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Court of Appeals
Division II
State of Washington
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NO. 53099-6-II

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

STATE OF WASHINGTON, Respondent

v.

DAVID GARRETT MICHAEL THOMAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01078-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence that Thomas committed the crime of attempted assault in the first degree.**
- II. **The State presented sufficient evidence that Thomas committed the crime of assault in the second degree while armed with a deadly weapon.**
- III. **The trial court did not abuse its discretion when it admitted evidence that Funk was biased in favor of Thomas.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Garrett Michael Thomas was charged by amended information with Attempted Assault in the First Degree, Assault in the Second Degree, Assault in the Third Degree, and Domestic Violence Court Order Violation for an incident on or about May 13, 2017 that began with the order violation and ended with assaults against the police. CP 162-64. Each of the assault counts included a deadly weapon enhancement alleging that Thomas was armed with a knife and the Attempted Assault in the First Degree and Assault in the Second Degree counts alleged the law enforcement aggravating circumstance. CP 162-64.

The case proceeded to a jury trial before the Honorable Robert Lewis, which commenced on January 15, 2019 and concluded on January

17, 2019 with the jury's verdicts. RP 50-733. The jury convicted Thomas as charged to include the deadly weapon enhancements and the aggravating circumstances for each count in which they were alleged. CP 279, 281-83, 285-89; RP 730-33. The trial court sentenced Thomas to a standard range sentence of 138 months of total confinement. CP 309; RP 773. Thomas filed a timely notice of appeal. CP 326.

B. STATEMENT OF FACTS

Thomas was in a romantic relationship with Syreeta Funk that lasted for about three years and ended when he assaulted her and was arrested. RP 160-63, 547. Following Thomas' arrest, a domestic violence no-contact order was entered that prohibited him from having contact with Funk. RP 163, 559-560. Nonetheless, late night on May 12, 2017 or early morning May 13, 2017, Thomas began calling Funk and left voicemails for her when she did not answer her phone. RP 164-65, 192. After listening to the voicemails, Funk decided that she would answer the phone the next time Thomas called. RP 165, 192-93. And so the next time Thomas called Funk answered the phone and the two discussed Thomas' request to visit, his request for some of his clothes that Funk still possessed, and his desire for emotional support from her. RP 165-68, 234-35.

Finally, Funk agreed to meet Thomas and bring him his clothes since Thomas was complaining of being really cold. RP 167-68. The two met in downtown Vancouver and Thomas got into Funk's SUV. RP 168-170. Thomas' mood "was really down" and he made comments to Funk that suggested that he may have been suicidal. RP 172-73, 175, 182. Eventually, Funk told Thomas that she had to leave, but Thomas refused to leave her vehicle. RP 172-73, 193. So Funk called Thomas' mother to see if she could convince him to get out of the car, but the two "discussed it and we together felt like calling the police would be safer. . . ." RP 173. Consequently, Funk drove to a nearby Chevron "because it was lit up," exited the SUV, walked away, and called 911 to report the no-contact order violation. RP 173-79, 236-37. Thomas was aware that Funk was calling the police and at some point before she exited the vehicle he told her something along the lines of that he would "die by police" or do something to get shot. RP 175-76, 212, 236-37.

The police arrived shortly thereafter. RP 179-180, 216-17. A few minutes later, in response, Thomas exited Funk's SUV and began walking away from the police. RP 101, 180-81, 218, 273, 306-07, 339-340. Among the responding officers from the Vancouver Police Department were Detective Branden Schoolcraft (listed victim for the Attempted Assault in the First Degree), Detective Trent Harris, Officer Sean Suarez

(listed victim for the Assault in the Second Degree), and Officer Kathryn Endresen (listed victim for the Assault in the Third Degree). RP 96, 271-72, 305-08, 337. The police repeatedly commanded Thomas to stop, but he just kept moving away from them and yelled back that he did not do anything and asked the officers what they wanted. RP 102-03, 106, 273-76, 307-08, 339-340, 348. During this contact, Thomas faced the officers with his fists clenched, but walked backwards away from them. RP 104-05, 275, 310, 353.

Eventually, when Thomas approached the curb at Mill Plain Blvd he stopped and took “like a bladed stance or a boxer stance.” RP 107-08, 310, 353. At that point, Thomas said “come on” to the officers in a firm and loud voice. RP 108, 310, 354. Despite the poor lighting, Det. Schoolcraft noticed something in Thomas’ right hand, which he described as looking, at the time, like a black “large sharpie type marker” with “just a portion of it sticking out of the top” of his *right hand*. RP 109, 358-59 (darkness of scene). Because of Thomas’ non-compliance and the officers’ belief that he would not submit to an arrest peacefully, Ofc. Suarez attempted to tase Thomas, but the Taser had no effect. RP 109-112, 276-78, 311-12, 356-57.

Det. Schoolcraft determined that this was his opportunity to try to close the gap between Thomas and the officers and grab a hold of Thomas.

RP 112, 278-79. When he did this, Thomas, with his *left hand*, punched Det. Schoolcraft on his nose, breaking it, and causing blood to stream out. RP 113, 118-19, 279, 300, 313, 359. The other officers immediately rushed in to try to control Thomas, whose right hand was swinging up, with Ofc. Suarez attempting to hold onto Thomas' right side. RP 113, 359-360, 380-81. Thomas continued to actively resist, throw punches, and fight the officers. RP 113-15, 279-280, 313, 361-62.

Next, Det. Harris lifted Thomas' leg off the ground causing Thomas and the officers to tumble into the street (Mill Plain Blvd). RP 114-15, 281, 314-15, 330-31, 363. The fight did not stop, however, as Thomas continued to strike, and attempt to strike, the officers. RP 115-16, 315. Ofc. Suarez offered his own blows in the form of knee and palm strikes, but neither had a noticeable effect on Thomas. RP 281-83, 315, 360. Eventually, Det. Schoolcraft was able to execute a carotid restraint on Thomas, which rendered him temporarily unconscious. RP 115-16, 283, 315, 367-68. And while this allowed the officers to gain the upper hand, Thomas regained consciousness before they could get him fully handcuffed and he continued to try to punch and strike officers with his right arm, which remained free. RP 116-17, 317, 368. Det. Schoolcraft then resorted to elbow strikes against Thomas and the officers were finally

able to get him fully handcuffed and gain control of him. RP 117-18, 317, 368. Thomas was then sent to the hospital for evaluation. RP 370.

Right after Thomas was handcuffed, the officers observed an open, black-handled, folding knife with a 3 inch blade on the street very near to where the altercation had taken place. RP 119-120, 132, 137-146, 284-85, 300-01, 330, 363-64, 385-86. None of the officers were missing their knives, and Det. Schoolcraft testified that it resembled the black object that Thomas had been holding in his hand. RP 119-20, 284-85, 317-18, 385-86.

Det. Schoolcraft and Ofc. Suarez also headed to the hospital that morning. Det. Schoolcraft received treatment for his nose. RP 120. Ofc. Saurez, meanwhile, started to feel pain in his arm and the two officers noticed that his shirt had been sliced and that there was a small puncture wound and cut on his arm consistent with a stab wound. RP 120-21, 285-291, 327-330. At that point, Det. Schoolcraft examined his own uniform and noticed that his police patch, which is made of a pretty tough material, had a cut or slash through it that did not pre-exist his contact with Thomas. RP 121-24, 131-32, 134, 324-26, 329-330.

ARGUMENT

I. Sufficient evidence supports Thomas' convictions

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996).

In prosecuting an attempt crime the State must only prove beyond a reasonable doubt the defendant’s “(1) intent to commit a specific crime and (2) any act constituting a substantial step toward the commission of that crime.” *State v. Nelson*, 191 Wn.2d 61, 71, 419 P.3d 410 (2018); *State v. Wilson*, 1 Wn.App.2d 73, 83, 404 P.3d 76 (2017). In turn, a “substantial

step” is an act “that is strongly corroborative of the actor’s criminal purpose.” *Wilson*, 1 Wn.App.2d at 83 (internal quotation marks and citation omitted). And while “[m]ere preparation to commit a crime is not an attempt,” any “slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *Id.* (quoting *State v. Price*, 103 Wn.App. 845, 852, 14 P.3d 841 (2000)). Importantly, the “question of what constitutes a ‘substantial step’ under the particular facts of the case is clearly for the trier of fact.” *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978) (emphasis added).

Here, when taking the evidence in the light most favorable to the State, the evidence that Thomas committed the crimes for which he was convicted is overwhelming. The narrative, combining both the direct and circumstantial evidence, is straightforward: Thomas, who had been using drugs and alcohol daily leading up to the incident, to include smoking 3 grams of methamphetamine that very day, became down or depressed and called Funk seeking her emotional support despite the no-contact order. RP 575-77. While Funk met with Thomas, she was unwilling to have him over to her place or spend the amount of time with him that he desired. That she would call the police to report the no-contact order violation after he refused to leave her car left him despondent and angry. Thus, when the police responded, rather than get arrested and go to jail, Thomas chose not

to cooperate and to disobey their commands. When escape was no longer an option, he stopped, faced the police, got in a fighting stance, flexed, brought his closed, black folding knife into his right hand, which Det. Schoolcraft observed, and told the police to “come on” and fight. RP 310.

At that point, he intended to fight and injure any police officer who tried to arrest him. And he intended to use his knife; after all he brought it with him when he exited Funk’s SUV, put it into his own hands rather than keeping it in a pocket, and opened it when the time was right—away from the bright lights of the Chevron. So when Det. Schoolcraft got close enough, Thomas, using his left hand, punched Det. Schoolcraft in the nose, breaking it. Thomas then, with his right hand, unfolded the blade of his knife and began swinging it towards Det. Schoolcraft as the officers descended upon him. At some point, as Thomas swung the knife towards Det. Schoolcraft, he was able to slice a patch on Det. Schoolcraft’s vest, stab Ofc. Suarez, and slice Ofc. Suarez’s shirt before losing control of it during the scuffle. In so doing, Thomas’ intent to commit assault in the first degree became clear and he took a substantial step towards committing that crime, as well as actually committing the crime of assault in the second with a deadly weapon.

Being disposed of the knife, however, did not stop Thomas from trying to assault the officers as he continued to try to punch and swing at

them. In fact, Thomas never relented or stopped fighting sufficient enough to allow himself to be arrested, despite even being made unconscious at one point. This further evinces his intent to assault as opposed to resist arrest. Sufficient evidence supports his convictions.

II. The trial court did not abuse its discretion when it admitted evidence that Funk was biased in favor of Thomas.

While Thomas' case was pending and just days before trial began, Funk exchanged messages with him over the jail messaging system and spoke to him over the telephone. RP 37-43, 242-45, 248-258. The State characterized these communications as relating to Funk's affection for Thomas and paraphrased some of her statements as "I love you, I care for you, I believe in you, I'm rooting for you. . . ." RP 37-38, 41, 254-55. Funk agreed that the tenor of her phone call with Thomas just prior to trial was one of love and support, though she disclaimed a role in most of the other communications. RP 248-258.

The State sought to admit evidence of these communications as evidence of Funk's bias in Thomas' favor.¹ RP 37-38, 40, 43-44, 230. The trial court agreed with the State commenting:

THE COURT: We're talking about two different things. They're not asking to impeach her with prior inconsistent

¹ The State did not attempt at any point to play the jail calls or read the messages in front of the jury nor did it seek to admit copies of either for the jury's consideration. RP 247.

statements. They're asking to impeach her with her bias and motive. Bias in favor of your client. So, whether or not it's a prior inconsistent statement, doesn't have anything to do with it. It's whether she has a bias for him. She has a motive to try to help him out. Those are two different types of impeachment. So, why shouldn't they be allowed to impeach her with bias and motive?

...
...

THE COURT: Okay, I'll go ahead and allow it. I would have -- if she had said, yeah, I talked to him a couple of days ago or I sent him a message a couple of days ago, that would be the end of it as far as I'm concerned. But, since she was directly asked the question and said I haven't spoken to him during that time period, I didn't call him, I didn't leave him messages, then the prosecutor can try to bring it out again, first by confronting her and then if she says yes, in fact I did do those things, then that's the end of it. On the other hand, if then she says no, there's no way that happened. I didn't call him; I didn't leave him messages then they can bring in extrinsic evidence about it.

RP 232-33. Accordingly, the State briefly asked Funk about her recent communications with Thomas and her affection for him. RP 254-57.

Thomas claims that the trial court abused its discretion in admitting said evidence because it "allowed the State to use extrinsic evidence to impeach Ms. Funk on a collateral matter." Br. of App. at 17. Thomas' argument fails because bias is not a collateral matter and extrinsic evidence is allowed to prove bias. *State v. Huynh*, 107 Wn.App. 68, 74, 26 P.3d 290 (2001); *State v. Jones*, 25 Wn.App. 746, 750-51, 610 P.2d 934 (1980); *State v. Spencer*, 111 Wn.App. 401, 410-11, 45 P.3d 209, (2002);

5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* § 607:3-4, at 298-300 (2019).

Bias refers to “the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party” *State v. Berlin*, 167 Wn.App. 113, 127, 271 P.3d 400 (2012) (quoting *U.S. v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)). Moreover, bias includes “that which exists *at the time of trial*, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness’s accuracy *while the witness was testifying*.” *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (emphasis in original) (internal quotation omitted). And, importantly, evidence of bias *is* relevant evidence. *Abel*, 469 U.S. at 51; *State v. Lee*, 188 Wn.2d 473, 488, 396 P.3d 316, 324–25 (2017); *State v. Tate*, 2 Wn.App. 241, 247, 469 P.2d 999 (1970). The more important the witness, the more relevant evidence of bias becomes. *Lee*, 188 Wn.2d at 488-89.

That bias is not a collateral matter has been well-established. *Jones*, 25 Wn.App. at 751 (citation omitted); *State v. Lubers*, 81 Wn.App. 614, 623, 915 P.2d 1157 (1996); *State v. Constantine*, 48 Wn.App. 218, 220, 93 P. 317 (1908); Tegland, § 607:3 at 299. Similarly, that parties may prove bias by use of extrinsic evidence is beyond dispute. *Abel*, 469 U.S.

at 51 (citing cases); *Huynh*, 107 Wn.App. at 74; *Berlin*, 167 Wn.App. at 127; *Spencer*, 111 Wn.App. at 410-11; *State v. McDaniel*, 37 Wn.App. 768 at 772-73, 683 P.2d 231 (1984); *Tegland*, § 607:4 at 300.

Here, Funk was the only witness who spent any amount of substantive time with Thomas contemporaneous to, and before, the incident with the police. Thus, as Thomas acknowledges “Funk’s testimony provided critical evidence related to Mr. Thomas’s sanity.” Br. of App. at 20; *see also* Br. of App. at 21 (stating “Funk’s observations were critical to a determination of whether Mr. Thomas was insane at the time of the incident. . .”). Nonetheless, Thomas argues that the trial court abused its discretion in admitting evidence of Funk’s bias by contradictorily claiming that “Funk’s credibility and any bias she had towards Mr. Thomas was not crucial to the outcome of his trial.” Br. of App. at 19. This argument is not tenable; the more critical Funk was to establishing Thomas’ defense the more relevant her bias in his favor became. *Lee*, 188 Wn.2d at 488-89

And during the cross-examination of Funk, when the questions were naturally leading in Thomas’ favor, Funk appeared to embellish Thomas’ psychiatric symptoms both in general and on the night in question. *Compare* RP 170-180, 182-183, 234-37 *with* RP 185-190, 198-

99, 211-13.² Accordingly, in order to allow the jury to properly assess Funk's credibility and her bias, the State properly sought to elicit from her the fact that she had very recent communications with Thomas in which she expressed her love and support for him. This evidence of bias was relevant, not collateral, and the State was allowed to prove Funk's bias by extrinsic evidence should it have chosen. Consequently, the trial court did not abuse its discretion when it allowed the State to ask Funk about her recent communications with Thomas.

Even assuming error, any error was harmless. The evidence of Thomas' guilt, as detailed above, was overwhelming to include the fact that his interactions with law enforcement were inconsistent with the claim that he was insane—he never appeared confused, to be responding to visual or auditory hallucinations, speaking nonsensically, or exhibiting any signs of mental illness. RP 105-06, 124-25, 129, 291-92, 311, 321-22, 371-77. Moreover, Funk's credibility was much more relevant to Thomas' mental state than what he physically did to the officers. And when Dr.

² Thomas' expert, Dr. Duncan, also relied on Funk's reporting in coming to some of his conclusions that were favorable for Thomas on the topic of his mental state. RP 430-31.

Duncan later failed to establish by any metric³ that Thomas was insane at the time of the crimes, any error related to Funk's testimony became harmless. *See* RP 413-465.

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³ The following discussion is illuminating:

[STATE:] Well, let me ask you this. So, during your -- in your assessment, is there any information from which you would conclude that he doesn't know it's the police he's interacting with?

[DR. DUNCAN:] I think he knows the police are there.

[STATE:] He knows it's the police? He's able to accurately perceive that it's the police that are present?

[DR. DUNCAN:] I think he knows police are there. I'm -- I'm wondering -- I don't -- I think that he's not appreciating the danger he's putting them and himself in due to the symptoms that he's experiencing.

[STATE:] Okay, so that's basically your bottom line is that you think that he's kind of miss -- miscalculating the risk?

[DR. DUNCAN:] And not appreciating kind of how he's presenting, the risk he's posing to officers, that sort of thing.

[STATE:] Okay.

[DR. DUNCAN:] All of the -- yes.

RP 443.

CONCLUSION

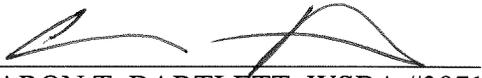
For the reasons argued above, Thomas' convictions should be affirmed.

DATED this 13th day of January, 2020.

Respectfully submitted:

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