

FILED

FEB 28, 2013

Court of Appeals
Division III
State of Washington

No. 31005-1-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

JESUS TORRES,

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Kevin J. McCrae, WSBA #43087
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A. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

B. RELIEF REQUESTED

The State asserts that no error worthy of reversal of the convictions occurred. The trial court should be affirmed.

C. ISSUES

1. Was there sufficient evidence for a reasonable trier of fact to conclude that Jesus Torres intended to inflict great bodily harm when he pointed a loaded gun at I.L. and his family and fired seven or eight shots at them?

D. STATEMENT OF THE CASE

Jesus Torres, his brother Jonathan Torres¹ and Yajiro Calzada are members of the South Side Locos (SSL) (A Sureno set) gang and were hanging out at the Torres brothers' home on December 2, 2011. RP 141-147, RP 157. Jonathan and Calzada were outside when they looked across a small valley with a canal in it and saw I.L. sitting on a concrete barrier in a cul-de-sac across the valley. They recognized I.L. as a member of the

¹ Jesus and Jonathan Torres will be referred to by their first names for clarity.

rival gang Pacheco Villa Locos (PVL) (A Norteno set). RP 141-42. Calzada said he wanted to go over and beat up I.L., and Jonathan agreed, but ran back in to get Jesus. *Id.*

In the meantime I.L. was sitting on the edge of the cu-de-sac watching his family members play a game of quarters. RP 49. C.O., another PVL associate, lived next to the cul-de-sac and was outside in his yard. RP 22-23. I.L. observed the three SSL members coming down the hill towards the canal. RP 49. They got to the canal and had blue bandanas over their faces. RP 52. The SSL members challenged I.L. to a fight, but I.L. declined. (trial exhibit 19, State's supplemental designation of clerk's papers) (TE 19). I.L. saw a rifle being passed back and forth. RP 55. Calzada, in his Smith affidavit, stated that Jesus handed Calzada the rifle and asked him to shoot. Calzada declined because he had been recognized and handed the rifle back. TE 19. Jesus then asked Calzada if he should shoot. *Id.* Calzada said that it was up to Jesus. Jesus then said "fuck it, I am going to dump on them." *Id.* He then pointed the gun at I.L. and fired approximately 8 shots. RP 65, 67. The six people in the cul-de-sac and C.O. standing nearby hit the ground or took cover as the shots ricocheted off the concrete barriers and splatted into the ground near them.

The State moved to decline Jesus to adult court. During the decline hearing the State introduced evidence that Jesus had severely

injured another PVL associate in a previous incident, as well as other incidents of street gang behavior. The State moved to introduce some of this same information during the trial in front of the same judge who decided the decline motion, but was prevented in doing so by a sustained relevance objection. RP 194. Also, during trial the State introduced evidence of various confrontations between SSL and PVL members. RP 36, 55, 60, 196. All witnesses agreed that the SSL and PVL were rivals. RP 27, 157, 196.

E. ARGUMENT

1. Legal Standard

The appellant challenges the sufficiency of evidence as to the intent to cause great bodily harm.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences.

State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A jury may infer intent 'where a defendant's conduct plainly indicates the requisite intent as a matter of logical probability.'" *State v. Savaria*, 82 Wn. App. 832, 841, 919 P.2d 1263 (1996).

For the most part the State agrees with appellant's statement of the applicable law. However, there is at least one misquote. The appellant cites *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) for the proposition that intent can never be presumed from the defendant's actions. Brief of Appellant at 7. However, the closest *Wilson* comes to saying that is "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." *Id.* This simply says more than actions may be relevant, not that intent can never be inferred from actions, or that evidence other than actions is required in all circumstances. The appellant significantly over reads *Wilson*.

2. There was sufficient evidence in the record to conclude Jesus intended to cause great bodily harm or death.

Other cases have upheld assault 1 convictions based on shootings without much more. In *State v. Saenz*, 156 Wn. App. 866, 875, 234 P.3d

336 (2010), overruled on other grounds, 175 Wn.2d 167, 283 P.3d 1094 (2012), the defendant had a brief argument in Wal-Mart with a rival gang member victim, then left, went over to his friend's truck, told him to drive over next to the victim and shot him. The court ruled that this was sufficient to prove intent to cause great bodily harm.

In *State v. Flett*, 98 Wn. App. 799, 992 P.2d 1028 (2000), there was almost no evidence of motive or intent. According to the facts of the case the defendant testified he came into the lot and pulled up near the victims because he thought they were causing trouble with some of his friends. He then claimed one of the people in the car pulled out a gun and he fired in self-defense. The court ruled that this evidence was sufficient to support first degree assault.

In this case both PVL members testified to conflicts with SSL members. RP 27, 36, 55 and 60. Jesus is a SSL member with SSL tattooed on his arms. RP 196. Officer Judkins testified that he has responded to conflicts with the SSL and PVL many times, and most of those conflicts have been violent. Jesus pointed the gun specifically at I.L. RP 67. Jesus said, just before he shot "fuck it, I am going to dump on them." It is a mantra in gun safety that you don't point a gun at anything you don't intend to kill. There was more than sufficient evidence that

Jesus Torres intended to inflict great bodily harm or death on I.L. and his family members when he pointed the gun at I.L. and squeezed the trigger.

3. Any lack of sufficient evidence in the record is the result of invited error, and cannot be reviewed on appeal.

Under the invited error doctrine, a party may not set up an error at trial and then complain about the error on appeal. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Ellison*, __ Wn. App. __, __P.3d__ , 2013 Wash. App. LEXIS 15 (2013)(Slip Op. at 6). "The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally." *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), rev'd on other grounds by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The appellant notes that "it is significant that the State presented no testimony about gang behavior in general or the relationship between these SSL and PVL gangs other than to call them rival gangs" Brief of Appellant at 10, and gives significant weight to the lack of specific instances of confrontations between the gangs in the record. First, as

previously noted, the State did introduce evidence of some confrontations of the individuals involved and SSL members. Second, Officer Judkins testified that the confrontations between the SSL and PVL were violent. Third, the State attempted to introduce evidence of specific acts of violence committed by Jesus Torres against PVL associates specifically to show hostility of the respondent to the PVL. RP 194. These acts were discussed in the decline hearing, and the police reports describing them were admitted in that hearing, thus the trial judge was aware of them and a detailed offer of proof at the adjudicatory hearing was unnecessary, as acknowledged by the defense trial attorney. *Id.*

Officer Judkins could have described, in accordance with his report, (decline exhibit 7, State's supplemental designation of clerk's papers) (DE 7) his observation of Jesus Torres' flight from that incident, the injuries to MCB, the fact that he arrested Jesus Torres for the crime and the fact that MCB was associated with the rival Norteno gang. EDH 43. The State had prepared and marked as exhibits the information noting MCB as the victim in that crime and the order on adjudication showing that Jesus committed an assault 2 against MCB. (Trial exhibits 17 and 18, State's supplemental designation of clerk's papers) (TE 17 and 18). These were ruled inadmissible by the court's evidentiary ruling based on a relevance objection the trial defense attorney.

If the court accepts Jesus' argument at trial issues such as this, showing the relationship between the SSL and PVL are irrelevant, then it was unnecessary to introduce such evidence to demonstrate Jesus' intent, and this appeal fails.

If the court accepts the State's contention that such evidence is relevant, but not critical, to proving Jesus' intent, then such evidence was not critical, and this appeal fails.

If the court accepts Jesus' argument on appeal that such evidence is not only relevant, but absolutely critical to the State's case, then the trial court committed error when it excluded the information as irrelevant. That error was committed at the invitation of defense trial counsel, the appellant may not benefit from it, and this appeal fails.

Simply put, a respondent cannot complain that information is irrelevant, and then come back and complain that that same information was absolutely critical to the State's case. This sort of trying to have it both ways is exactly what the invited error doctrine forbids.

4. Even if there is lack of sufficient evidence the court should remand for entry of conviction and sentencing for the crime of assault 2.

The respondent was charged with assault 1, which, in relevant part, states: A person is guilty of assault in the first degree if he or she, with

intent to inflict great bodily harm: (a) Assaults another with a firearm. RCW 9A.36.011. Jesus only challenges the intent to inflict great bodily harm element. Assault 2 occurs when a person “Assaults another with a deadly weapon.” RCW 9A.36.021(1)(c). A firearm is a per se deadly weapon. RCW 9A.04.110(6). Thus assault 2 is a lesser included crime of assault 1. In his appeal the appellant has conceded all of the elements of assault 2.

Under RAP 12.2 the appellate court “may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.” *In re Pers. Restraint of Heidari*, 174 Wn.2d 288, 291-92, 274 P.3d 366 (2012). In *Heidari* the Supreme Court ruled that a lesser included is only available on remand if the lesser included was presented in instructions to the jury. However, it is an open question as to whether *Heidari* applies to bench trials, where there are no jury instructions. “It is clear case(s) may be remanded for resentencing on a ‘lesser included offense’ only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense.” *Id.* at 294 (citing *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980)). Because a bench trial includes findings of fact and conclusions of law, the record does disclose that the finder of fact expressly found each of the elements of the lesser offense. In the undisputed findings of fact, which

are verities on appeal, the court found that Jesus Torres fired seven or eight shots at the group, putting all seven victims in reasonable fear of great bodily harm. CP 56. Under conclusions of law 3.6 the trial court found “Jesus Torres, with intent to cause great bodily harm, assaulted the group in the cul-de-sac with a firearm.” CP 57. Assuming the court incorrectly found the intent to cause great bodily harm, conclusion of law 3.6 would read “Jesus Torres assaulted the group in the cul-de-sac with a firearm.” It is undisputed the event occurred in Royal City, Washington, meeting the jurisdictional element. *Id.* This is a more than adequate finding to conclude the finder of fact found each element of assault 2. In addition appellate courts presume that judges know the law and will apply it appropriately. *In re Welfare of Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975). A judge is well aware of the availability of lesser includes and can apply them as appropriate, unlike a jury who must be instructed on the issue. Therefore the reasoning in *Heidari* does not apply, and the appellate court can remand for entry of convictions for assault 2, should it find insufficient evidence of assault 1.

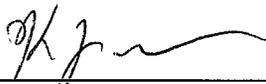
F. CONCLUSION

There is more than sufficient evidence for a finder of fact to conclude that Jesus Torres intended great bodily harm when he shot at I.L. and his family. Even if there is not in this record, its lack is due to an

invited error, not a failure of the State to offer sufficient evidence, therefore the trial court should be affirmed. If the appellate court determines there is not sufficient evidence, the court should remand for entry of judgment and sentence on assault 2 charges.

Dated this 27th day of February, 2013.

D. ANGUS LEE
Prosecuting Attorney

By: 
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31005-1-III
)	
vs.)	
)	
JESUS TORRES,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

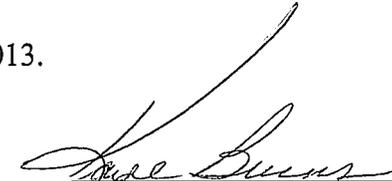
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
Gasch Law Office
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Green Hill Training School
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Dated: February 28, 2013.



Kaye Burns