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Court of Appeals
Division III
State of Washington

NO. 31259-3-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

BONIFACIO ALCANTAR- MALDONADO

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
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A. COUNTERSTATEMENT OF THE ISSUES

1. **DID THE STATE OFFER SUFFICIENT EVIDENCE TO ESTABLISH THE APPELLANT ASSAULTED EUDIS MENDOZA WITH THE INTENT TO INFLICT GREAT BODILY HARM?**

2. **DID THE RECORD SHOW A SUFFICIENT NEXUS BETWEEN THE CRIME AND THE USE OF A MOTOR VEHICLE TO WARRANT REVOCATION OF THE APPELLANT'S DRIVER'S LICENSE?**

B. RESPONSE TO STATEMENT OF THE CASE

In the spring of 2012 the Appellant, Bonifacio Alcantar-Maldonado Jr., separated from his wife, Twylight Krusow. The Appellant and Krusow made arrangements for him to move out of their Pasco residence. He moved out and gave up his key to the residence. Krusow had his name taken off the lease a few weeks later (RP at 82-85). On May 8, 2012, the Appellant drove to Krusow's residence in Pasco, Washington. (RP at 82 & 89) He arrived armed with a handgun and knocked on the door. (RP at 25 & 89). Krusow refused to let him in the residence. The Appellant then knocked the door down and entered without her permission. (RP at 89-90).

Once inside, the Appellant proceeded to Krusow's room where he found Eudis Mendoza. He pointed the gun at Mendoza and told him to "get the fuck out" of the house or he would blow his brains out. (RP at 26 & 91). Mendoza tried to leave the room but the Appellant struck him in the face with the gun. (RP at 27 & 92). Mendoza began to bleed heavily from the blow and went down the hallway to leave the home. (RP at 27-28 & 93).

The Appellant followed Mendoza down the hall. In the living room, Mendoza tried to grab his wallet and keys to leave but the Appellant kicked him in the face. The Appellant then struck him again in the face with the handgun. These assaults actually impeded Mendoza's ability to leave the area as the Appellant had originally requested. During this time Mendoza made no aggressive moves and only tried to leave the house. (RP at 26-30). Krusow and the Appellant's two year old daughter woke up and begin to cry. Krusow's mother, Aide Rodriguez, came from next door and tried to comfort her. (RP at 94-95). She witnessed a large amount of blood and started to call police, but the Appellant did not allow it. (RP at 114). During this time period the Appellant expressed no concern for his daughter's safety and had no contact

with her. (RP at 119).

The Appellant eventually pushed Mendoza out the door and Mendoza made his way to his car. (RP at 29-30). Mendoza's sight was impaired due to damage to his face. The Appellant struck Mendoza again in the face as he tried to get his car open. Mendoza realized he had the wrong keys and tried to get back inside to recover them. (RP at 30).

Krusow's step-father, Jose Rodriguez, eventually intervened. Rodriguez got the Appellant's attention by approaching him. The Appellant then raised the gun, put it in Rodriguez's face, and told him to "[s]tay the fuck out of this." (RP at 40-41). Mendoza then got his keys and left the location. (RP at 31). The Appellant went to his car, took apart the gun, and ejected a bullet, which fell on the ground. He left a short time thereafter in his vehicle. (RP at 42). After he left, he began to call Krusow repeatedly on her cell phone. When she refused to answer he sent a text stating: "[i]f you don't answer, I will drive down there. No fucking joke." (RP at 98-99).

Police responded to 2712 W. Marie Street, Pasco, at 12:23 a.m., on May 8. The first officer responding, Officer Anthony Aceves, arranged for containment to be set up around the area to

stop the suspect if he was on foot. (RP at 62-63). He witnessed blood on the concrete steps of the residence, on the inside and outside of the front door, all over the living room, and down the hallway into the bedroom. (RP at 65-66). Krusow identified the assailant as her ex, the Appellant. She described him as a five-foot ten-inch Hispanic male wearing a red muscle shirt and a black baseball cap. (RP at 65). Krusow gave the Appellant's address as 6303 W. Virginia Street, Kennewick. Officer Aceves also discovered the Appellant had left in a blue 2010 Ford Focus. (RP at 66-67).

Based on the Defendant's address, police were dispatched to the blue bridge to attempt to intercept the Appellant. (RP at 143-44). An ATL was put out on the suspect and his vehicle. (RP at 67). Law enforcement saw a vehicle matching the description going at a high rate of speed towards Kennewick, coming away from the blue bridge. (RP at 154). A similar vehicle was also sighted going at a high rate of speed with its lights turned off moments later. By the time the officer turned around, however, the vehicle had disappeared. (RP at 155). The Appellant later admitted he had taken the blue bridge to leave Pasco and return to

his friend's home where he lived. (RP at 286).

Officer then proceeded to the Kennewick address and found the suspect vehicle there. (RP at 75 & 146). The police later conducted a search of the vehicle and found a nine millimeter magazine containing twelve bullets. (RP at 74). At that location law enforcement placed the Appellant under arrest and searched the residence. (RP at 69-71). Police found a red muscle shirt in the Appellant's bedroom and a black baseball cap in the sink of the bathroom. (RP at 72). During that search police also found a Glock 19 semi-automatic pistol underneath the Appellant's bed which had the victim's blood on it. (RP at 71-72 & 231-232).

Law enforcement also responded to Mendoza's home. They photographed blood splattered and dripping from various parts of his car. Mendoza appeared disoriented and had to sit down to avoid passing out. (RP at 165). Paramedics responded and Mendoza went to the hospital and received treatment for the damage to his face which included numerous broken bones. He later underwent surgery to have the bones put back together and had two plates placed in his face, along with a tube in his nose to ensure the bones were held in place. (RP at 34).

C. RESPONSE TO ARGUMENT.

1. BASED ON THE APPELLANT'S WORDS, HIS CONDUCT, AND THE INJURIES HE INFLICTED, THERE IS SUFFICIENT EVIDENCE SHOWING HE INTENDED GREAT BODILY HARM WHEN HE STRUCK THE VICTIM REPEATEDLY WITH A FIREARM IN THE FACE.

On May 8, 2012, from the moment the Appellant entered his estranged wife's residence, his words and conduct evidenced a clear intent to do great bodily harm. Intent is governed by inference in the majority of cases. These inferences are to be gathered from the surrounding circumstances in the case. State v. Ferreira, 69 Wash.App. 465, 469, 850 P.2d 541 (1993). The jury may "infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wash.2d 179, 201, 86 P.3d 139 (2004). This includes the manner in which the wounds were inflicted and any other conduct which shows the nature of the prior relationship. Ferreira at 469.

When considering claims of insufficiency of the evidence, the Court acknowledges that a reviewing court is not ideally placed to second guess the trier of fact:

> The standard for determining whether a conviction rests on insufficient evidence 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. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.

In re Martinez, 171 Wash.2d 354, 364, 256 P.3d 277 (2011) (citations omitted). Taking the truth of the State's evidence and all inferences therein, the record is more than sufficient uphold the jury's decision to find the Appellant acted with intent to do great bodily harm.

According to the jury instructions, in the present case there are four elements to the charge of Assault in the First Degree. CP 51. The Appellant concedes he (1) assaulted the victim on May 8, 2012, (2) that he assaulted the victim with a firearm, and (4) that the acts occurred in the State of Washington. The only element disputed is whether the Appellant intended to inflict great bodily harm. "Great bodily harm" means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or

impairment of the function of any bodily part or organ." WPIC 2.04.

The injuries sustained by the victim rise to this level. According to Dr. Beverly Harn, the damage sustained by the victim was considerable:

> "...he had orbital fractures or the eye socket. Injuries both on the outside wall and on the floor of the eye socket. Both of those were fractured in several places and displaced a little. He had a fracture in the lamina papyracea, which is the inside part of the back of the eye socket.
>
> His sinus in his cheek, his maxillary sinus, the outside wall and the front wall and the medial wall or middle wall were all broken and displaced. One of the fractures extended down into the base of his teeth. Some of those were displaced.
>
> His nose was broken on both sides, as well as the middle of the nose. He had swelling in the soft tissue and air in the soft tissues and swelling in the sinuses – both in the maxillary and sigmoid sinuses, which are on the face, back behind the sinus and back by the nose. And then, there was some swelling in the central sinus called the sigmoid sinus. And the right shoulder was okay.

(RP at 130-31). The victim testified that he also had to have surgery as a result of the injuries. That surgery included metal plates and a tube being placed into his face. Washington case law does not define serious permanent disfigurement, but a jury could certainly make such a determination from the testimony about mental plates being put into the victim's face. State v. Hill, 48

Wash. App.344, 346-347, 739 P.2d 707 (1987).

In any event, the State is not required to prove actual injury of any degree, the severity of the injuries simply goes to the inference that the Appellant intended to great bodily harm. Looking at the manner in which the Appellant inflicted the wounds also shows a clear intent to cause great bodily harm during the course of the assault.

The manner of entry into the home is the first piece of evidence which inform the Appellant's intent. The Appellant kicked down the door with a loaded firearm in hand. He then walked straight past his daughter's room (who he claimed to want to protect) and confronted Mendoza in the room of Krusow. He pointed the gun at Mendoza immediately upon seeing him, even though Mendoza had not made any aggressive moves toward him.

The Appellant ordered Mendoza from the residence and Mendoza immediately moved to comply. If protecting Appellant's daughter had been his sole motivation, the Appellant would have ended the confrontation at that time. Instead, he revealed that he intended not just to threaten Mendoza and cast him out of the residence, but that he also wanted to harm him. Both Mendoza

and Krusow testified that the Appellant struck Mendoza in the face with the handgun as he tried to leave the bedroom. This caused Mendoza to bleed profusely and stagger down the hall.

The Appellant followed Mendoza closely down the hall. The Appellant kicked Mendoza in the face as he bent over to reach for his keys. He also struck Mendoza in the face with the handgun at least once more at this location. There are only two possible inferences to be drawn from blows struck which actually inhibit Mendoza's ability to get his keys and leave. One, the Appellant wanted to prevent him from leaving in order to inflict more damage, or two, that the Appellant cared more about inflicting damage then he did about Mendoza actually leaving the residence. In any case, either inference supports the conclusion that the Appellant intended to do great bodily harm to Mendoza.

By the accounts of all witnesses, and by looking at the sheer amount of blood left on the ground, the Appellant had already suffered substantial bodily harm at this point (at least). The Appellant argues this is a case should stop there, as an Assault in the Second Degree. But this ignores the Appellant's decision to strike more blows after the already doing major damage to

Mendoza. Once outside the Appellant followed Mendoza to his car and hit him so hard blood splashed on the outside of the vehicle. Jose Rodriguez, Krusow's stepfather, described the sound this made as like a watermelon breaking when you throw it on the ground. (RP at 42). This blow, and all the later blows are evidence of the Appellant's intent; he was not satisfied with merely bloodying up Mendoza, for some reason, he wanted to severely hurt him.

In addition to the direct testimonial evidence, the jury also heard circumstantial evidence of the severity of the beating. The State submitted photos of the injuries to the victim's face, of the blood stains running the length of the house, and of the blood splashed on Mendoza's car. All this evidence allowed the jury to draw inferences about the Appellant's intent that night. The logical conclusions the jury drew from the progressive and unnecessary assault, was that the Appellant intended to do great bodily harm.

During the course of the assault, the Appellant did not actually fire the weapon. However, both Mendoza and Krusow testified the Appellant used the firearm as the means to control Mendoza. So long as the gun remained in the hands of the Appellant he was free to beat Mendoza with the firearm without

fear of retaliation. The Appellant argues using the gun in this manner cannot amount to Assault in the first Degree. This assumption ignores the plain language of the RCW 9A.36.011:

> (1) 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 or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> > (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> > (c) Assaults another and inflicts great bodily harm.

The plain language is unambiguous. The elements of the crime are clearly laid out. This activates the plain meaning rule whereby

> we examine the language of the statute, other provisions of the same act, and related statutes to determine whether we can ascertain a plain meaning. *City of Seattle v. Allison,* 148 Wash.2d 75, 81, 59 P.3d 85 (2002). Each provision must be read in relation to the other provisions, and we construe the statute as a whole. *In re Detention of Williams,* 147 Wash.2d 476, 490, 55 P.3d 597 (2002). "Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other." *US West Communications, Inc. v. Wash. Util. & Transp. Comm'n,* 134 Wash.2d 74, 118, 949 P.2d 1337 (1997). If the plain language of the statute is unambiguous, this court's inquiry is at an end and we enforce "the statute in accordance with its plain

> meaning." *Armendariz,* 160 Wash.2d at 110, 156 P.3d 201.

In re Det. of Boynton, 152 Wash. App. 442, 452, 216 P.3d 1089, 1094 (2009). Using this method one can see, the individual language of 9A.36.011 and the overall arrangement of the chapter indicate the one can commit Assault in the First Degree in a number of different ways. It states a "person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm..." then list a number of different options including assault with a firearm. It does not specify the manner of the assault just that it is "with a firearm." Nothing in RCW mentions the firearm actually discharging. The Appellant reads additional elements into the statute by suggesting such a requirement.

The Appellant also suggests that actually firing the firearm is what raises an Assault in the Second Degree to an Assault in the First degree offense. Comparing the two degrees of assault indicates this is not the distinction the legislature intended. Assault in the Second Degree only requires an assault with a deadly weapon. RCW 9A.36.021. It has no requirements other than an assault with a deadly weapon. Assault in the First Degree requires

an additional level of "intent to inflict great bodily harm" and the requirement that the assault be done with "a firearm or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011. This introduces two new requirements which raise the conduct to a higher level crime. Adding a third requirement, that the firearm be fired, would be reading in additional criteria in a statute which already specifically indicated the elements of the crime.

The Appellant cites four cases for the proposition that a firearm must be discharged in order to contribute to a conviction for Assault in the First Degree. A closer review of these cases indicates they do not stand for that position. Each of the four cases, Odom, Flett, Mann, and Adlington-Kelly, are merely examples of Assault the First Degree being committed by discharging a firearm. None of them state that such a discharge is required in order to charge Assault in the First Degree.

In State v. Adlington-Kelly, The Court agrees with the State's position, saying that "the two degrees of assault are distinguished on the basis of intent." 95 Wash.2d 917, 958, 631 P.2d 954 (1981). This is consistent with a reading of the statute which turns

on whether the Appellant intended to do great bodily harm with the firearm, not whether he meant to discharge it. What made the current case an Assault in the First degree was the Appellant's intent to cause great bodily harm to the victim. If the Appellant had used his fist, and the State had charged the case under the prong of "a means likely to produce great bodily harm," the question would still be one of intent.

A case which is much more similar to the current facts is State v. Pierre, 108 Wash.App. 378, 31 P.3d 1207 (2001). In that case the victim was attacked by five different men who beat him severely. Id. At 381. Witnesses testified that the five men assaulted the victim for about seven minutes, thirty seconds of which they spent kicking the victim in the head. Id. As a result the State charged Assault in the First Degree for the kicks to the head. Id. At trial the doctor could not be sure about the exact effect of the kicks to the head and the jury ultimately found that the defendant had used a force or means likely to inflict great bodily harm to commit Assault in the First Degree, but did not unanimously agree that great bodily harm was inflicted on the victim. Id. At 382-83.

The defendant in Pierre challenged the jury's finding that he intended to commit great bodily harm by arguing that no rational trier of fact could conclude that the act of kicking the victim established that he had any intent to cause great bodily harm. Id. At 386. The Pierre court acknowledged that "[s]pecific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances." Id. at 386 citing State v. Louther, 22 Wash.2d 497, 502, 156 P.2d 672 (1945). The court then went on to say "it is difficult to avoid an inference that Pierre could have possibly intended anything other than intending great bodily harm when he continued to kick at [the victim's] head. Id. at 386.

Similarly, in this case, one can only infer that the Appellant intended to cause great bodily harm when he continued to strike Mendoza in the face with a hard metal firearm. As the damage began to manifest itself and Mendoza became disoriented and had trouble leaving, the attack continued. Just as in Pierre, continuing to strike the head of the victim, whether it is with a kick or hard metal firearm, leads one to infer intent to cause great bodily harm.

While the Appellant may not have pulled the trigger of the gun, his intent was clearly indicated by his actions.

In State v. Ferreira, the defendant gave two individuals directions to the victims' home, knowing they intended to do a drive by shooting. 69 Wash.App. 465, 467, 850 P.2d 541 (1993). The shooters and the defendant then went to a Yakima residence and opened fire, shooting the house twelve times with one of the bullets striking a six year old child. Id. The lower court's findings indicated that the suspects had fired at the house without knowing exactly who and where the residents were located. Id. at 469. Division Three took note of the lower courts deliberate choice to find the shooters had not known their bullets would strike anyone and ruled that although the defendant was an accomplice to a crime where a firearm had been discharged and actually hit someone; there was still not sufficient evidence of intent. Id. at 469-70. The firing of a weapon does not in itself show intent to do great bodily harm; it is merely one factor for the trier of fact's consideration.

In this case the Appellant knew exactly who he targeted the moment he came into Krusow's room and saw Mendoza. He could see in front of him exactly what wounds he inflicted as he inflicted

those wounds. He knew his blows slowed Mendoza's retreat from the residence yet he continued to inflict the blows. He did not cease his attack until Krusow's stepfather intervened and distracted him by allowing the gun to be turned towards him. Unlike the defendant in Ferreira, who did not know if his bullets would strike anyone, the Appellant attacked with specific purpose and intent to do great bodily harm to Mendoza.

2. THE RECORD CONTAINS AMPLE EVIDENCE THAT THE APPELLANT USED HIS VEHICLE IN THE COURSE OF THE OFFENSE

According to the testimony in the case, the Appellant used his vehicle, a Ford Focus to leave the scene of the crime. By leaving the crime in the vehicle, the Appellant was able to avoid containment set up by law enforcement. This escape, along with the approach to the house, is part of the crime and the reason his license must be suspended by the Department of Licensing.

Under RCW 46.20.285(4), committing any felony in which the commission of which a motor vehicle used, causing a one year driver's license revocation. The Supreme Court agreed with Division Two in its analysis of the whether a felony has sufficient

nexus to warrant suspension of a license:

> In affirming the decision of the trial court, the Court of Appeals determined that in order for the statute to apply the vehicle must contribute in some way to the accomplishment of the crime. There must be some relationship between the vehicle and the commission or accomplishment of the crime. Accordingly, where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony. In support of its reasoning, the Court of Appeals consulted a dictionary in order to ascertain the plain and ordinary meaning of the word "used" and concluded that it meant employed in accomplishing something (quoting Webster's Third New International Dictionary 2524 (3d ed.1966)). We are entirely comfortable with the Court of Appeals' view of the statute in question. In reaching this conclusion, we accept the concession of both parties that there is nothing ambiguous about the word "used," and we approve the meaning the Court of Appeals ascribed to that term and the language of the statute in question.

State v. Batten, 140 Wash. 2d 362, 365, 997 P.2d 350, 351-52 (2000) (some citations omitted).

In this case, the Appellant used a motor vehicle to accomplish his crime by using it to transport himself and his weapon to the scene of the crime. He then used the car to escape with the evidence of his crime and elude police for a time. The

Appellant left his firearm's ammunition in the vehicle. Once at home he had valuable time to hide his gun and shed the clothing he wore at the time of the offense.

According to the Appellant, he lived about 15 minutes away from Krusow by vehicle. (RP at 277). He arrived at Krusow's home at approximately 12 a.m. at night. (RP at 88). The Appellant could not have made it this distance from his home in Kennewick, and then back after the crime, without the use of his motor vehicle. This made a motor vehicle essential for commission of the crime.

V. CONCLUSION

The Appellant in this case attacked Mendoza at the outset of the encounter and continued that attack in manner which could only be described as vicious. The only purpose for the attack, the only intent, was to severely injure the victim. The evidence presented to the jury eliminated every other possible reason for the continuing assault, leaving the jury with on one logical inference, the Appellant intended serious bodily harm. On the basis of the arguments set forth herein, it is respectfully requested that the

jury verdict of the Superior Court for Franklin County be upheld.

Dated this 3rd day of September 2013

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By:
Brian V. Hultgrenn,
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

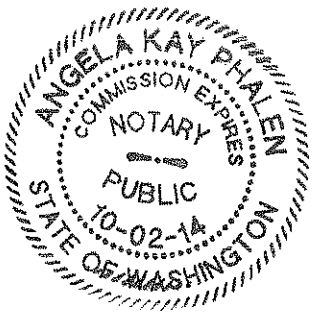
COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 3rd day of September, 2013, a copy of the foregoing was delivered to Bonifacio Alcantar-Moldonado #361475, Appellant, Coyote Ridge Correction Center, P.O. Box 769, Unit B-BB10, Connell, WA 99326 and to Dennis W. Morgan,

opposing counsel, P. O. Box 1019, Republic WA 99169 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Signed and sworn to before me this 3rd of September, 2013



Notary Public in and for
the State of Washington,
residing at Benton City.
My appointment expires:
October 2, 2014.

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