NO. 44172-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MICHAEL BALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00762-2

BRIEF OF RESPONDENT

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SERVICE		
	Lise Ellner Po Box 2711 Vashon, WA 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 18, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Whether the allegation that Bale "knowingly possessed ... a stolen firearm" was sufficient to apprise him of the elements of the crime of possessing a stolen firearm?

3. Whether the evidence was sufficient to establish that Bale knew the gun was stolen?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

John Michael Bale was charged by information filed in Kitsap County Superior Court with two counts of first-degree assault with a firearm and one count of possessing a stolen firearm. CP 74. A jury found him guilty as charged. CP 119.

B. FACTS

Port Orchard Patrol Officer Charles Schandel was dispatched to Powers Park regarding the possibility of narcotics activity. 2RP 145.[1] When Schandel arrived, Bale and two other men were walking out of the

[1] All references are to the reports of proceedings of trial labeled Volume I and Volume II.

adjacent mobile home park. 2RP 145. They matched the description given him by the dispatcher. 2RP 145.

Schandel got out of his car and approached them. 2RP 145. He asked them for identification. 2RP 147. Two of them complied, but Bale, after fumbling with his wallet, asserted that he did not have any ID on him. 2RP 147.

Officer Stephen Morrison was in the park on an unrelated call at the time. 1RP 61. When he heard the dispatch call, he left the person he was speaking with and went to assist Schandel. 1RP 61.

When Morrison approached, Bale was standing at the back of Schandel's vehicle with Schandel. 1RP 64. Schandel was holding two ID cards. 1RP 64. Bale had his wallet in his hands and was looking extremely nervous. 1RP 64. He was rocking back and forth and looking around. 1RP 64. Schandel told Morrison that Bale said he did not have ID, and asked Morrison to talk to Bale. 1RP 64. While Morrison was doing that, Schandel ran the ID's of the other two men through dispatch. 2RP 149.

Morrison asked Bale if he had ID, and Bale said he did not have it or could not find it. 1RP 64. Under the circumstances Morrison's next step would normally have been to ask Bale his name. 1RP 65. Morrison did not get that far, however, because of the way Bale was acting. 1RP

65. Morrison became concerned for the officers' safety. 1RP 66.

Morrison therefore decided to put Bale in cuffs and frisk him for weapons. 1RP 66. Morrison placed his hand on Bale's wrist and asked him to turn around and put his hands behind his back. 1RP 66-67. As soon as Morrison touched him, Bale started pulling away. 1RP 67. Bale broke free and ran. 1RP 67. Morrison yelled that he was running. 2RP 149.

Bale took off toward the trailer park. 1RP 67. Morrison and Schandel pursued him and yelled for him to stop running because he was under arrest. 1RP 68, 2RP 149. Bale did not stop. 1RP 68. The officers caught up with Bale and tackled him. 1RP 70.

As Morrison tackled Bale, he heard a metallic noise. 1RP 71. Afterwards, Morrison realized that it was the sound of a pistol being racked. 1RP 72. Schandel saw that Bale had a semiautomatic handgun in his hand and was holding the gun in the firing position and was trying to point it at Morrison. 2RP 151. Schandel was immediately afraid that Bale was going to shoot Morrison. 2RP 152. Schandel yelled that Bale had gun. 1RP 72.

Morrison then saw that Bale had a semiautomatic pistol in his right hand. 1RP 72. Bale was holding the gun as a person would to shoot it. 1RP 74. He was rotating the gun toward Morrison. 1RP 75. Morrison

saw that the gun was cocked; the hammer was back. 1RP 74. That meant the gun was ready to fire. 2RP 151. With the hammer cocked, it would take much less trigger pressure to fire. 2RP 152. The only reason to cock a gun is to shoot it. 1RP 74. That made Morrison think Bale was trying to shoot them. 1RP 74. He was pointing it Morrison's chest. 1RP 75.

Schandel contemplated shooting Bale, but was afraid if he let go of Bale's hands, Bale would shoot Morrison. 2RP 153. Schandel noted that the fact that Bale had the hammer cocked would have allowed Schandel to use lethal force under departmental protocols. 2RP 166. The protocol required him to believe that someone's life was in jeopardy. 2RP 166.

Bale had a "death grip" on the gun with his finger on or close to the trigger. 2RP 153. Bale was trying to point the gun at Morrison. 2RP 154. Schandel feared that if Bale shot Morrison, he would then try to shoot Schandel. 2RP 154, 168. If he had shot Morrison, he could have easily shot Schandel as well. 2RP 170. All he would have had to do was bring his arms up. 2RP 170.

They were struggling with the gun and Bale kept trying to point it back toward Morrison. 2RP 155. At no time did Bale make any attempt to get rid of the gun. 2RP 158. He had thrown away the holster 15 feet from where they tackled him. 2RP 158. He could have also ditched the gun then. 2RP 158.

Morrison grabbed the top of the barrel with both hands. 1RP 73, 2RP153. He yelled at Bale to drop the gun. 1RP 75. Morrison leaned back to try to get out of the gun's trajectory. 1RP 76. This put Morrison, who was on his knees, off-balance. 1RP 76. Bale had the muzzle within inches of Morrison's body. 1RP 77. Morrison wrested the gun from Bale by pulling it up and over his head and behind his back. 1RP 78, 2RP 158. Morrison was very concerned and afraid for his life. 1RP 78.

After getting the gun away from him, Morrison continued to try and hold Bale with his other hand. 2RP 90, 159. Bale continued to struggle. 2RP 90. Schandel let go of Bale with one hand to call for backup. 2RP 90-92, 159.

Bale stood up and broke their grip and began running. 2RP 92, 190. Bale ran through the trailer park and back toward Powers Park. 2RP 93. Morrison and Schandel pursued him. 2RP 94. Schandel tripped over a root and fell hard enough to crack a couple of ribs. 2RP 94, 160.

Morrison caught up to Schandel at a car. 2RP 97. He ordered Bale to get down to the ground, multiple times, but he refused. 2RP 96. The car was associated with the original call. 2RP 99. There was a woman in the driver's seat. 2RP 100.

Morrison was on one side of the car and Bale was on the other. 2RP 102. Bale was yelling at the driver to start the car. 2RP 102. He was

starting to get in the car. 2RP 102. Morrison tried to edge around the car, but Bale kept moving. 2RP 104. Morrison holstered his gun and drew his taser. 2RP 104.

Morrison told Bale to get on the ground or he would tase him. 2RP 106. Bale was trying to catch his breath and looked like he was about to run again. 2RP 106. Morrison pulled the trigger on the taser, and its probes struck Bale's torso and knocked him to the ground. 2RP 106. Because he was still holding Bale's gun, Morrison was unable to cuff him. 2RP 106. Morrison kept the taser on him and told him not to move. 2RP 106. When the first shock ended, Bale attempted to sit up. 2RP 107. Morrison again told him to lay down and not move. 2RP 107. Morrison had to tase Bale two more times before he finally submitted and lay on his stomach. 2RP 107.

Meanwhile, Schandel got up and continued after them. 2RP 161. When he caught up, the other two suspects were still standing with their hands on the trunk of the patrol car. 2RP 161. Schandel patted them down quickly and put them in the back of his car. 2RP 161. Then he went to assist Morrison. 2RP 161.

Schandel found Morrison and Bale near a car in the park. 2RP 162. Bale was on his hands and knees and Morrison had his taser out. 2RP 162. Schandel handcuffed Bale. 2RP 109, 162.

After Bale was secured, Morrison inspected Bale's gun. 2RP 110. It was a 9mm semiautomatic. 2RP 117. He ejected the magazine, which was loaded with 14 rounds. 2RP 110, 117. Morrison ran the serial number on Bale's gun and determined that it had been stolen. 2RP 130.

A subsequent search of the area found Bale's ankle holster, hat and wallet, which contained his ID. 2RP 163, 167.

John Hagenson was the registered owner of the gun Bale used. 2RP 175. He noticed that the gun was missing about a week before the incident. 2RP 177. He filed a police report. 2RP 176.

It had been about three months since Hagenson had last looked at the gun before he noticed it was missing. 2RP 178. There was no forced entry into the gun safe. 2RP 178. They questioned the stepson about it, and he said he could get it back. 2RP 178.

Hagenson had known Bale's family for years. 2RP 176. Bale and his stepson had been friends for years. 2RP 176. The stepson was not permitted to possess firearms. 2RP 176. Bale was with Hagenson's stepson around the date of the incident. 2RP 177.

Bale could not have bought it from the stepson believing it was lawfully the stepson's because "they knew each other's pasts." 2RP 180. Bale and Hagenson's stepson were fairly close. 2RP 180. Bale would

have known that the stepson should not have had the gun. 2RP 180.

III. ARGUMENT

A. EVIDENCE THAT BALE PULLED AND COCKED A LOADED GUN, AND REPEATEDLY ATTEMPTED TO POINT IT AT MORRISON AT POINT-BLANK RANGE UNTIL THE OFFICERS MANAGED TO DISARM HIM WAS SUFFICIENT TO ESTABLISH THE ELEMENT OF FIRST-DEGREE ASSAULT OF INTENT TO INFLICT GREAT BODILY HARM.

Bale argues that evidence was insufficient to establish the element of first-degree assault of intent to inflict great bodily harm. This claim is without merit because evidence that Bale pulled and cocked a loaded gun, and repeatedly attempted to point it at Morrison at point-blank range until the officers managed to disarm him was more than sufficient to establish the element.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Specifically, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Although he cites to *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009), Bale fails to understand the holding of that case. *Elmi* began with a discussion of *State v. Wilson*, 125 Wn.2d 212, 219, 883 P.2d 320 (1994), which held:

> Under a literal interpretation of RCW 9A.36.011, once the mens rea is established, RCW 9A.36.011, not the doctrine

> of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.

In *Wilson*, the defendant fired several gunshots into a tavern, missing his intended victims, but striking two unintended victims. *Wilson*, 125 Wn.2d at 218. In *Elmi*, the defendant fired into a house, intending to shoot his ex-wife, resulting in fear to her children, who were also in the house. Elmi attempted to distinguish *Wilson* on the grounds that the unintended victims in *Wilson* were actually struck (common-law battery) while the unintended victims in his case were not (thus common law attempted battery or common law assault *i.e.* putting in fear).

The Supreme Court rejected the distinction, holding that so long as the defendant intended to cause great bodily harm, any resulting assault, whether by common-law battery, attempted battery or putting in fear, was a first-degree assault:

> The assault statute provides for the various methods of assault to be treated equally. As such, whether the unintended victim is actually battered (like in Wilson) or not (like in this case) is irrelevant for purposes of determining whether an assault occurred.
>
> Indeed, RCW 9A.36.011 provides that once the mens rea is established, any unintended victim is assaulted if they fall within the terms and conditions of the statute. *Wilson*, 125 Wn.2d at 219. This conclusion is supported by the plain language of RCW 9A.36.011(1)(a): "A person is guilty of assault in the first degree if he or she, *with intent to inflict* great bodily harm: ... [a]ssaults *another* with a

> firearm ...." (emphasis added). In so reasoning, we hold in accord with *Wilson*, that once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim.

Elmi, 166 Wn.2d at 217-18.

Here, the evidence clearly supports the inference that Bale intended to shoot Morrison. Bale pulled and cocked a loaded gun, and repeatedly attempted to point it at Morrison at point-blank range until the officers managed to disarm him. Intent was thus established.[2]

Having established that intent, any form of assault thereafter establishes the second element, that Bale assaulted Morrison and Schandel. Both men testified that they were in fear of being shot, satisfying the assault element. The evidence also supports an attempted battery assault against Morrison as well.

Bale's reliance on *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993), is thus misplaced. In that case the conviction was overturned because the evidence failed to establish that the defendants actually knew the house they shot into was occupied. As such, the evidence at best showed an intent to cause apprehension or fear, not an intent to cause great bodily harm. *Id.* Here, as discussed, the evidence did

[2] Indeed, the evidence also supports an inference that if he had succeeded in shooting Morrison, Bale would also have shot Schandel as well.

show that Bale intended to shoot Morrison.

Finally, Bale's discussion of cases where the requisite intent was found does not establish that the evidence was insufficient here. Although shots were actually fired in those cases, nothing in them holds that an actual shooting is required to prove intent to cause great bodily harm. The mere fact that Bale was unable to actually shoot and likely kill Morrison does not mean that the evidence is insufficient. As noted, he drew, cocked and attempted to point the loaded gun at Morrison. It was only through a great effort by the two officers that Bale was unable to actually get Morrison in his sights and a tragedy was averted. This claim should be rejected.

B. THE ALLEGATION THAT BALE KNOWINGLY POSSESSED A STOLEN FIREARM WAS SUFFICIENT TO APPRISE HIM OF THE ELEMENTS OF THE CRIME OF POSSESSING A STOLEN FIREARM.

Bale next claims, for the first time on appeal, that the State charged him in a defective information. He asserts that it failed to allege his knowledge that the gun was stolen. A common-sense reading of the charging document belies that contention, however.

The state and federal constitutions require that an information contain all essential elements, statutory and nonstatutory, of the charged offense so that a defendant may prepare a proper defense. *State v.*

Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

Because Bale challenges the information for the first time on appeal, the Court must apply the *Kjorsvik* test and liberally construe the document in favor of its validity. *Kjorsvik*, 117 Wn.2d at 105. *Kjorsvik* sets forth a two-pronged test: (1) whether the necessary facts appear by fair construction in the document, and if so, (2) whether the defendant shows that any inartful language caused him actual prejudice. *Kjorsvik*, 117 Wn.2d at 105-06.

Under *Kjorsvik*'s first prong, the Court reads the information as a whole, employing common sense. *Kjorsvik*, 117 Wn.2d at 109. The information need not include the exact statutory language if "words conveying the same meaning and import are used." *Kjorsvik*, 117 Wn.2d at 108. Knowledge or intent can fairly be implied by a description of the offense or a common understanding of the terms. *State v. Hopper*, 118 Wn.2d 151, 159, 822 P.2d 775 (1992) (the term "assault" by itself implies intent or knowledge); *see also Kjorsvik*, 117 Wn.2d at 110-11 (intent to steal element of robbery can be implied from a description of forceful and unlawful taking).

In *State v. Moavenzadeh*, 135 Wn.2d 359, 361, 364, 956 P.2d 1097 (1998), the Supreme Court held that an information charging possession of stolen property alleging only that the defendant "did possess stolen

property exceeding One Thousand Five Hundred Dollars" in value without stating that the defendant "'knowingly' possessed stolen property" was deficient. Based on that case, Bale alleges that the information here was inadequate to allege the crime of possession of a stolen firearm.

RCW 9A.56.310(1) sets forth the elements of the crime of possessing a stolen firearm:

> A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm.

The State must also prove that the defendant knew the gun was stolen. *State v. Khlee*, 106 Wn. App. 21, 24, 22 P.3d 1264 (2001). The information here alleged:

> On or about July 2, 2012, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly possess, carry, deliver, sell, or have in his or her control a stolen firearm; contrary to the Revised Code of Washington 9A.56.310 and RCW 9A.56.140.

CP 76.

Relying on *Khlee* and *State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992),[3] Bale argues that the term "knowingly" as used in the information does not cure this deficiency.

In *Khlee*, the information alleged that Khlee "did knowingly

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[3] Bale also relies on *State v. Zillyette*, 178 Wn.2d 153, 307 P.3d 712 (2013). However, that case held only that the identity of the controlled substance involved in a charge of controlled substances homicide must be set forth in the information. The case has no apparent relevance here.

possess a .380 caliber pistol, a stolen firearm." 106 Wn. App. at 23. The Court reversed the conviction because the language in the information was "not the same as saying that he possessed the gun knowing it to be stolen. One can knowingly possess a gun without knowing it to be stolen." *Khlee*, 106 Wn. App. at 25.

In *Simon*, the amended information charged that Simon "did knowingly advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and did advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." *Simon*, 120 Wn.2d at 197-98, 840 P.2d 172. *Simon* held that "[n]o one of common understanding reading the information would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18." *Simon*, 120 Wn.2d at 199.

Bale's cited cases do not support his argument. As the courts have held, one can knowingly possess a gun without knowing that it is a stolen item or knowingly promote and profit from prostitution without knowing the prostitute's age. A more reasonable understanding of the language in those cases would be that the defendant had knowledge of his possession of a gun, which happens to be stolen, or the defendant knowingly advanced and profited from prostituting one who happens to be under 18. In other words, it would be unreasonable to expect a person reading the

information to infer knowledge that the gun was stolen or knowledge that the compelled person was under 18 was an element of the crime.

But the language in the present case – "did knowingly possess ... a stolen firearm" – differs from that in *Simon* and *Khlee* because its structure indicates that the defendant had knowledge that the property was stolen property, not property that happens to be stolen. Unlike *Khlee* and *Simon*, here a person of common understanding would understand from the information that he was being charged with knowledge that he possessed a stolen firearm.

Moreover, this language comports with that suggested by the Supreme Court in *Moavenzadeh*. That Court found fault in *Moavenzadeh* because "[t]he information did not allege Moavenzadeh 'knowingly' possessed stolen property." *Moavenzadeh*, 135 Wn.2d at 361. Here the information alleged precisely that.

Finally, *Khlee* is further distinguishable because the court applied a strict preconviction, rather than the liberal post-verdict, standard that applies here. *Khlee*, 106 Wn. App. at 23. Reading the information liberally in favor of validity, it contains all the essential elements of first degree possession of a stolen firearm.

Furthermore, Bale does not assert that he suffered any prejudice as a result of the language in the charging document. As such, Bale's

argument fails. This claim should be rejected.

C. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT BALE KNEW THE GUN WAS STOLEN.

Bale next claims that the evidence was insufficient to establish that Bale knew the firearm was stolen. The standard of review is set forth above. Taking the evidence, including the circumstantial evidence in the light most favorable to the State the evidence was sufficient.

The evidence showed that the gun was taken by a good friend of Bale's in the months before Bale was arrested in possession of it. Bale was with the friend around the time of the crime. The friend was the stepson of the owner of the gun. The owner testified that Bale could not have bought it from the stepson believing it was lawfully the stepson's because "they knew each other's pasts." 2RP 180. Taking all the inferences in the light most favorable to the State, the evidence was sufficient. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Bale's conviction and sentence should be affirmed.

DATED December 18, 2013.

Respectfully submitted,
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