

65609-1

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NO. 65609-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN WEIBLE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

There was insufficient evidence of intent to inflict great bodily harm to support appellant's first degree assault conviction.

Issue Pertaining to Assignment of Error

When the evidence is viewed in the light most favorable to the State, was there sufficient evidence to prove the specific intent to inflict great bodily harm?

B. STATEMENT OF THE CASE¹

1. Procedural History

John Weible was charged by amended information with first degree assault with a firearm (domestic violence). CP 22-23. A jury found Weible guilty as charged. CP 36. The jury also returned special verdicts finding Weible was armed with a firearm and the crime was an aggravated domestic violence offense. CP 37-38. Weible was sentenced to 170 months, which is within the standard range including enhancements. CP 55-71. Amended notice of appeal was timely filed on July 1, 2010. CP 57.

2. Substantive Facts

¹ 1RP refers to the verbatim report of proceedings of September 3, 2009. 2RP refers to the verbatim report of proceedings of December 2, 2009. 3 RP refers to the verbatim report of proceedings of June 7, 8, 9, 10, 11, and 23, 2010, which are sequentially numbered.

John Weible began a relationship with Doris Elaine Berger in early 2007. 3RP 77. Several months later Weible moved in with Berger, who also lived with five of her daughters. 3RP 79, 131. The relationship between Berger and Weible began to deteriorate over the next two years. 3RP 88-90. Weible began to exhibit anger problems that made Berger uncomfortable and concerned for her children. 3RP 89, 99. These “flashes of anger” were generally resolved by Weible leaving the room. 3RP 89.

Berger eventually asked Weible to move out of the house they shared. 3RP 90. Weible started to move his possessions back to his home and Berger “thought he was accepting of it.” 3RP 90. Weible, however, was not moving out quickly enough so on June 29, 2009, Berger had her son give Weible a thirty day notice to vacate. 3RP 91-92. Berger’s son also arranged the locks so that Weible only had access to the garage and a bedroom. 3RP 90. After that Weible began to slowly move some of his possessions. 3RP 90.

On July 8, 2009, Berger was in her kitchen when she heard a sound from outside Weible’s bedroom. Berger asked Weible what he was doing and in response Weible asked her to come talk to him. 3RP 96. As Berger approached she saw a gun pointing at her. 3RP 96. When Berger saw the gun, she grabbed a chair that was in front of her but she was uncertain

whether she threw the chair. 3RP 100-101. Berger testified the only thing she remembered immediately after grabbing the chair was a single gunshot and then being on the floor bleeding. 3RP 103. Berger also remembered telling a medic she could feel a bullet moving inside of her, losing consciousness and then regaining her memory a week later in Harborview Medical Center. 3RP 103-104.

Berger's daughter testified she saw Weible shoot her mother and she heard five or six gunshots. 3RP 134. Berger's friend, Rosemary Nelson, saw Weible point a gun in Berger's face and heard him say, "You got anything to live for?" 3RP 149. Nelson testified Berger responded, "I can't believe you are doing this in front of my children," then Berger picked up a chair and lunged at Weible. Id. Nelson said Weible knocked the chair out of Berger's hand and then "there was a bang, bang, bang, bang...." Id. Nelson testified that it appeared Weible pointed the gun at Berger for his last shot. 3RP 152. Nelson admitted, however, that in her initial statement to the police she did not mention anything about Weible aiming the gun—just that he fired several shots. 3RP 156.

Weible testified he accepted that his relationship with Berger was over and was moving out of the house. 3RP 299-300. While he was moving his belongings he found a gun. 3RP 304. Weible previously told Berger he would give her the gun and that is what he went to do. 3RP

305. When he approached her, holding the gun, “everything went crazy....[t]he kids were screaming and evidently she was screaming and my mind went like that.” 3RP 307. As he went to give Berger the gun something hit him, and “all of a sudden [he heard] a pop, pop, pop.” 3RP 307. Weible testified he did not take the gun out with a purpose of shooting Berger and had no intent to cause her bodily injury. 3RP 308-309.

After the shooting, Snohomish County Sheriff’s Deputy Terry Haldeman was notified that Weible left in black Ford Bronco. 3RP 164. Halderman was familiar with Weible from previous contacts and recognized him as he drove by. 3RP 164. Halderman stopped Weible who was arrested. 3RP 166. Weible was cooperative with police. 3RP 172.

In Weible’s car police found, among other things, a copy of John Weible’s will, a .38-caliber Smith & Wesson revolver and a bag of bullets compatible with the revolver. 3RP 201-208, 236. Police found five separate bullets in the home. 3RP 192. A sixth was recovered from Berger. 3RP 128, 193. The gun recovered from Weible’s car fired the bullets. 3RP 211-212.

3. Stipulated Facts

Berger was airlifted to Harborview Medical Center and immediately taken to the operating room. 3RP 127. She had a gunshot wound to her upper right arm or shoulder. Id. The bullet traveled through her right shoulder and through her right chest and entered her abdominal cavity. Id. The path of the bullet caused several internal injuries including a significant liver laceration, a tearing of the diaphragm, a lung laceration, a bile duct laceration, a transection of the portal vein (the vein which carries blood to the liver), and internal bleeding in her chest. 3RP 127-128. During the surgery a bullet was found and removed. 3RP 128.

Berger needed three separate surgeries: a damage control laparotomy and two subsequent surgeries to repair the bile duct, repair her liver and close her abdomen. 3 RP 128. Berger was hospitalized at Harborview for fourteen days. 3RP 129. The path of the bullet was such that it could have produced great bodily harm or caused Berger's death. Id.

C. ARGUMENT

THE STATE FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT WEIBLE INTENDED TO INFLICT GREAT BODILY HARM.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. State v. Atterton, 81 Wn. App. 470 at 471-472, 915 P.2d 535 (1996). In reviewing the sufficiency of the evidence, an

appellate court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. Id. at 472.

The mens rea of first degree assault is the specific intent to inflict great bodily harm. RCW 9A.36.011(1)(a); State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994); see also State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). “Great bodily harm” means “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).

Under RCW 9A.08.010(1)(a), a person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. Although specific intent can be inferred as a logical probability from all the facts and circumstances, it can never be presumed from a defendant’s actions. Wilson, 125 Wn.2d at 217. 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. 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) rev. den. 114 Wn.2d 1002, 788 P.2d

1077 (1990)). Specific intent cannot be presumed simply from the fact of the assault, even if the assault is with a deadly weapon. Wilson, 125 Wn.2d at 217.

In order to sustain Weible's conviction for first degree assault, the evidence must show that he acted with the specific intent to cause great bodily harm. That is, he must have actually intended to cause "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). It is not sufficient to establish that he knew he would cause great bodily harm or that he was recklessly indifferent to the possibility of causing great bodily harm.

Intent has been inferred from the manner and act of inflicting the wound where a defendant repeatedly kicked a bleeding and unconscious store clerk in the head to the point of severe and permanent brain damage. State v. Pierre, 108 Wn. App. 378, 383-87, 31 P.3d 1207 (2001). Intent has also been inferred based on a defendant's previous threats and a tumultuous prior meretricious relationship. State v. Mitchell, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). Similarly, intent to inflict great bodily harm was inferred from the circumstances where an inmate assaulted an officer in his attempt to escape. State v. Anderson, 72 Wn. App. 453, 457,

864 P.2d 1001 (1994). Each of these cases has a common thread that is not present here: the intent could be inferred from a motive to proceed with some action, either for purposes of pursuing a crime, a continuing conflict in a relationship, or for escape.

Here there are no such motives. On the contrary, the evidence shows Weible was simply indifferent to the level of harm he caused Berger. 3RP 308-309. The State failed to show Weible acted with the specific intent to inflict great bodily harm. Thus, Weible's conviction should be reversed.

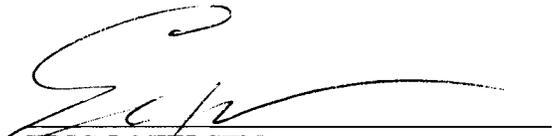
D. CONCLUSION

For the above reason, this Court should reverse Weible's conviction.

DATED this 29 day of November, 2010.

Respectfully submitted,

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v.)	COA NO. 65609-1-I
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JOHN WEIBLE,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF NOVEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] JOHN WEIBLE
DOC NO. 341608
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF NOVEMBER 2010.

x *Patrick Mayovsky*

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