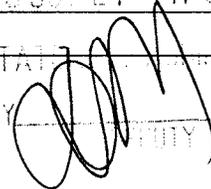


NO. 39769-2-II

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STATE OF WASHINGTON

BY  COUNTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA ELIAS BOYD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 09-1-01577-7

RESPONDENT'S BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for the jury to find all the elements of attempted murder in the first degree beyond a reasonable doubt, including that defendant acted with premeditated intent to cause the death of another?
2. Were the principles of double jeopardy followed where the trial court entered judgment on only one count, attempted murder in the first degree?
3. Should the court remand on the domestic violence court order violation to include language consistent with the holding in *In re Brooks*?

B. STATEMENT OF THE CASE.

1. Procedure

On March 23, 2009, the Pierce County Prosecuting Attorney's office (State) charged JOSHUA ELIAS BOYD, hereinafter "defendant" with one count of assault in the first degree and one count of domestic violence court order violation in Pierce County Cause No. 09-1-01577-7. CP 1-2.

On August 4, 2009, the information was amended to one count of attempted murder in the first degree and one count of domestic violence court order violation. CP 10-11.

On September 15, 2009, the information was amended a second time to include three charges: count one for attempted murder in the first degree, count two for domestic violence court order violation, and count three for assault in the first degree. CP 13-15. The case was assigned to the Honorable James Orlando for trial.

At trial, the parties stipulated that at the time of the incident, defendant had two previous convictions for violating the provisions of the domestic violence no contact court order as required to be proven beyond a reasonable doubt in Count II. RP 356.

On September 30, 2009, the jury returned the verdicts finding defendant guilty of attempted murder in the first degree, domestic violence court order violation, and assault in the first degree. CP 107-109. The jury also returned special verdicts for both the attempted murder charge and the assault in the first degree charge, finding that defendant was armed with a deadly weapon during the commission of the crime. CP 110-111.

On November 6, 2009, defendant was sentenced to a standard range sentence of 312 months, plus an additional 24 months for the sentencing enhancement, for a total of 336 months for attempted murder in the first degree. CP 115-130. Defendant was sentenced to a standard range sentence of 54 months for domestic violence court order violation.

Id. The court did not enter a judgment on the assault in the first degree conviction. CP 117; RP 564.

Defendant filed a timely notice of appeal from entry of this judgment. CP 131.

2. Facts

On September 29, 2008, the Pierce County Superior Court issued an order prohibiting defendant from having contact with Tasha Mitchell under Pierce County Cause No. 08-1-00421-1. CP 10-11; RP 171. The order was valid for two years. *Id.*

On the afternoon of March 20, 2009, defendant went to Tasha Mitchell's apartment, located at 2410 South I Street in Tacoma, Washington, to visit with his and Tasha's two children. RP 133-134. Around 9 p.m., Tasha called her mother into her bedroom and once her mother arrived, Tasha told defendant "I told you Mom was here, so why don't you leave?" RP 102. Defendant left without incident. RP 135.

Sometime after midnight on March 21, 2009, defendant returned to Tasha's apartment and began banging on the front door demanding to see his children. RP 136. Tasha informed defendant that the children were asleep. *Id.* Defendant then went to the window next to the front door and started beating on it, making a lot of noise. *Id.* Tasha was concerned that defendant would wake everyone up so she let him in. *Id.* The defendant

was being loud, boisterous and aggressive. RP 136-137. The minute Tasha opened the door she realized defendant was drunk. *Id.*

Defendant sat down on the couch and began asking Tasha for money. *Id.* When Tasha refused to give defendant money, he responded by getting louder and louder. RP 139. Tasha told defendant to leave numerous times but defendant continued to ignore her requests. *Id.* Finally, Tasha cursed at defendant and told him he needed to leave. *Id.*

Defendant jumped up from the couch, got his coat and put it on. *Id.* Defendant then walked over to the couch where Tasha was laying, pulled a knife out of his coat pocket, stood over Tasha, and began stabbing her repeatedly with the knife. RP 139-140. Defendant stabbed Tasha in her neck, her chest, her wrist, her knee, and her finger as she begged him to stop. RP 139-140, 148.

Tasha's screams woke her mother, Cheryl Mitchell¹, and her mother's boyfriend, Billy Bell. RP 104. Mr. Bell jumped out of bed and ran to the living room to check on Tasha. RP 65. Cheryl followed behind him. RP 104. Cheryl and Mr. Bell saw Tasha on the couch and defendant standing over her. RP 65. To Cheryl and Mr. Bell, it appeared at the time that defendant was punching Tasha as she tried to protect herself with a blanket. RP 68, 105.

¹ Members of the Mitchell family will be referred to by their first name to prevent confusion.

When defendant suddenly spun around, Mr. Bell saw that defendant was holding a knife and stabbing Tasha. RP 68. Mr. Bell went to the kitchen to arm himself with a knife while Cheryl called 911. RP 69, 105. When Mr. Bell left the room, defendant ran out the door. RP 70, 105.

Tasha's brother, Terry Mitchell, and Terry's girlfriend, Dominique Nason, heard Tasha's screams and ran downstairs from their apartment to check on her. RP 180, 211. Terry left to try to find defendant while Ms. Nason went inside Tasha's apartment. RP 183, 212.

When Ms. Nason entered Tasha's apartment, she saw the children near their bedroom, crying; Cheryl on the phone with 911; and Tasha standing in the hallway, covered in blood. RP 183. It looked like Tasha was about to pass out. *Id.* Ms. Nason assisted Tasha to the couch, took off Tasha's shirt, and used towels to apply pressure to Tasha's wounds. RP 186. Ms. Nason, who had previously been trained as a nurse's assistant, described Tasha's chest wound as "really, really deep." RP 187. She could see flesh. *Id.* Tasha came in and out of consciousness. *Id.*

Officer David May from the Tacoma Police Department (TPD) was the first to arrive at the scene. RP 272-273. When Officer May walked into Tasha's apartment, he immediately saw Tasha lying on a couch dressed in only underwear, holding a white washcloth up against her throat and bleeding from several areas of her body. RP 273-274.

Officer May saw that there was a significant amount of blood throughout the apartment, bloody drippings on the carpet, and on both couches. *Id.*

Tasha complained to Officer May that she was losing feeling on the right side of her body. RP 274. Officer May applied pressure to the compress on Tasha's neck and asked her if she knew who had done this to her. *Id.* Tasha looked up at Officer May, made direct eye contact with him, and said "[i]t was Joshua Boyd." *Id.*

TPD Officers Robin Seibert and Johnathan Hill provided containment of the neighborhood surrounding Tasha Mitchell's apartment in an effort to locate defendant, who had fled from the scene. RP 361, 378.

When TPD Officer Wendy Haddow-Brunk responded to the scene, she was met by Terry, who was yelling "[h]e's on J Street. Follow me, he's going to get away." RP 329-330. Officer Haddow-Brunk followed Terry and then set up a K-9 track to try to locate defendant. RP 337. The K-9 led Officer Haddow-Brunk to a black jacket that belonged to defendant. RP 340.

The K-9 signaled to Officer Haddow-Brunk that the suspect may be in the area. RP 346. Officer Haddow-Brunk saw a man on the porch of 2353 South J Street, talking on a cell phone. RP 285, 347. The man on

the phone was identified as defendant and arrested. RP 348. Officer Hill read defendant his *Miranda*² rights. RP 384.

In the meantime, the Tacoma Fire Department arrived at Tasha's apartment and took over attending to Tasha. RP 280. Tasha was taken to the Trauma Center at Tacoma General Hospital. RP 395.

TPD Officer Philip Hoschouer went to Tacoma General Hospital to speak with medical staff about Tasha's injuries. RP 300. Tasha had a laceration approximately 2 ½ inches long on the left side of her neck, a laceration on the upper part of the right side of her chest, and defensive lacerations on the top side of her right wrist, her right knee, and her left middle finger. RP 301. In Officer Hoschouer's experience, the wounds that Tasha sustained on her neck and chest were consistent with being specifically targeted areas. RP 314.

Dr. Paul Inouye, a trauma surgeon, treated Tasha for her injuries. RP 395. Dr. Inouye found that Tasha's chest wound was one to two inches deep. RP 401. He initially thought the penetration was only to the muscle level, however, when Tasha returned to the hospital a few days later for a follow-up appointment, an x-ray was taken and showed that Tasha had a collapsed lung. RP 401.

Dr. Inouye testified that a collapsed lung can be anywhere from a nuisance to life threatening. RP 402. He stated that Tasha had a

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

complication called Tension Pneumothorax, which occurs when there is a hole in the lung, the air coming into the body goes into the space between the lung surface and chest wall. RP 402-403. With each breath, more air gets into that space and it makes the hole bigger and bigger. *Id.* It can actually push the heart and the vena cava to the opposite side of the body and can be life threatening. *Id.*

Tasha was admitted to the hospital and a tube was inserted into her chest to help inflate her lung. RP 403-404. Tasha was hospitalized for almost a week. RP 147. Dr. Inouye testified that all of Tasha's wounds were consistent with being inflicted by a knife and that both the neck and the chest wound "very clearly can cause lethal injuries." RP 407.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE WAS ADDUCED FOR THE JURY TO FIND ALL THE ELEMENTS BEYOND A REASONABLE DOUBT INCLUDING THAT DEFENDANT ACTED WITH PREMEDITATED INTENT TO CAUSE THE DEATH OF ANOTHER.

Due process requires the State to bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review

is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Additionally, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences therefrom. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in a light most favorable to the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury was instructed that in order find defendant guilty of the crime of attempted murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 21st day of March, 2009, the defendant did an act which was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree; and
- (3) That the acts occurred in the State of Washington.

CP 67-106; Jury Instruction 8. Attempt consists of two elements, (1) intent, and (2) a substantial step. *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.3d 1325 (1995).

Defendant only contests the sufficiency of the evidence that proved defendant attempted to murder Tasha Mitchell. Appellant's Brief, p. 11. Specifically, defendant contends that the evidence was insufficient to prove that he acted with premeditated intent to cause the death of another. *Id.*

The jury was instructed that:

“Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditation. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.”

CP 67-106; Jury Instruction 11. Premeditation is the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999) (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 967 (1995)). Premeditation must involve more than a moment in time, however, mere opportunity to deliberate is not sufficient to support a finding of premeditation. *State v. Finch*, 137 Wn.2d at 831. Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable and the evidence supporting the jury’s finding is substantial. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

Washington State cases hold that four characteristics of the crime are particularly relevant to establish premeditation: motive, procurement of a weapon, stealth, and the method of killing. *State v. Pirtle*, 127 Wn.2d at 644.

The characteristics mentioned in *State v. Pirtle* are borne out by the evidence here. Defendant and Tasha Mitchell have had a heated relationship which resulted in two restraining orders, both in place at the time of the attack. On March 20, 2009, defendant spent several hours at Tasha Mitchell's apartment while Tasha's family was home. There appeared to be no problems until Tasha's family went to bed and defendant was told it was time for him to leave. RP 135. Around 9 p.m., Tasha called her mother into the room and said to defendant "I told you mom was here, so why don't you leave?" RP 102. Tasha testified that she did this so defendant would know she was not alone. RP 167. In addition to the heated relationship, the jury could infer that Tasha had control over when defendant could see his children. This inference is supported by Tasha's testimony that defendant had only visited his children twice that year. RP 133. Both of these factors gave defendant motive to kill Tasha.

After spending the day with Tasha and their children, defendant left but returned after midnight, this time armed with a knife. Defendant was belligerent, banging on the door demanding to see his children. RP 136. Tasha told defendant that the children were asleep. *Id.* Defendant started beating on a window and continued to make noise until Tasha finally let him inside. *Id.* Defendant's procurement of a knife during the hours between leaving Tasha's apartment and returning after midnight to

kill her lend further support to his premeditated intent. The jury could conclude that defendant thought about murdering Tasha sometime between leaving her apartment earlier that day and returning to her apartment after midnight with a knife.

Furthermore, defendant knew that Tasha's family went to bed around 9 p.m. that night. The jury could infer that defendant returned to the apartment after he knew Tasha's family was asleep so Tasha would be alone and he could murder her.

When Tasha cursed at defendant telling him to leave, defendant got up from the couch, put on his coat, walked back over to Tasha, pulled the knife out of his coat pocket, and stabbed Tasha repeatedly with the knife. RP 139-140. The jury could conclude that defendant waited for the right moment to get up from the couch, get the knife he had brought with him, and use that knife to stab Tasha repeatedly in an effort to take her life.

Defendant took a substantial step towards the commission of the murder when he armed himself with a knife and made noise outside Tasha's apartment until she let him in. When defendant decided it was time to murder Tasha, he went over to his coat and put it on because he knew his knife was in the coat pocket. He then walked back over to Tasha, pulled out the knife and started stabbing her. The jury could infer

from all of this evidence that between 9 p.m., when defendant left Tasha's apartment, and sometime after midnight when he returned to Tasha's apartment armed with a knife, that he planned how he would murder Tasha Mitchell and took substantial steps towards committing that murder.

There was sufficient evidence for the jury to conclude that defendant acted with premeditated intent to cause the death of Tasha Mitchell.

2. DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED BECAUSE JUDGMENT WAS NOT ENTERED ON THE ASSAULT IN THE FIRST DEGREE CONVICTION.

The Washington State Constitution's double jeopardy clause provides the same protection as the federal Constitution. *In re Pers. Restraint of Borrero*, 161 Wn.2d. 532, 536; 167 P.3d 1106 (2007); see U.S.Const. amend. V; Wash. Const. art. I § 9. The State can bring and a jury can consider "multiple charges arising from the same criminal conduct in a single proceeding." *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). However, the double jeopardy principles bar multiple punishments for the same offense. *Borrero*, 161 Wn.2d at 536. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense."

State v. Freeman, 153 Wn.2d at 771.

In *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), the Washington State Supreme Court held that entering judgment and sentence on multiple convictions for the same offense violated double jeopardy. In *Womac*, the defendant was charged and convicted of homicide by abuse, second-degree felony murder, and first-degree assault for the same conduct. *Id.* The trial court sentenced Womac only on the homicide by abuse conviction, but entered judgment on all three convictions declaring that both the felony murder and assault convictions were “valid” while clarifying that imposing separate punishments would violate double jeopardy provisions. *Id.* at 658.

The Court of Appeals held that entering judgment on all three convictions was a violation of double jeopardy and remanded with instructions that the trial court conditionally vacate the two non-sentenced convictions, but also noted that if the homicide by abuse conviction was overturned, the other convictions could be reinstated. *Id.* at 649.

However, the Washington State Supreme Court held that it is a violation of double jeopardy to conditionally vacate an offense with the idea that it can be reinstated if the sentenced conviction is overturned. *Id.* The Court also distinguished the *Womac* case from *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005), noting that Ward’s right against double jeopardy was not violated because judgment was entered only on one of his convictions. *Id.*

In *Ward*, the defendant was charged and convicted of both manslaughter and felony murder for the same homicide. *Id* at 144. Ward argued that it was a violation of double jeopardy for the trial court not to vacate his manslaughter conviction. *Id*. However, the Court of Appeals held that because the trial court did not enter judgment and sentence on Ward's manslaughter conviction, there was no violation of double jeopardy and the court was not required to vacate the manslaughter charge. *Id*.

The present case is similar to that of *Ward*. In the present case, while defendant was convicted on both attempted murder in the first degree and assault in the first degree, the trial court did not enter judgment on the assault in the first degree conviction. CP 115-130. In fact, the Trial Judge specifically did not enter judgment on the assault in the first degree conviction in an effort to comply with *Womac*. RP 563-564.

Since judgment was entered on only the attempted murder in the first degree conviction, defendant's right against double jeopardy was not violated. Therefore, the trial court did not commit err when it did not enter the judgment finding defendant guilty of assault in the first degree.

3. REMAND ON THE DOMESTIC VIOLENCE NO CONTACT ORDER VIOLATION IS REQUIRED TO CORRECT THE JUDGMENT AND SENTENCE TO INCLUDE LANGUAGE THAT EXPLICITLY STATES DEFENDANT'S TOTAL SENTENCE MAY NOT EXCEED THE STATUTORY MAXIMUM.

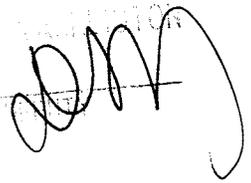
When a defendant's sentence includes both confinement and community custody, "a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime." RCW 9.94A.505(5). When a sentence exceeds the statutory maximum due to a combination of confinement and community custody, the court must include language that states explicitly on the judgment and sentence that "the total term of incarceration and community custody cannot exceed the maximum." *In re Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); *State v. Sloan*, 121 Wn. App. 220, 224, 87 P.3d 1214 (2004).

Defendant was convicted of domestic violence court order violation and sentenced to a standard range sentence of 54 months confinement, with an additional 12 months community custody. CP 115-130. If defendant were to serve his entire sentence, the combined term of confinement and community custody would exceed the statutory maximum of five years for domestic violence no contact order violation.

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Therefore, remand is required to add the appropriate language on the Judgment and Sentence.

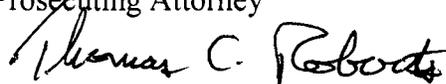
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D. CONCLUSION.

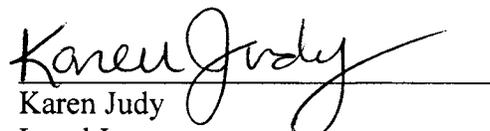
For the forgoing reasons, the State respectfully requests the Court affirm defendant's conviction for attempted murder in the first degree and remand on the no contact order violation to add the necessary language to the Judgment and Sentence.

DATED: July 21, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

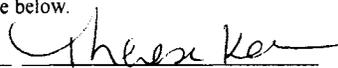


THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442


Karen Judy
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7. 
Date Signature