NO. 45579-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON GUSTER CLOUD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00824-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE		
	John A. Hays 1402 Broadway Longview, WA 98632 Email: jahays@3equitycourt.com	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 30, 2014, Port Orchard, WA _____ **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
I. COUNTERSTATEMENT OF THE ISSUES 1
II. STATEMENT OF THE CASE 1
III. ARGUMENT 12
A. Cloud's claim of insufficient evidence must fail because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the state proved the elements of the charged offense beyond a reasonable doubt. 12
B. Cloud's claim that the trial court abused its discretion in excluding evidence of the existence of a DOC warrant is without merit because: (1) at the time Cloud sought to admit this evidence he failed to show that the mere existence of the warrant was relevant; and (2) even if error were to be assumed, the error was harmless. ... 18
C. Cloud's claim that the trial court improperly precluded him from making an "other suspect" argument during closing is without merit because the trial court actually allowed Cloud to make the only argument he actually proposed to make in this regard. 22
IV. CONCLUSION 24

TABLE OF AUTHORITIES

CASES

In re Welfare of Shope,
23 Wn. App. 567, 596 P.2d 1361 (1979) 18
State ex rel. Carroll v. Junker,
79 Wn.2d 12, 482 P.2d 775 (1971) 18
State v. Aguirre,
168 Wn.2d 350, 229 P.3d 669 (2010) 18, 21
State v. Baeza,
100 Wn.2d 487, 670 P.2d 646 (1983) 13
State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 13
State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 13
State v. Fankhouser,
133 Wn. App. 689, 138 P.3d 140 (2006) 21
State v. Ferreira,
69 Wn.App. 465, 850 P.2d 541 (1993) 14, 16
State v. Flett,
98 Wn.App. 799, 992 P.2d 1028 (2000) 15, 17
State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 13, 14
State v. Guloy,
104 Wn.2d 412, 705 P.2d 1182 (1985) 24
State v. Hoffman,
116 Wn.2d 51, 804 P.2d 577 (1991) 15, 17

State v. Kirwin,
165 Wn.2d 818, 203 P.3d 1044 (2009) 24
State v. Mann,
157 Wn.App. 428, 237 P.3d 966 (2010) 15, 17
State v. Mitchell,
65 Wn.2d 373, 397 P.2d 417 (1964) 16
State v. Moles,
130 Wn.App. 461, 123 P.3d 132 (2005) 13
State v. Odom,
83 Wn.2d 541, 520 P.2d 152 (1974) 15, 17
State v. Pirtle,
127 Wn.2d 628, 904 P.2d 245 (1995) 13
State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995) 18
State v. Robinson,
171 Wn.2d 292, 253 P.3d 84 (2011) 24
State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992) 13
State v. Scoby,
117 Wn.2d 55, 810 P.2d 1358 (1991) 13
State v. Walton,
64 Wn. App. 410, 824 P.2d 533 (1992) 13
State v. Wilson,
125 Wn.2d 212, 883 P.2d 320 (1994) 14, 17
State v. Woo Won Choi,
55 Wn.App. 895, 781 P.2d 505 (1989) 14, 16

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Cloud's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the state proved the elements of the charged offense beyond a reasonable doubt?

2. Whether Cloud's claim that the trial court abused its discretion in excluding evidence of the existence of a DOC warrant is without merit when: (1) at the time Cloud sought to admit this evidence he failed to show that the mere existence of the warrant was relevant; and (2) even if error were to be assumed, the error was harmless?

3. Whether Cloud's claim that the trial court improperly precluded him from making an "other suspect" argument during closing is without merit when the trial court actually allowed Cloud to make the only argument he actually proposed to make in this regard?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Aaron Guster Cloud was charged by amended information filed in Kitsap County Superior Court with one count of drive-by shooting, one count of unlawful possession of a firearm in the first degree, and one count of assault in the first degree (with a firearm enhancement). CP 34-36. A jury found the defendant guilty of all three counts and found that Cloud

committed the crime of assault in the first degree while armed with a firearm. CP 124; 125. The trial court then imposed a standard range sentence. CP 232-34. This appeal followed.

B. FACTS

In July of 2013 Cloud had been living for a few weeks with Michele Ross. RP 75-76. On July 24, 2013, at approximately 9:30 p.m. Ms. Ross was driving her silver 2006 Jetta to Bremerton after having been at her mother's house in Port Orchard. RP 79. At that time Ms. Ross had two passengers with her in her car: Cloud (who was sitting in the front passenger seat); and Brandon Egeler (who was in the back seat behind Ms. Ross). RP 77, 79-80, 102. Ms. Ross stated that Cloud's mood was "uneasy" and that he was "on edge" and "frustrated." RP 78-79.

Ms. Ross described that as she approached the intersection at Naval and 6th in Bremerton she stopped in the left turn lane and that the windows to her car were down. RP 80, 82. In the lane next to her there was a gentleman in a black truck. RP 80. Ms. Ross stated that this individual was a young kid who had a "macho kind of cocky attitude" and that he kept "starring us down." RP 80. Ms. Ross stated that Cloud was "kind of like, 'What's up,' you know." RP 83. Ms. Ross stated that as a result of this interaction she was afraid because of the verbal confrontation and "how macho guys can be." RP 84.

Ms. Ross then made a left turn and she noticed that the driver of the truck also turned left and started following her car. RP 84-85. As the pick up truck approached Ms. Ross's car on the right side Ms. Ross began to slam on her brakes, and as she did so she saw Cloud's arm come up and she heard a "pop." RP 86, 88-89. At trial Ms. Ross testified she never saw a gun and did not see Cloud with a gun. RP 87-88.[1]

Kyle Fortuna, the driver of the blue and black Mazda B2600 pickup truck, also testified at trial. RP 47. Mr. Fortuna can fairly be described as a reluctant witness who admitted that he did not want to be present in court. RP 51. Mr. Fortuna initially testified that he did not remember the events in question. RP 47. Later, however, Mr. Fortuna testified that he had been driving his truck and that he had been shot at, and that as a result he found a bullet hole in the driver's side door of his truck. RP 120, 123. Officers later photographed the bullet hole in the door and recovered the bullet from the inside of the driver's door. RP 213. The bullet appeared to be a .380 round. RP 216.

Some redacted portions of Mr. Fortuna's 911 call were also admitted at trial. RP 110; CP 259-60. In the call he describes that the shot came from a silver Jetta or Passat and that the shooter was a white male

[1] At trial, the State introduced (for impeachment purposes) a prior statement that Ms. Ross had given to an officer at the scene in which she stated that the driver of the truck and Cloud got into a dispute and Cloud pulled out a handgun and began shooting at the

passenger with a shaved head. CP 259-60. Mr. Fortuna also specifically testified that the shot was fired at his truck as he came up to the side of the silver car. RP 134. Mr. Fortuna also testified that he heard the shot, saw the silhouette of a gun, and that he then ducked. RP 134-35.

Ms. Ross also testified that after she heard the "pop," both of her passengers instructed her to make a turn and that she did so. RP 89. Ms. Ross said she was really nervous and didn't understand what was going on, so she followed their instructions and was "turning here, turning there." RP 89-90. She then drove around a neighborhood for several minutes, making several turns, and eventually she turned onto a street where she saw a police car blocking the road, giving her no choice but to stop. RP 90-91. Cloud, however, told her to "Go, go, go," but Ms. Ross testified that because the police car was right in front of her there was nowhere to go. RP 91. At this point Cloud opened his door and got out of the car and started to run. RP 92. As Ms. Ross watched Cloud run she heard another "pop." RP 92. She also saw that the police officer had his gun drawn and was screaming at Cloud to stop, but Cloud ran off. RP 93. Ms. Ross and Mr. Egeler remained in the car, and eventually other officers arrived at the scene and instructed Mr. Egeler, and later Ms. Ross, to exit the car. RP 94-95.

---

truck. RP 207-08. Ms. Ross later made a similar statement to a detective. RP 442.

Bremerton Police Officer Jonathan Meador was the officer who was blocking the road and was the officer who first made contact with Ms. Ross's car. RP 139. Officer Meador described that he had heard that call out for a report of a drive-by shooting and that he then began looking for the suspect vehicle which was a silver Jetta with black rims. RP 140-41. When Officer Meador saw the suspect vehicle he activated his emergency lights and focused his spotlight on the car. RP 145. He then stepped out of his car and stood between the opened door and the interior of the car with his sidearm out at "low-ready." RP 145. Officer Meador could see a female in the driver's seat and a male passenger with a shaved head in the front passenger seat and another male with dark hair and a "medium haircut" in the backseat behind the driver. RP 150, 188, 190. The male passenger in the front seat was moving frantically, and Officer Meador then saw the front passenger door open and the passenger stood up. RP 152. Officer Meador then heard that a handgun went off, but he did not return fire because he did not see a muzzle flash and didn't see the weapon. RP 153.

The front passenger, later identified as Cloud, then either ducked down or fell down briefly and then began running westbound on 6th Street. RP 154. Officer Meador described that Cloud was barefoot and wearing a black shirt and black shorts and had either a shaved head or "very, very,

short hair." RP 155. As Cloud was running away Officer Meador saw Cloud fall two times, once near a market and once near a bank. RP 156. Officer Meador informed CENCOM of Cloud's location and the direction of his flight, and the officer then returned to dealing with the car and its occupants. RP 158-59.

Additional officers arrived at the scene and eventually Ms. Ross and Mr. Egeler were removed from the car. RP 160. Officer Meador then walked around the car, but did not see anything of note. RP 167. He then walked down 6th street to retrace the path Cloud took when he fled. RP 167. While doing this, Officer Meador found a handgun in the approximate location where Cloud had fallen to the ground when he fled. RP 167-68, 182, 189. The handgun, which was admitted as Exhibit 17, was a "Bryco" semiautomatic .380 caliber handgun. RP 181, 335.

Other officers arrived in the area and began to look for Cloud. RP 260. Officer Inklebarger was one of the officers who responded, and he eventually spotted Cloud running in front of several residences. RP 264. Officer Inklebarger pulled his patrol car up almost parallel to Cloud and announced "police" several times. RP 265. He also yelled out "stop" and also yelled out, "Stop, Aaron, or you're going to get shot." RP 265. Cloud briefly stopped and turned towards the officer, but soon afterwards Cloud turned back and continued to run away from the officer and ran into

a field that was covered in grass and blackberry bushes. RP 265-66. Officer Inklebarger chased Cloud for some time until Cloud eventually encountered a number of other officers and was taken into custody. RP 267-68, 283-84.

After Cloud was arrested, Officer Forbragd went back to the area where the original drive-by shooting had occurred to look for any shell casings that might have fallen to the ground. RP 300-01. Officer Forbragd found a .380 caliber shell casing at the scene. RP 301, 307.[2]

At trial, the last witness called by the State was Detective Crystal Gray. RP 457. During the cross examination of Detective Gray defense counsel attempted to elicit from the witness that at the time of Cloud's arrest there was also an outstanding Department of Corrections warrant for his arrest. RP 524-25. The State objected, and the matter was then discussed outside of the presence of the jury. RP 525. The defense argued that the existence of the DOC warrant provided an alternative explanation for Cloud's flight from the pursuing officers. RP 526. The trial court then asked defense counsel if he anticipated offering any other evidence (other than the mere existence of the warrant) to connect the DOC warrant to Cloud's flight. RP 527. Defense counsel answered, "No." RP 527. The trial court then stated,

---

[2] No weapons or shell casings were found in Ms. Ross's car. RP 422.

> I am going – Mr. Houser, I am going to sustain the objection. It seems to me if the only information the jury has is that your client has a DOC warrant to argue that that was the basis of the reason he ran, without any other evidence, is speculative, and so I'm going to sustain the objection.

RP 527. The trial court further explained its ruling by noting that there was an absence of any evidence that Cloud even knew of the warrant. RP 528. The trial court further stated that if defense counsel believed he had any additional evidence then the court's ruling might be different, but without additional evidence the mere existence of the warrant was insufficient to connect it to Cloud's flight. RP 530. At no point during this discussion did defense counsel even give any indication that there was any potential evidence that would have shown that Cloud was aware of the existence of the DOC warrant.

Later, during the defense case, defense counsel called an officer to testify that when Cloud was ultimately arrested he had made a statement to the effect of, "Gee, guys, it's just a DOC warrant. All I have is a warrant." RP 546, 558. The State objected on the grounds that the statement was self-serving hearsay, but the trial court overruled the State's objection and allowed the testimony. RP 552. The trial then also asked if defense counsel was going to ask anything beyond that question regarding the statement, but defense counsel said that it was not going to ask anything

further. RP 552. The officer then was allowed to testify regarding Cloud's statement. RP 558. At no point during this later discussion did Cloud ever ask the trial court to reconsider its ruling regarding the existence of the actual DOC warrant, nor did defense counsel ever make any additional efforts to introduce testimony about the actual existence of the warrant. The defense then rested without any further discussion of the DOC warrant. RP 559.

Prior to closing argument, defense counsel asked to address the issue of "other suspect" evidence outside the presence of the jury. RP 581. Prior to trial the State had filed several written motions in limine, including one that specifically requested that there be no reference to "other suspect" evidence without prior approval from the court. CP 40. When these motions were discussed by the parties, the defense stated that they had no object to this motion, and that if an issue arose regarding this motion then the defense would raise the issue outside the presence of the jury. RP 10-11. The trial court then granted the motion in limine with the caveat that the defense could re-raise the issue outside the presence of the jury, should the need arise. RP 11.

Prior to closing argument, defense counsel explained that there had been evidence at trial that another male was in the car and that the description of the shooter given by Mr. Fortuna arguably matched both

Cloud and this other male. RP 581.

The trial asked defense counsel if he believed the evidence that was before the jury was sufficient to allow him to argue that the other suspect must have been the shooter, and defense counsel responded,

> I believe it can go toward the issue of reasonable doubt. Rather that saying there's another suspect, it goes to the issue of reasonable doubt as to whether they got the right suspect.

RP 583. The trial court then noted that there had in fact been evidence that Mr. Egeler was in the car and there was at least some evidence that he was similar in appearance to the description of the shooter. RP 584. The following exchange then took place:

> THE COURT: Is it your intention then, Mr. Houser, to say, look, you know, as a matter of reasonable doubt, we know there was someone else in the car. We know there was someone else who at least had been provided a similar description to your client, location and hair. How do you follow up with that? That that's likely our shooter?
>
> MR. HOUSER: No. That the identification by Mr. Fortuna of a white male with a shaved head could cover more than one person in that car, and that goes directly –
>
> THE COURT: That's an accurate statement, isn't it, Mr. Davy?
>
> MR. DAVY: I would agree with that. I do believe that he is proper in arguing reasonable doubt facts in or not in evidence,
>
> . . .
>
> THE COURT: I'm going to allow Mr. Houser to argue based on what's been presented at trial regarding identity,

> specifically the testimony of Mr. Fortuna regarding identity, and the other evidence related to identity of those persons in the car. I'm not going to, Mr. Houser, allow you to argue at this point that – or make a statement indicating that Brandon Egeler must have been the shooter because I don't believe the evidence at this point, applying that evidence to [*State v.] Mak*, that you can argue that he's the other shooter or he wasn't – I think you catch my drift on that.
>
> MR. HOUSER: I think I understand, and I'm sure I will be directed if I go beyond what I'm supposed to.

RP 584-86.

In closing argument defense counsel focused immediately on a "reasonable doubt" argument and argued that the evidence did not prove that Cloud was the shooter. RP 629. Rather, the defense argued that the police focused on Cloud merely because he had fled. RP 635-36. Defense counsel also repeatedly argued several theories as to why there was reasonable doubt as to whether Cloud had fired the shot at Mr. Fortuna's car. RP 632-47. Defense counsel also specifically argued that the other passenger in the car was described by one officer as having a shoved head, and thus matched the description on the 911 call. RP 639. Specifically, defense counsel argued as follows:

> Kyle Fortuna said on the 911, as he described the person who he believed shot the gun, he said it was a passenger in the Jetta or Passat – he didn't actually narrow it down – white with a shaved head. Those are the four things that he said. If I'm wrong, you'll know because you're going to listen to it, if you choose to.
>
> And so we take a look, and I guess we get to interpret

> what a shaved head is. Maybe this is a shaved head looks like. There's hair on it; both front and back there's hair. We had one police officer indicate that the other male passenger in that car had a shaved head.
>
> Now, as counsel said, he was taken out of the car at the time of the arrest behind the driver's seat. Might I suggest to you that that does not necessarily mean during the situation where someone might be in an excited situation that they would stay in their seat with a seatbelt? Might not be. But be that as it may, it's something for you to take into consideration when you evaluate this case. The identification of Mr. Fortuna is very, very vague. Take that into consideration.

RP 639-40.

III. ARGUMENT

A. CLOUD'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

Cloud argues that the evidence was insufficient to show that he acted with the intent to inflict great bodily harm, and thus the evidence was insufficient to support the jury's finding of guilt on the charge of assault in the first degree. App.'s Br. at 16. This claim is without merit because, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Under well established Washington law evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is "whether, 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." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

In the present case, Cloud was charged with assault in the first degree, and under RCW 9A.36.011 a first degree assault occurs when a person, "with intent to inflict great bodily harm ... [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.01 l(l)(a). Intent is present when a person "acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010. "Evidence of intent ... is to be gathered from all of the circumstances of the case." *State v. Ferreira*, 69 Wn.App. 465, 468, 850 P.2d 541 (1993) (*quoting State v. Woo Won Choi*, 55 Wn.App. 895, 906, 781 P.2d 505 (1989)). Evidence of a defendant's intent may be gathered from all of the circumstances. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "Specific intent cannot be presumed, but it can be inferred as a logical probability from all of the facts and circumstances." *Id.*

In the present case, the issue before this Court is whether any rational trier of fact could have found beyond a reasonable doubt that Cloud intended to cause great bodily harm. *Green*, 94 Wn.2d at 221–22. Here, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Cloud fired a gun at an occupied car, hitting the driver's door and that intent could be inferred as a logical probability from these facts.

Previous Washington courts, for example, have held that pointing a gun at a person and then firing is sufficient to establish intent to inflict great bodily injury. *See, e.g., State v. Odom*, 83 Wn.2d 541, 550, 520 P.2d 152 (1974) (jury was entitled to find intent to kill from the fact that the defendant shot at the victims). Similarly, in *State v. Hoffman*, 116 Wn.2d 51, 84–85, 804 P.2d 577 (1991), the court held that proof that a defendant fired his weapon at a victim was sufficient to justify a finding of intent to kill. As an intent to kill necessarily encompasses the intent to inflict great bodily harm, it follows that if a defendant fires his or her weapon at a victim it is reasonable to infer that the defendant intended to inflict great bodily harm. Thus, if a jury could infer intent to kill from the firing of a weapon at victims, they can surely find intent to inflict bodily injury.

Washington courts have also found that evidence that a defendant fired a gun at a victim was sufficient to show an intent to inflict great bodily harm. *See also, State v. Mann*, 157 Wn.App. 428, 439, 237 P.3d 966 (2010) (Evidence that defendant pointed gun at victim and fired was sufficient to show intent to inflict great bodily harm); *State v. Flett*, 98 Wn.App. 799, 805, 992 P.2d 1028 (2000) (In first degree assault case, evidence was sufficient when defendant fired gun into occupied car at close range, despite defendant's claim that he fired in self defense).

In the present case a rational juror certainly could have concluded, as a matter of logical probability, that by firing a gun from one speeding vehicle at another vehicle Cloud acted with the intent to inflict great bodily injury to the driver of the other vehicle. Most importantly, the shot was not fired over the car, but rather was fired directly at the driver's door on the other vehicle. In short, the evidence was clearly sufficient to each of the elements of assault in the first degree.

In the present case Cloud also cites *State v. Ferreira*, 69 Wn.App. 465, 850 P.2d 541 (1993), in which the defendant was riding in a car when someone in the car discharged a firearm at a house, injuring one of its occupants. The court in *Ferreira* held that the evidence was insufficient to find intent to injure, in part because the State did not prove that the shooters knew that anyone was inside the house or had fired at 'occupied areas' of the house. *Ferreira*, 69 Wn.App. at 469. *Ferreira*, however, is easily distinguishable from the present case because here, unlike *Ferreira*, the structure fired upon (a car) was clearly occupied.

Cloud also cites to two cases where the courts found the evidence was sufficient in part because there was evidence of prior animosity or threats between the defendant and the victim and this prior animosity was evidence of intent to inflict harm. *See* App.'s Br. at 20-22, *citing State v. Mitchell*, 65 Wn.2d 373, 397 P.2d 417 (1964); *State v. Woo Won Choi*, 55

Wn.App. 895, 906, 781 P.2d 505 (1989). While it is certainly true that evidence of prior animosity can be a relevant factor in determining intent, neither of these cases (nor any other Washington case that the State is aware of) hold that evidence of prior animosity is somehow *required* in order to prove intent. In short, motive is always relevant, but it is not an element of assault or murder. Nor is there any authority for the proposition that evidence of prior animosity is somehow required for assault in the first degree or murder.

Rather, as outlined above, well-established Washington law holds that evidence of a defendant's intent may be gathered from all of the circumstances and that specific intent can be can be inferred as a logical probability from all of the facts and circumstances. *Wilson*, 125 Wn.2d at 217. In addition, Washington courts have repeatedly held that pointing a gun at a person and then firing is sufficient to establish an intent to inflict great bodily injury. *See, Odom*, 83 Wn.2d at 550, *Hoffman*, 116 Wn.2d at 84–85, *Mann*, 157 Wn.App. at 439, and *Flett*, 98 Wn.App. at 805.

In conclusion, viewing the evidence in the present case in a light most favorable to the State, a rational jury could have easily concluded that Cloud acted with intent to inflict great bodily harm when he fired a handgun from one moving vehicle at another, occupied vehicle, striking the driver's side door of that other vehicle. Nothing more is required, and

Cloud's claim of insufficient evidence, therefore, must fail.

B. CLOUD'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF THE EXISTENCE OF A DOC WARRANT IS WITHOUT MERIT BECAUSE: (1) AT THE TIME CLOUD SOUGHT TO ADMIT THIS EVIDENCE HE FAILED TO SHOW THAT THE MERE EXISTENCE OF THE WARRANT WAS RELEVANT; AND (2) EVEN IF ERROR WERE TO BE ASSUMED, THE ERROR WAS HARMLESS.

Cloud next claims that the trial court erred in excluding evidence that there was an outstanding Department of Corrections warrant for his arrest. App.'s Br. at 27-30. This claim is without merit because Cloud has failed to show that the trial court abused its discretion and because even if the trial court did err, any error was harmless.

Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and are reviewed only for manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *In re Welfare of Shope*, 23 Wn. App. 567, 569, 596 P.2d 1361 (1979); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

With respect to the issue of the existence of the DOC warrant in

the present case, the trial court's actions must be evaluated with an accurate understanding of the sequence of events below. When the issue of the warrant first arose, the trial court specifically asked defense counsel if there would be any additional evidence offered (other than the mere existence of the warrant) to connect the DOC warrant to Cloud's flight. RP 527. Defense counsel answered, "No." RP 527. Thus, as the issue was presented to the trial court, the question was whether the existence of the warrant was relevant and admissible in the absence of any evidence that Cloud was even *aware* of the existence of the warrant. The State acknowledges that the existence of the warrant may well have been relevant to explain Cloud's flight if Cloud had presented the trial court with some evidence that he was actually aware of the warrant. At the time this issue was discussed in the trial court, however, Cloud offered no such evidence. Thus the trial court was presented with no evidence that would have provided the critical link between the existence of the warrant and the claim that the warrant was somehow the reason for Cloud's flight. The trial court made this point perfectly clear in its oral ruling when it stated,

> I am going – Mr. Houser, I am going to sustain the objection. It seems to me if the only information the jury has is that your client has a DOC warrant to argue that that was the basis of the reason he ran, without any other evidence, is speculative, and so I'm going to sustain the objection.

RP 527.

The trial court further explained its ruling by noting that there was an absence of any evidence that Cloud even *knew* of the warrant. RP 528. The trial court even went so far as to explain that if defense counsel believed he had any additional evidence then the ruling might be different, but (as the issue was actually presented to the trial court) the mere existence of the warrant was insufficient to connect it to Cloud's flight. RP 530. At no point during this discussion did defense counsel even give any indication that there was any potential evidence that would have shown that Cloud was aware of the existence of the DOC warrant.

It is true that later in the trial, during the defense case, defense counsel called an officer to testify that when Cloud was ultimately arrested he had made a statement to the effect of, "Gee, guys, it's just a DOC warrant. All I have is a warrant." RP 546, 558. This evidence would have arguably have provided the critical link between the existence of the warrant and Cloud's flight, but defense counsel did not present this evidence to the court when the issue of the DOC first arose. Thus at the time the trial court was actually asked to rule on the admissibility of the DOC warrant the court was deprived of this critical evidence. Given those circumstances, Cloud cannot show that the trial court abused its discretion. Rather, at the time of the trial court's ruling the defense simply offered no evidence that Cloud was even aware of the existence of the warrant.

Furthermore, once the potential link was established Cloud never asked the trial court to revisit its previous ruling nor did Cloud seek to introduce evidence of the actual warrant. In short, the trial court cannot be said to have abused its discretion after the link was established because the trial court was never asked to exercise its discretion after the link was established.[3]

Furthermore, even if one were to assume that the trial court's ruling was an abuse of discretion, any error was harmless. An erroneous ruling excluding evidence requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial. *Aguirre*, 168 Wn.2d at 361-62; *State v. Fankhouser*, 133 Wn. App. 689, 695, 138 P.3d 140 (2006).

In the present case the jury heard that when the Defendant was arrested he told the officers, "Gee, guys, it's just a DOC warrant. All I have is a warrant." RP 546, 558. The jury was therefore aware that Cloud made a claim at the time of the arrest that his flight had nothing to do with the shooting. The jury, however, was also able to weigh this claim against the strong evidence that supported the contrary conclusion that Cloud's flight was directly related to the shooting, especially in light of the fact

[3] In addition, as Cloud never sought to admit evidence of the existence of the DOC warrant after establishing the "missing link," Cloud failed to properly preserve the issue for appeal, as the trial court was never afforded an opportunity to exercise its discretion in

that there was no claim at trial that the shooting did not occur (just that the Cloud did not fire the actual shot). In addition, the jury found Cloud guilty of the charge of possession of firearm and thus necessarily concluded that the defendant was a convicted felon in possession of a firearm, which in and of itself would have given him a reason to flee in addition to the DOC warrant.

In short, given the actual evidence at trial and the fact that the jury heard Cloud's claim that he ran due to a DOC warrant, there simply is no reasonable possibility that the outcome of the trial would have differed had the jury heard additional testimony regarding the existence of the DOC warrant. Cloud's claim, therefore, must fail.

C. CLOUD'S CLAIM THAT THE TRIAL COURT IMPROPERLY PRECLUDED HIM FROM MAKING AN "OTHER SUSPECT" ARGUMENT DURING CLOSING IS WITHOUT MERIT BECAUSE THE TRIAL COURT ACTUALLY ALLOWED CLOUD TO MAKE THE ONLY ARGUMENT HE ACTUALLY PROPOSED TO MAKE IN THIS REGARD.

Cloud next claims that the trial court denied the defendant his "constitutional right to present relevant, exculpatory evidence in his defense" when it made its ruling regarding the use of an "other suspect" argument during closing arguments. App.'s Br. at 33. This claim is

---

full view of the "missing link" evidence.

without merit because the trial court did not actually exclude the defense from presenting any evidence, and the record does not show that Cloud actually sought to argue anything further than what the trial court actually allowed the defense to argue in closing.

In the present case the record does not show that defense counsel was actually precluded from making any proposed argument that he actually sought to make. The record for instance, shows that defense counsel asked for clarification because he wanted to argue as part of reasonable doubt argument that there was some doubt that the police got the right suspect. RP 583. The trial court specifically ruled that counsel could make this argument regarding identity. RP 584-86. In addition, the trial court specifically asked defense counsel if he intended to go further and argue that Mr. Egeler (the other suspect) must have been the shooter, and defense counsel specifically answered "No." RP 584.

It is true that that the trial court did ultimately rule that it would be improper for defense counsel to argue that "Brandon Egeler must have been the shooter," but this ruling, even if technically incorrect, was clearly harmless and caused absolutely no prejudice to the defense because defense counsel had informed the court that he had no intention of making such an argument.

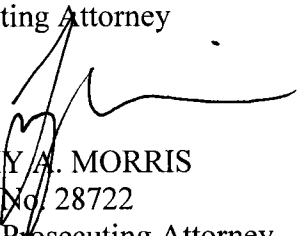
In short, Cloud's claim is without merit both because (1) this issue was not properly preserved for appeal (as the defense did not actually seek to make any such argument or object to the trial court's ruling)[4]; and (2) the trial court's ruling, even if erroneous, was clearly harmless because defense counsel affirmatively stated he had no intention of making such an argument.[5]

IV. CONCLUSION

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

DATED December 30, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

---

[4] The general rule is that a party must raise an issue at trial to preserve the issue for appeal, unless the party can show the presence of a "manifest error affecting a constitutional right." *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011), (*quoting State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)).

[5] Even under the more stringent constitutional error analysis, any error regarding the court's ruling on this issue would be harmless because defense counsel affirmatively stated he had no intention of arguing that Mr. Egeler must have been the shooter. The trial court's ruling thus only precluded defense counsel from making an argument he stated he had no intention of making. Under any analysis it is clear beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the constitutional error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)("A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.").

KITSAP COUNTY PROSECUTOR

December 30, 2014 - 7:33 PM

Transmittal Letter

Document Uploaded: 5-455790-Respondent's Brief.pdf

Case Name: State v Aaron Cloud
Court of Appeals Case Number: 45579-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Jeremy A Morris - Email: jmorris@co.kitsap.wa.us

A copy of this document has been emailed to the following addresses:

jahays@3equitycourt.com
jahayslaw@comcast.net