Appellant.	No. 41432-5-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Jason Weiss guilty of second degree assault with a deadly weapon after Weiss clutched the arm of a police officer who was attempting to arrest him and drove off, forcing the officer to run beside Weiss's moving vehicle for 30 to 40 feet. RCW 9A.36.021(1)(c); RCW 9.94A.535(3)(v).

On appeal, Weiss argues that the State failed to present sufficient evidence to prove he intended to use his car to strike or injure a police officer. Weiss also argues in his statement of additional grounds (SAG)[1] that the trial court erred by refusing to instruct the jury on self-defense and by denying his motion to dismiss for destruction of evidence. Because substantial evidence supports the jury's verdict finding Weiss guilty of assault with a deadly weapon (Weiss's vehicle),

[1] RAP 10.10.

the State presented sufficient evidence to show intent. Weiss produced no evidence of self-defense, and the State did not destroy any evidence that was material or exculpatory and did not otherwise act in bad faith. Accordingly, we affirm.

FACTS

On January 23, 2010, Tacoma Police Officers Eric Barry and Dean Waubanascum pulled Weiss over for speeding. While contacting Weiss—who was still in the vehicle's driver seat—Barry could "smell a bit of the odor of intoxicants" and asked Weiss for his car keys. 2 Report of Proceedings (RP) at 146. When Weiss refused, Barry told him that he was under arrest. Barry then reached inside the car for Weiss's keys and an altercation ensued. Waubanascum came around to the driver's side of the car to assist Barry.

Although Officer Barry managed to back away from Weiss's vehicle, Weiss started his car and began pulling away while holding onto Officer Waubanascum's arm. The car traveled 30 to 40 feet, accelerating to as much as 20 miles per hour, before Waubanascum freed himself from Weiss's hold. After releasing his grip on Waubanascum, Weiss sped off without headlights on. A high-speed pursuit ensued and, eventually, police arrested Weiss.

On January 25, 2010, the State charged Weiss with first degree assault for the incident involving Officer Waubanascum. RCW 9A.36.011(1)(a).[2] Weiss moved prior to trial to assert that he acted in self-defense. Weiss also moved to dismiss for destruction of evidence prior to trial. The trial court denied both motions.

Weiss represented himself at trial, which took place over five days between October 20

[2] The State also charged Weiss with third degree assault, attempting to elude a pursuing police vehicle, and reckless endangerment. Weiss does not challenge his convictions related to those charges.

and October 29. After the close of evidence, Weiss renewed his motion to instruct the jury on self-defense. The court maintained its earlier ruling, again denying the motion. On October 29, 2010, a jury found Weiss not guilty of first degree assault, but guilty of the lesser included offense of second degree assault. RCW 9A.36.021(1)(c). The jury also found by special verdict that the assault was committed against a law enforcement officer. The trial court sentenced Weiss to 60 months confinement and 18 months community custody for the second degree assault charge, to run concurrent with lesser sentences on several other counts. Weiss timely appeals his second degree assault conviction.

DISCUSSION

Sufficiency of the Evidence – Second Degree Assault

Weiss argues that the State failed to prove that he intended to use his car as a deadly weapon against Officer Waubanascum contrary to RCW 9A.36.021(1)(c) and that insufficient evidence supports his second degree assault conviction. Because the State presented sufficient evidence that Weiss used his vehicle to cause an actual battery or that, alternatively, Weiss committed assault under the common law, we affirm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Notaro*, 161 Wn. App. 654, 670-71, 255 P.3d 774 (2011). The reviewing court must accept the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v Thomas*, 150 Wn.2d

821, 874-75, 83 P.3d 970 (2004). Circumstantial evidence and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person is guilty of second degree assault if he or she "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). A person may commit second degree assault with a deadly weapon in three ways: "'(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].'" *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998) (alterations in original) (quoting *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)). The second and third alternatives, actual battery and common law assault, are applicable here.

A. Actual Battery

Second degree assault by actual battery does not require proof that the defendant specifically intended to inflict substantial bodily harm.[3] *State v. Daniels*, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031 (1998). Rather, assault by actual battery involves "an intentional touching or striking of another person that is harmful or offensive, regardless [of] whether it results in any physical injury." *State v. Stevens*, 158 Wn.2d 304, 314,

[3] First degree assault, by contrast, requires proof of specific intent to cause great bodily harm:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

RCW 9A.36.011.

143 P.3d 817 (2006) (Madsen, J., dissenting).

Here, any reasonable juror could conclude that Weiss committed actual battery when he accelerated while clutching Officer Waubanascum's arm and holding it inside the accelerating vehicle, effectively forcing Waubanascum to run alongside the speeding car. *See State v. Johnston*, 85 Wn. App. 549, 554-55, 933 P.2d 448 (1997) (evidence was sufficient to show assault by actual battery where a defendant accelerated while a security officer was reaching into the vehicle, causing the security officer's arm to be struck by the vehicle). Although it clearly did, the State did not need to show that Weiss intended to use his car to inflict *grievous bodily harm* on Waubanascum. *Daniels*, 87 Wn. App. at 155. The State needed to show only that Weiss's continuing to hold Waubanascum's arm while accelerating in his vehicle was intentional and harmful or offensive—e.g., an actual battery—*no matter the extent of injury it caused*. *See Stevens*, 158 Wn.2d at 314. The fact that Weiss continued to accelerate despite Waubanascum's orders and pleas raises a reasonable inference that Weiss's actions were intentional and that he committed an actual battery against Waubanascum.

Weiss also argues that under the circumstances in which he used it, his vehicle was not a deadly weapon. The statutory definition of a "deadly weapon" includes using a vehicle such that it is "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Here, Weiss's actions forced Officer Waubanascum to have to hang on and run alongside Weiss's moving vehicle to avoid being seriously injured. Any reasonable trier of fact could infer that, in these circumstances, Weiss's vehicle was capable of causing death or substantial bodily harm to Waubanascum.

Accordingly, the State presented sufficient evidence from which any rational juror could

find that Weiss intentionally drove his car as a deadly weapon, and that Weiss's trapping Officer Waubanascum's arm while accelerating his car in an attempt to escape arrest was an unlawful touching of Waubanascum with a deadly weapon.

B. Common Law Assault

In addition, the State presented substantial evidence from which any rational juror could find that Weiss committed common law assault by "'putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm.'" *Taylor*, 90 Wn. App. at 318 (quoting *Wilson*, 125 Wn.2d at 218).

At trial, the following exchange took place between Officer Waubanascum and trial counsel:

> Q Based upon your knowledge as well as it was occurring that night/early morning hours, were you concerned that that vehicle that [Weiss] was driving was essentially something that could be considered, you considered to potentially be a deadly weapon?
> A Yes.
> Q And based upon your personal experience, your training and your experience in terms of having been on the street now for some four years, any doubt in your mind that it could inflict great bodily harm?
> A No, I don't.
> Q Did you consider yourself fortunate that in essence you went home with what amounts to a small rug burn?
> A Extremely.

2 RP at 248-49. Waubanascum testified that he experienced fear when Weiss used his accelerating vehicle to drag him along the road. Any rational juror could have found that Weiss used his car as a deadly weapon and committed common law assault against Waubanascum.

Self-defense Jury instruction

In his SAG, Weiss argues that the trial court erred by refusing to instruct the jury on self-

defense. Weiss moved to assert self-defense and requested that the jury be instructed on self-defense prior to trial and again at the conclusion of the evidence. Because the trial court properly held that Weiss did not produce any evidence of self-defense, it did not abuse its discretion by refusing to instruct the jury on self-defense.

We review a trial court's refusal to give a requested self-defense instruction, when based upon a ruling of law, de novo. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). As a matter of law, a defendant is entitled to a jury instruction on self-defense only if the defendant produces evidence that demonstrates self-defense. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). In Washington, "[e]vidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *Walden*, 131 Wn.2d at 474 (quoting *Janes*, 121 Wn.2d at 238). The long-settled general rule is that a person is justified in using reasonable force in self-defense when facing the appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 736-37, 10 P.3d 358 (2000). But an arrestee is only justified to use force against an arresting law enforcement officer if the arrestee faces actual imminent danger of serious injury or death. *Bradley*, 141 Wn.2d at 737.

Here, the trial court ruled that the evidence did not support a finding that Weiss was in actual danger and was thereby not entitled to present a claim of self-defense against Officer Waubanascum, a duly authorized police officer performing an arrest. This finding applies the correct legal standard and our independent review of the record supports the trial court's finding. *See Bradley*, 141 Wn.2d at 737.

When first making contact with Weiss, Officers Waubanascum and Barry smelled alcohol

on Weiss and saw an improperly restrained three-year-old child in the front seat of Weiss's vehicle. They asked Weiss to surrender his car keys. When Weiss refused to do so, they advised him that he was under arrest; when he continued to resist arrest and appeared as though he may flee, they attempted to physically restrain him. These actions then led to Weiss's attempt to flee the scene in his car while still clutching Waubanascum's arm.[4] The trial court's finding that Weiss presented no evidence that he faced imminent danger of serious injury or death from the circumstances of his arrest is amply supported by the record. Accordingly, we hold that the trial court did not err by refusing to give a self-defense instruction to the jury.

Failure to Preserve Evidence

Also in his SAG, Weiss contends that the trial court erred by failing to dismiss the assault charge based on destruction of evidence. Weiss argues that the State destroyed the car used in the crime without opportunity for his private investigator to examine it. Because Weiss's car was neither material nor exculpatory evidence, and because Weiss has not shown how the State acted in bad faith, this claim lacks merit.

The State's failure to preserve evidence that is "material and exculpatory" violates a defendant's right to due process. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). Material, exculpatory evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain

[4] After Officer Waubanascum released himself from Weiss's hold, Weiss fled the scene. Weiss's vehicle eventually became stuck when Weiss attempted to drive it down railroad tracks. Weiss got out of the car and ran, taking the child with him. Weiss threw the child over a fence, hopped the fence himself and continued to run, dragging the child. However, after running a short distance, Weiss gave up, laid down, and shortly thereafter City of Tacoma Police Officer Matthew Graham arrested him.

comparable evidence by other reasonably available means." *Wittenbarger*, 124 Wn.2d at 475 (citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). If

the State fails to preserve potentially useful evidence that is not material and exculpatory, the State has not violated the defendant's right to due process unless the defendant can show that the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

Here, our review of the record does not suggest that Weiss's private investigator could have obtained any material, exculpatory evidence from the car. Weiss suggested at a motion hearing before trial that he could have shown that the height of the window openings on the car proved the assault could not have occurred as described by Officers Waubanascum and Barry. But even if the evidence discredited some of Waubanascum's description of events, the height of the windows could not rule out that Weiss assaulted Waubanascum by accelerating while Waubanascum's arm was trapped in Weiss's grasp inside the car.[5]

Further, there is no evidence that the State knew of any possible exculpatory value of the car prior to its destruction. There is also no evidence in the record of bad faith by the State. Law enforcement took photographs of the car before it was towed and Weiss received notice that the car was released to the towing company. Weiss had opportunity to examine the car before it was auctioned. Accordingly, we hold that the trial court did not err by denying Weiss's motion to dismiss for failure to preserve evidence that was not shown to be exculpatory, does not appear to be material, and was not destroyed without adequate notice to Weiss or in bad faith.

[5] We note that the general height of the car windows on this make and model of vehicle is readily available information and that officers photographed the car before it was towed.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.