

No. 46687-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DARRELL PARNEL BERRIAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-03133-9
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence to establish that Darrell Berrian intended to cause the victim great bodily harm, which is an essential element of assault in the first degree.
2. The State failed to present sufficient evidence to establish that Darrell Berrian assaulted the victim with a deadly weapon.
3. The State failed to present sufficient evidence to establish that Darrell Berrian was armed with a deadly weapon when he committed the offense.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to present sufficient evidence to establish that Darrell Parnel Berrian intended to cause the victim great bodily harm, where the evidence showed that the weapon used to stab the victim had a blade approximately two inches long; that the blade did not penetrate far enough to touch any internal organs; and where even the doctor who treated the victim did not believe such an injury generally causes death or serious impairment of bodily function? (Assignment of Error 1)

2. Did the State fail to present sufficient evidence to establish that Darrell Berrian assaulted the victim with a deadly weapon, or that Darrell Berrian was armed with a deadly weapon when he committed the offense, where the evidence showed that the weapon used to stab the victim had a blade approximately two inches long; that the blade did not penetrate far enough to touch any internal organs; and where even the doctor who treated the victim did not believe such an injury could generally cause death or serious impairment of bodily function? (Assignments of Error 2 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Darrell Parnel Berrian with first degree assault (RCW 9A.36.011(1)(a)), and alleged that he was armed with a deadly weapon during the commission of the offense (RCW 9.94A.530, RCW 9.94A.533, RCW 9.94A.825). (CP 1-2) Before trial, Berrian moved to suppress the victim's identification of Berrian from a photo montage, and to exclude any in-court identification as impermissibly tainted. (CP 51-56) The trial court denied the

motion. (CP 85-88; 1RP 61)¹

The trial court also denied Berrian's mid-trial motion to dismiss the charge for lack of evidence establishing intent to inflict great bodily harm. (4RP 61-63) The jury convicted Berrian as charged. (4RP 129-30) Berrian agreed to the State's recitation of his criminal history and calculation of his offender score. (4RP 134-35) The trial court then imposed a standard range sentence totaling 209 months, but ordered that the sentence run consecutive to a sentence imposed in an earlier unrelated case. (4RP 146; CP 231, 234) This appeal timely follows. (CP 242)

B. SUBSTANTIVE FACTS

Friends Tavaris Morriel, Revvaneishea Brown, and Kamonua Brown spent the evening of November 13, 2012 together, hanging out and drinking alcohol. (3RP 70, 71, 72, 73, 157, 176-77, 179) They were all intoxicated, especially Morriel, when they decided around 11:00 PM to walk to a nearby Texaco gas station/convenience store to purchase beer. (3RP 74, 75, 155, 158, 179, 180)

The description of what transpired at the Texaco differs from witness to witness. According to Morriel, he was inside the store

¹ The transcripts will be referred to by their volume number (#RP).

purchasing beer when he saw an unknown African-American man with dreadlocks arguing with a Texaco cashier in the parking lot. (3RP 75-76, 77, 96, 97) It appeared to Morriel that the clerk was having trouble with the man, so Morriel decided to intervene and try to “calm the situation down.” (3RP 76) When he approached and told the men to “chill out”, the unknown man swung at Morriel. (3RP 76)

According to Morriel, he and the man fought in the parking lot for five to 10 minutes. (3RP 77) Eventually, they both ended up on the ground. (3RP 77) The man tried to get up, but Morriel grabbed his dreadlocks and pulled him back down. (3RP 78) The man called to a friend to come help him, and a second man then started stomping on and kicking Morriel. (3RP 78) Eventually someone pulled the second man away from Morriel, and the second man and the dreadlocked man started walking down the street away from the Texaco. (3RP 78, 80)

According to Morriel, he and the Browns began walking home, when one of the Browns alerted Morriel that someone was running towards them. (3RP 83) Morriel turned and felt something impact his lower chest. (3RP 83-84, 85-86) At first he did not realize he had been stabbed, but then he saw the dreadlocked man

holding a small knife with a blade about two inches long. (3RP 84, 86) Morriel testified that when he realized what had happened, he walked straight to his girlfriend's apartment across the street from the Texaco, where he was eventually contacted by police and medical aid personnel. (3RP 87, 89-90)

Revvaneishea Brown and Kamonua Brown testified that they exited the Texaco after they made their purchases, and saw Morriel on the ground and a man standing over him. (3RP 161, 162-63, 184m 185) According to the Browns, Morriel was bleeding and had already been stabbed. (3RP 162, 171, 185) They helped Morriel into the store and asked the clerk to call 911. (3RP 62, 167, 169, 186) Because it was dark in the parking lot, they were unable to see any physical characteristics of Morriel's assailant. (3RP 165, 166, 184, 189)

The Texaco clerk, Linson Tara, testified that he went outside to clean up the parking lot, and saw two men fighting. (3RP 54, 55) He testified that the men were both African-American, but he could not remember what they looked like. (3RP 56-57) Tara went back inside the store, and shortly after Morriel and the women came inside. (3RP 59, 60, 62) Morriel was bleeding so Tara called 911. (3RP 60, 62) Morriel eventually left but the Browns stayed and

were present when the police arrived. (2RP 61-62, 107; 3RP 63)

Dyeshanae May was Morriel's girlfriend at the time, and testified that she was asleep when Morriel came to her apartment. He told her he had been stabbed, and he was bleeding and having trouble breathing. (2RP 105, 107, 110) She also testified that he looked like he had been in a fight and seemed intoxicated. (2RP 110, 117)

Police arrived soon after and tried to talk to Morriel about what had happened. (2RP 23, 27-28) But Morriel was uncooperative and would not give responding officers many details about the incident. (2RP 27-28) Morriel was also uncooperative with medical responders. (2RP 28-29) Later, at the hospital, Morriel was more forthcoming, and told the officers that the assailant was an unfamiliar black male with dreadlocks. (2RP 35-36) Officers who responded to the Texaco station noticed blood droplets inside the store, but were unable to recover any video recordings of the incident. (2RP 52, 62, 64-65)

Morriel was treated at St. Joseph's hospital by Dr. Michelle Strong. (2RP 71, 74) Morriel had a stab wound on the left side of his chest/abdominal area, but the knife had not penetrated into his abdomen. (2RP 74-75, 76) He had no internal injuries, but had

some internal bleeding near his lung. (2RP 76, 77) He stayed in the hospital for three to four days, and was then discharged. (2RP 78) About a month later he returned to the hospital, complaining of shortness of breath. (2RP 78) Dr. Strong found that the blood had accumulated around his lung, which can become life threatening if not treated. (2RP 79, 81) So Dr. Strong performed a surgical procedure to remove the accumulated blood. (2RP 80, 82)

Although Dr. Strong said Morriel was released after a few days, Morriel testified that he remained in the hospital for two or three weeks. (2RP 78; 3RP 91) He also testified that he has a small scar from where he was stabbed and a longer scar as a result of the surgery. (3RP 92-93) He testified that he has some numbness around the wound, and that he cannot take breaths as deep as he used to. (3RP 93-94) However, Dr. Strong testified that she would not expect a stab wound like the one Morriel sustained to cause permanent loss or impairment of an organ or bodily function. (2RP 82-83, 84)

On August 6, 2013, Lakewood Police Department Investigator Jeff Martin received information from the Pierce County Jail that an inmate had information about a stabbing at a Lakewood Texaco station in the fall of 2012. (3RP 201) That inmate, Anthony

Anderson, was at the time facing drug charges and hoped that by talking to investigators he would be able to get a deal. (2RP 134, 141-42, 143; 3RP 24) Anderson told police, and testified at trial, that his cellmate said he stabbed a man at a gas station in the same Lakewood neighborhood where Morriel was stabbed. (2RP 140-41, 146, 156, 160)

Based on this information, Investigator Martin put together a photo montage containing a photo of a current inmate named Robert Ivery, who had dreadlocks. (3RP 202, 203, 204; 4RP 19-20) On August 7, 2013, Martin showed the montage to Morriel. (4RP 19-20, 22) Morriel told Martin that he chose Ivery because he most closely resembled the assailant, but Martin was only “60 percent” sure in his choice of Ivery. (3RP 112, 113; 4RP 26)

Investigator Martin then contacted Anderson, who told him that his cellmate was named Darrell Berrian. (2RP 137; 4RP 26-27) According to Anderson, Berrian told him that the police were looking for him so he cut off his dreadlocks. (2RP 169) With this new information, Martin collected eight photographs, including Berrian’s recent, dreadlock-free booking photo, and showed them to Morriel. (2RP 114; 4RP 28, 29, 30, 31-32) Morriel chose Berrian’s photograph, and said he was 100 percent certain that

Berrian was the assailant. (2RP 118, 120; 4RP 32)

IV. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1988); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

The State charged Berrian with first degree assault, pursuant

to RCW 9A.36.011(1)(a). (CP 1-2) That statute provides, in relevant part:

(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(1)(a). The State also alleged that Berrian's sentence should be enhanced because he was armed with a deadly weapon during the offense. (CP 1-2) However, the State's evidence does not establish that Berrian intended to inflict great bodily harm, or that he was armed with a deadly weapon for the purpose of the substantive crime or the special verdict.

A. THE STATE'S EVIDENCE DOES NOT ESTABLISH THAT BERRIAN INTENDED TO CAUSE GREAT BODILY HARM.

"Assault in the first degree requires a specific intent" to cause great bodily harm. State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). "Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats." State v. Choi, 55

Wn. App. 895, 906, 781 P.2d 505 (1989). “Specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.” State v. Louth, 22 Wn.2d 497, 502, 156 P.2d 672 (1945).

Great bodily harm is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ[.]” RCW 9A.04.110(4)(c). The term great bodily harm “encompasses the most serious injuries short of death.” State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

In this case, the evidence showed that Berrian stuck a knife with a blade about two inches long into Morriel’s chest/abdominal area. (3RP 84-86) Berrian inflicted one wound, and Morriel did not even realize at first that he had been stabbed. (3RP 84-86) The short blade did not penetrate far enough into Morriel’s abdomen to strike any vital organs, and caused only some internal bleeding and left a small scar. (2RP 74-75, 76-66; 3RP 92-93)

The State’s evidence certainly shows an intent to cause some injury, but it does not show an intent to cause a “most serious injury short of death.” Stubbs, 170 Wn.2d at 128. Even Dr. Strong

did not foresee the type of injury sustained by Morriel as creating a risk of death or causing permanent loss or impairment of an organ or bodily function. (2RP 82-83, 84)

The State's evidence simply does not establish that Berrian acted with the objective or purpose of causing great bodily harm to Morriel. The State therefore failed to establish all the essential elements of the crime of first degree assault, and Jones' conviction on this count must be reversed.

B. THE STATE'S EVIDENCE DOES NOT ESTABLISH THAT BERRIAN ASSAULTED MORRIEL WITH A DEADLY WEAPON OR THAT HE WAS ARMED WITH A DEADLY WEAPON.

To prove the crime of first degree assault as charged in this case, the State was required to prove that Berrian assaulted Morriel with a deadly weapon. (CP 1-2, 156) To support the special verdict, the State also had to prove that Berrian was armed with a deadly weapon. (CP 1-2, 164)

For the purpose of the substantive crime of assault, a deadly weapon is defined as "any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance . . . which, *under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]*" RCW 9A.04.110(6)

(emphasis added). Substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]” RCW 9A.04.110(4)(b).

For the purpose of the special verdict, the definition of a deadly weapon includes “an implement or instrument which has the capacity to inflict death and *from the manner in which it is used, is likely to produce or may easily and readily produce death.*” RCW 9.94A.825 (emphasis added). Whether a knife shorter than three inches is a deadly weapon is a question of fact to be determined by its capacity to inflict death and the manner in which it was used. State v. Zumwalt, 79 Wn. App. 124, 130, 901 P.2d 319 (1995); RCW 9.94A.825. Relevant to this determination are the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied and the injuries inflicted. Zumwalt, 79 Wn. App. at 130 (citing State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977)).

The knife used in this case does not meet either definition of deadly weapon because it was not used in a manner “readily capable of causing death or substantial bodily harm,” or in a

manner that was “likely to produce or may easily and readily produce death.” The knife, as described by Morriel, had a blade of about two inches, or about as long as his thumb. (3RP 86) It did not and could not easily penetrate into the abdomen where the vital organs are housed. Dr. Strong testified that no organs were injured and she would not expect Morriel’s wound to be life threatening or cause a loss or impairment of an organ or bodily function. (2RP 77, 82-83, 84) The State’s evidence did not establish that the knife was a deadly weapon under either definition, and Berrian’s first degree assault conviction and deadly weapon sentence enhancement must both be vacated.

V. CONCLUSION

Because the State failed to prove all of the elements of the crime of first degree assault, or that the knife was a deadly weapon, Berrian’s first degree assault conviction and deadly weapon sentence enhancement should both be reversed and dismissed with prejudice.

DATED: February 28, 2015



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CERTIFICATE OF MAILING

I certify that on 02/28/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Darrell P. Berrian, DOC# 377195, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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