

No. 36815-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WALKER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01121-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence to prove that Walker was armed with a deadly weapon at the time he assaulted the store security officer.

2. Whether it was error for the court to deny Walker's motion for new appointed counsel.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The State presented sufficient evidence to prove that Walker was armed with a deadly weapon at the time he assaulted the Target security officer.

Evidence is sufficient to support a conviction 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).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt.

“Instead, the relevant question 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*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 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 therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

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). This court must defer 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). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The jury convicted Walker of second degree assault, one element of which is that the defendant assaulted the victim with a deadly weapon. In addition to the verdict form for that charge, the court submitted to the jury a special verdict form [CP17] asking it to determine whether, at the time he committed the assault, he was armed with a deadly weapon, thus allowing the sentencing enhancement provided for in RCW 9.94A.602:

Deadly weapon special verdict—Definition. In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

The statute goes on to define deadly weapon, and Walker concedes that the knife at issue here is included in that definition. RCW 9.94A.533 provides for the term of the weapons enhancement for various categories of weapons.

Walker does not dispute that he committed second degree assault or that the knife was a deadly weapon. He only argues that

he was not “armed” with the knife because it was closed and the blade locked in place at the time he committed the assault.

“A person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). A person is armed with a deadly weapon when there is a gun under the seat in which he is riding, within easy reach. Id. The mere presence of a weapon at the scene of the crime is insufficient. “One should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).” State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002). Not only must the weapon be accessible, but there must be a nexus between the defendant, the weapon, and the crime. Id., at 572.

In Walker’s case, he was taken into custody by Target security officers after he was seen shoplifting a DVD player. He became agitated, and one of the security officers told him he’d be handcuffed unless he calmed down. [Trial RP 76] Immediately, Walker reached into his pocket and pulled out a knife. [Trial RP 76-77]. A scuffle ensued as the two officers attempted to grab Walker’s

arms, bring him under control, and take the knife away from him. [Trial RP 79-80, 149-151]. The knife was a folding one, and it was never opened during this time. [Trial RP 80]. While he had the knife in his right hand, before the officers were able to take it away from him, Walker, repeatedly tried to maneuver his hands together in an apparent effort to open the blade of the knife. [Trial RP 80, 150-152, 168]. One of the officers was eventually able to get it out of Walker's hand and place him in handcuffs. [Trial RP 80].

After the police arrived and Walker was arrested, he told Lacey Police Officer Brimmer that "I didn't want to be caught, so I pulled out my knife." "I just tried to get away." "I was just trying to intimidate them. That's all." [Trial RP 121]. The knife had switches to open and close it, plus a third switch to lock the blade in place. The blade could be opened by flipping a switch with a finger. The officer who took the knife into evidence did not recall having to unlock the knife to open it. [Trial RP 58-61].

While Walker argues that because the knife was closed it was not accessible, the facts do not support him. He was unable to open the knife because the security officers were grappling with him, not because the knife was inaccessible. His statements to the police make it clear his purpose was to use it for

offensive purposes, although it is not necessary to prove his purpose in order to prove that it was accessible.

Viewing the evidence in the light most favorable to the State, and drawing the reasonable inferences from it, the jury had more than sufficient grounds to find that Walker was armed with a deadly weapon and his weapon enhancement should be affirmed.

2. Although Walker expressed dissatisfaction with his trial counsel and asked the court to substitute counsel, he failed to show good cause that would warrant the appointment of another attorney.

An appellate court reviews a trial court's denial of new court appointed counsel for abuse of discretion. State v. Varga, 151 Wn. 2d 179, 200, 86 P.3d 139 (2004).

[A] defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. . . . To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown of communication between the attorney and the defendant." . . . Generally a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel. (Cites omitted)

Varga, *supra*, at 200. See also State v. Schaller, 143 Wn. App. 258, 267, 177 P.3d 1139 (2007)

The Sixth Amendment does not guarantee a meaningful relationship between an accused and his counsel. In re Personal

Restraint of Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). In the opinion on Stenson's direct appeal, State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997), the Supreme Court had set forth the following factors to be considered in deciding whether to grant a motion to substitute counsel: (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. Subsequent to that opinion, a Ninth Circuit Court of Appeals decision applied the following test to determine "whether a trial court erred in failing to substitute counsel to the determination of whether an irreconcilable conflict exists between a defendant and his counsel: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." In re PRP of Stenson, *supra*, at 723-4.

Walker argues that there was an irreconcilable conflict between him and his appointed counsel and cites to United States v. Moore, 159 F.3d 1154, 1158, (9th Cir. 1998), for the proposition that if he shows irreconcilable conflict, he need not show prejudice. However, irreconcilable conflict alone is insufficient to presume prejudice. The language in Moore reads as follows:

A defendant need not show prejudice when the breakdown of a relationship between attorney and client from irreconcilable differences *results in the complete denial of counsel*. (Cites omitted, emphasis added.)

Id. Examples of complete denial of counsel cited in Moore include the attorney using racial epithets against the defendant and doing nothing more than “standing in” during sentencing. Id.

“A complete breakdown of communication which may lead to an unjust verdict is considered good and sufficient reason for withdrawal.” State v. Hegge, 53 Wn. App. 345, 350, 766 P.2d 1127 (1989). The court in Hegge considered that such a breakdown had occurred where “this matter has consumed [the attorney] and his staff for approximately 18 months, . . . he has been called as a witness by Mr. Hegge and has been forced to testify in court to Mr. Hegge’s detriment, and may be called at trial. . . .” Id.

Irreconcilable conflict requires more than an uncooperative defendant or a clash of personalities. “Counsel and defendant must be at such odds as to prevent presentation of an adequate defense.” Schaller, *supra*, at 268.

In examining the extent of the conflict, this court considers the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. If the representation is inadequate, prejudice is presumed. If the

representation is adequate, prejudice must be shown. Because the purpose of providing assistance of counsel is to ensure that defendants receive a fair trial, the appropriate inquiry necessarily must focus on the adversarial process, not only the defendant's relationship with his lawyer as such. "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (Cites omitted.)

Schaller, *supra*, at 270. In Shaller, the court found that his refusal to meet with his attorneys after the State rested its case insufficient to constitute an irreconcilable conflict. "It is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys." *Id.*, at 271.

Walker further maintains that the trial court did not undertake an adequate inquiry into the dispute between him and his attorney. "But a trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully. . . . Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record." *Id.*, at 271. Here the court gave both Walker and his attorney an opportunity to explain the specifics of their problem, as well as permitting argument from the deputy prosecuting attorney. [Trial RP 5-13].

The untimeliness of the motion was only one factor the court articulated in denying it; it also found that defense counsel had “more than adequately prepared” the case, and that Walker had refused to meet with his attorney twice on the day before trial. [Trial RP 14]. The court did take into account that the motion was first brought to its attention the morning of trial; there would be witnesses and a jury pool present and waiting. While it is not the only consideration, a court can take into account the disruption that appointing new counsel would cause to the trial schedule.

It is apparent from the record that the animosity Walker felt for his attorney did not rise to an irreconcilable conflict such that he was effectively denied an adequate defense. In fact, he received a competent and vigorous defense. His attorney prepared and argued a corpus delicti motion [Trial RP 17-29], thoroughly cross-examined the State's witnesses, and moved to bifurcate the deadly weapons enhancement portion of the trial from the guilt phase because of the wording of the jury instructions. [Trial RP 182-83]. He met with witnesses, communicated with the prosecutor, and obtained discovery. [Trial RP 10-12]. He had two visits with Walker [Trial RP 10] and made two more trips to the jail the day before trial, prepared to review the video evidence with him, but the defendant

refused to see him. [Trial RP 5]. The only reason he was unprepared to make an opening statement was that Walker would not tell him whether or not he wished to testify, not that he was otherwise unprepared for trial. [Trial RP 5-6].

Walker has not claimed that he received ineffective assistance of counsel. He has presented no evidence supporting his argument before the trial court that his case required more extensive face-to-face contact with his attorney than he received, or would have received had he not refused to see counsel. He tried to fire the same attorney twice before in a previous case, [Trial RP 9], but apparently was unsuccessful, leading to the conclusion that another judge did not find irreconcilable conflict there, either. He presumably did see the video before trial—the court provided such an opportunity, [Trial RP 29] and there is nothing in the record to indicate he did not take advantage of it.

The record supports the same conclusion the Schaller court made: “A change in counsel would not have brought about any different result. Shaller was a difficult client . . . and he would be difficult for any attorney to work with.” Schaller, *supra*, at 270. Walker’s trial counsel did an excellent job of defending him, and he has pointed to no evidence that he was in any way prejudiced by

the conflict, which he himself caused. The court acted well within its discretion in denying his motion for new counsel.

D. CONCLUSION.

There was sufficient evidence presented to the jury to support its finding that Walker was armed with a deadly weapon at the time of his assault on the security officer. The court acted within its discretion in denying Walker's motion to dismiss his appointed counsel and obtain substitute counsel. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 26th of June, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, No. 36815-3-II,
on all parties or their counsel of record on the date below as follows:

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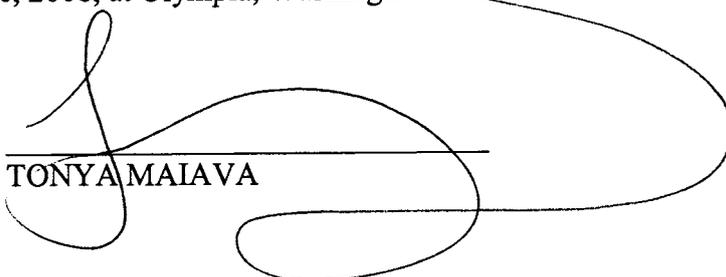
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 26th day of June, 2008, at Olympia, Washington.



TONYA MAIAVA