

FILED

DEC 08 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

| | | |
|-----------------------|---|-----------------|
| STATE OF WASHINGTON, |) | NO. 32508-3-III |
| Plaintiff/Respondent, |) | |
| |) | |
| vs. |) | |
| |) | |
| ANTONIO ZAMUDIO, JR., |) | |
| Defendant/Appellant |) | |

BRIEF OF RESPONDENT

JASON MERCER, WSBA #42877
Deputy Prosecuting Attorney

Douglas County
P.O. Box 360
Waterville, WA 98858

Telephone: (509) 745-8535

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF CONTENTS..... | i |
| TABLE OF AUTHORITIES..... | ii |
| Table of Cases..... | ii |
| Other References..... | iii |
| I. STATEMENT OF FACTS..... | 1 |
| II. ISSUES..... | 4 |
| 1. Was Mr. Zamudio Jr.’s offender score miscalculated?..... | 4 |
| 2. Did Mr. Zamudio Jr. receive effective assistance of counsel at sentencing? | 4 |
| 3. Is the State required to prove that a firearm is “operable” for the purposes of a firearm enhancement?..... | 4 |
| 4. Did the State prove, beyond a reasonable doubt, the necessary fear and apprehension of the victim required for an assault in the second degree conviction?..... | 4 |
| III. ARGUMENT..... | 4 |
| 1. The trial court did not err when sentencing Mr. Zamudio Jr. where defense counsel expressly acknowledged and participated in the calculation of Mr. Zamudio Jr.’s offender score..... | 4 |
| 2. Mr. Zamudio Jr.’s counsel was effective at sentencing..... | 7 |
| 3. The State is not required to prove that a firearm is “operable” for the purposes of a firearm enhancement..... | 8 |
| 4. The State proved Mr. Zamudio Jr.’s assault on the victim by | |

| | |
|--|----|
| apprehension and fear beyond a reasonable doubt..... | 11 |
| IV. CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

Table of Cases

| | <u>Page</u> |
|---|-------------|
| <u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 874, 50 P.3d 618..... | 5 |
| (2002) | |
| <u>Strickland v. Washington</u> , 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 7 |
| <u>State v. Bergstrom</u> , 162 Wn.2d 87, 93, 169 P.3d 816 (2007)..... | 5, 6 |
| <u>State v. Brown</u> , 111 Wn.2d 124, 761 P.2d 588 (1988)..... | 10 |
| <u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... | 13 |
| <u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)..... | 12 |
| <u>State v. Early</u> , 70 Wn. App. 452, 460, 853 P.2d 964 (1993)..... | 8 |
| <u>State v. Eastmond</u> , 129 Wn.2d 497, 500, 503-04, 919 P.2d..... | 12 |
| 577 (1996) | |
| <u>State v. Faust</u> , 93 Wn. App. 373, 376, 967 P.2d 1284..... | 8, 10 |
| (1998) | |
| <u>State v. Ford</u> , 137 Wn.2d 472, 480, 973 P.3d 452 (1999)..... | 5 |
| <u>State v. Hunley</u> , 175 Wn.2d 901, 910, 287 P.3d 584 (2012)..... | 5 |
| <u>State v. Lopez</u> , 147 Wn.2d 515, 519, 55 P.3d 609 (2002)..... | 5 |
| <u>State v. McNeal</u> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)..... | 7 |

| | |
|--|----------|
| <u>State v. Mendoza</u> , 165 Wn.2d 913, 920, 205 P.3d 113 (2008)..... | 5 |
| <u>State v. Montgomery</u> , 163 Wn.2d 577, 586, 183 P.3d 267..... (2008) | 11 |
| <u>State v. Nicholson</u> , 119 Wn. App. 855, 860, 84 P.3d 877..... (2003) | 12 |
| <u>State v. Pam</u> , 98 W.2d 748, 659 P.2d 454 (1983), <i>overruled on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988) | 8, 10 |
| <u>State v. Recuenco</u> , 163 Wn.2d 428, 437, 180 P.3d 1276..... (2008) | 8, 9, 10 |
| <u>State v. Rosborough</u> , 62 Wn. App. 341, 348, 814 P.2d 679 (1991)..... | 7 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068..... (1992) | 11 |
| <u>State v. Thomas</u> , 150 Wn.2d 821, 874-75, 83 P.3d 970..... (2004) | 11 |
| <u>State v. Tili</u> , 148 Wn.2d 350, 358, 60 P.3d 1192 (2003)..... | 5 |
| <u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980) | 10 |

Statutes

| | |
|--------------------------|---|
| RCW 9.41.010(1)..... | 8 |
| RCW 9.94A.030(11)..... | 5 |
| RCW 9.94A.525(2)(c)..... | 5 |
| RCW 9.94A.530(1) | 4 |

I. STATEMENT OF FACTS

On November 12, 2013, at around 10:30 pm, Brian Lumsden was in the BJ's Rock Island parking lot speaking with David Berndt, a long haul truck driver, whom he had just met. (RP 86). After approximately fifteen or twenty minutes a white Toyota Tundra type of truck came rolling through the parking lot with its bright lights on. Mr. Berndt yelled to the white truck to dim its lights because the lights were blinding the two men as they stood in the parking lot talking. (RP 90).

The driver of the white truck, later identified as Mr. Zamudio Jr., exited his vehicle, walked up to the two men, and asked with "a little attitude and a raised voice" what Mr. Berndt had said as he drove by and asked if Mr. Berndt had a problem. Mr. Berndt responded "no" and explained that the two men just wanted him to dim the lights of his truck. (RP 91, 102-103). Mr. Zamudio Jr. turned away and mumbled "that's what I thought" after which Mr. Berndt said something along the line of "hey man, I don't want any problems." (RP 102). Mr. Zamudio Jr. turned back around, walked up to Mr. Berndt, and asked again if he had a "problem." Mr. Berndt responded "yeah, I'd like you to dim your lights when you're driving through the parking lot because you're blinding us." Mr. Zamudio Jr. became angry, as if he had been insulted, a "little bit out of control," and pulled out a "pistol" which he held six inches from Mr.

Berndt's face while asking Mr. Berndt "what's your problem." (RP 92-94).

Mr. Lumsden was standing approximately three feet to the left of Mr. Berndt while Mr. Zamudio Jr. held a pistol six inches from Mr. Berndt's face and had a "very clear view" of the entire incident. Mr. Lumsden testified that he was personally fearful during the incident and, while thoughts of being a hero and/or running away crossed his mind, he was frozen in place and could not move or act. Mr. Lumsden further testified that before the incident Mr. Berndt was in good spirits but his demeanor changed during the interaction with Mr. Zamudio Jr. While the handgun was pointed at him Mr. Berndt had a look in his eyes that made Mr. Lumsden believe he was frightened. (RP 93, 95-96).

After this incident, Mr. Zamudio Jr. was located by Douglas County Sheriff's Deputies and placed under arrest. Deputy Jason DeMeyer executed a search warrant on Mr. Zamudio Jr.'s white Toyota Tundra. A black Walther PPS .40 caliber handgun loaded with six live .40 caliber rounds was found inside the truck behind the front passenger's seat. (RP 64-65). Lumsden and Berndt reported the incident to Sergeant Downs, an off duty Sheriff's Deputy, and he described their demeanors as "serious." (RP 116, 119). Deputy Mike Baker took statements from Lumsden and Berndt and described Berndt's demeanor as "calm but concerned,"

“concerned about what happened, what he witnessed, and what he was the victim of.” (RP 133-134).

A jury found Mr. Zamudio Jr. guilty of assault in the second degree and unlawful possession of a firearm in the first degree. The jury answered the Special Verdict in the affirmative that Mr. Zamudio Jr. was armed with a firearm at the time of the assault (CP 50-52). At sentencing, the Court inquired whether an agreement regarding Mr. Zamudio Jr.’s criminal history had been reached to which defense counsel stated “I believe we do, yes.” (RP 251). During the State’s recitation of Mr. Zamudio Jr.’s criminal history and the standard range for his assault in the second degree conviction, defense counsel interrupted, conferred with the State, and ultimately corrected the State’s calculation of the offender score. The correction raised Mr. Zamudio Jr.’s offender score from a “seven,” the score which the State had originally calculated, to an “eight.” (RP 252). Mr. Zamudio Jr.’s criminal history as listed on his judgment and sentence is contained in CP 55.

During the State’s sentencing recommendation to the Court it was noted that Mr. Zamudio Jr. had an extensive criminal history beginning with juvenile felonies in 1996 that continued unabated through 2005, and it was additionally noted that Mr. Zamudio Jr. was sentenced to prison in 2005 and had been back in the community approximately a year and a half

to two years at the time his current offenses had been committed. (RP 254). During the imposition of sentence, the Court also referenced the fact that Mr. Zamudio Jr. had not been out of prison long before these crimes were committed. (RP 259).

II. ISSUES PRESENTED

- 2.1 Was Mr. Zamudio Jr.'s offender score miscalculated?
- 2.2 Did Mr. Zamudio Jr. receive effective assistance of counsel at sentencing?
- 2.3 Is the State required to show that a firearm is "operable" for the purposes of proving a firearm enhancement?
- 2.4 Did the State prove, beyond a reasonable doubt, the necessary fear and apprehension of the victim required for an assault in the second degree conviction?

III. ARGUMENT

- 3.1 The trial court did not err when sentencing Mr. Zamudio Jr. where defense counsel expressly acknowledged and participated in the calculation of Mr. Zamudio Jr.'s offender score.

A defendant's offender score, together with the seriousness level of his current offense, dictates the standard sentence range used in determining his sentence. RCW 9.94A.530(1). To calculate the offender score, the court relies upon its determination of the defendant's criminal history, comprising "the list of a defendant's prior convictions and

juvenile adjudications, whether in this state, federal court, or elsewhere.” RCW 9.94A.030(11). Class C felonies wash out if the current offense was committed over five years after the offender was sentenced or was last released from confinement. RCW 9.94A.525(2)(c). A sentencing court’s calculation of an offender score is reviewed de novo. State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

The State bears the burden of proving criminal history by a preponderance of the evidence. State v. Bergstrom, 162 Wn.2d 87, 93, 169 P3d 816 (2007); State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); and State v. Ford, 137 Wn.2d 472, 480, 973 P.3d 452 (1999). Bare assertions, unsupported by evidence, do not satisfy the State's burden to prove the existence of a prior conviction. State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). The best evidence of a prior conviction is a certified copy of the judgment. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). “This is not to say that a defendant cannot affirmatively acknowledge his criminal history and thereby obviate the need for the State to produce evidence.” State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2008). A defendant's “mere failure to object to State assertions of criminal history at sentencing does not result in an acknowledgement.” Hunley, 175 Wn.2d at 912, 287 P.3d 584. But when defense counsel

affirmatively acknowledges a defendant's criminal history, the court is entitled to rely on such acknowledgement. Bergstrom, 162 Wn.2d at 97–98, 169 P.3d 816.

In the present case Mr. Zamudio Jr.'s defense attorney affirmatively acknowledged his client's criminal history. At sentencing, the Court inquired whether an agreement regarding Mr. Zamudio Jr.'s criminal history had been reached to which the defense attorney responded "I believe we do, yes." The record clearly shows that, far from being a passive participant in the sentencing hearing and simply acquiescing to the State's calculation of the offender score, Mr. Zamudio Jr.'s defense attorney in reality had made his own calculation of his client's offender score and went as far as to correct the State's calculation. The defense attorney's correction led to his client's offender score on count one being increased from a "seven" to an "eight." Both the State and the defense were aware of Mr. Zamudio Jr.'s criminal history, were in agreement regarding his offender score, and were aware that none of the felonies included in his offender score washed out.

Mr. Zamudio Jr.'s challenge to his offender score determination at sentencing is not properly before this Court when no declaration has been filed and no additional facts have been presented showing that Mr. Zamudio Jr.'s convictions should have washed out. No proof has been

presented by Mr. Zamudio Jr. that he has been in the community for any five year period since 1995 without a criminal conviction other than a vague reference to the sentencing dates of his convictions in his appeal.

The sentencing court was entitled to rely on the defense attorney's affirmative acknowledgment of Mr. Zamudio Jr.'s criminal history, and, absent proof on the record or verification submitted on appeal showing the wash out of specific convictions, Mr. Zamudio Jr.'s challenge to the court's determination of his offender score should be denied.

3.2 Mr. Zamudio Jr.'s counsel provided adequate assistance at Sentencing.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Rosborough, 62 Wn. App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. McNeal, 145 Wn.2d at 362, 37 P.3d 280 (citing Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. McNeal, 145

Wn.2d at 362, 37 P.3d 280 (citing State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993)).

Mr. Zamudio Jr. fails to establish either prong of the ineffective assistance test. Moreover, Mr. Zamudio Jr. fails to demonstrate error or prejudice because the record does not establish that any of his prior felony convictions would have washed out or that his offender score was incorrect. Thus, Mr. Zamudio Jr. has not shown that his counsel made an error, that he was prejudiced thereby, or that he received ineffective assistance of counsel at sentencing.

3.3 The State is not required to show that a firearm is “operable” for the purposes of proving a firearm enhancement.

A “firearm” is “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” RCW 9.41.010(1). A firearm does not need to be operable during the commission of a crime to constitute a “firearm” within the meaning of RCW 9.41.010(1). *See State v. Faust*, 93 Wn. App. 373, 376, 967 P.2d 1284 (1998). The relevant question is not whether a gun is operable, but instead whether the firearm is a “gun in fact” rather than a “toy gun.” Faust 93 Wn. App. at 380, 967 P.2d 1284.

Mr. Zamudio Jr. relies on State v. Recuenco, citing State v. Pam, for the proposition that a jury must be presented with sufficient evidence

that a firearm is “operable” in order to uphold a firearm enhancement. State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). Mr. Zamudio Jr.’s reliance is misplaced.

The issue in Recuenco was not whether a defendant had to possess an operational firearm, but was whether harmless error analysis applied when the State failed to submit a firearm enhancement to the jury. Recuenco, 163 Wn.2d at 433, 180 P.3d 1276. The State charged Recuenco with a deadly weapon sentencing enhancement and the jury found Recuenco committed his crime while armed with a deadly weapon but, at sentencing, the State requested a firearm sentencing enhancement. Recuenco, 163 Wn.2d at 431-32, 180 P.3d 1276. Recuenco faced three years in prison for the firearm enhancement but only one year for the deadly weapon enhancement. Recuenco, 163 Wn.2d at 432, 180 P.3d 1276. The trial court sentenced Recuenco on the firearm enhancement. Recuenco, 163 Wn.2d at 432, 180 P.3d 1276.

The Washington State Supreme Court held that the trial court lacked authority to sentence Recuenco on an enhancement not found by the jury. Recuenco, 163 Wn.2d at 439, 180 P.3d 1276. The Supreme Court also held that harmless error analysis did not apply in this situation. Recuenco, 163 Wn.2d at 431, 180 P.3d 1276. The cited language Mr. Zamudio Jr. relies on, that the firearm must be "operable," was cited by

the Recuenco Court merely to point out that differences exist between a deadly weapon sentencing enhancement and a firearm sentencing enhancement. Recuenco, 163 Wn.2d at 437, 180 P.3d 1276. That language was not part of Recuenco's holding and is non-binding dicta.

The case Recuenco relies on for the statement that a firearm must be operational, State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled on other grounds by* State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988), does not hold that the firearm must be operational. Faust, 93 Wn. App. at 379, 967 P.2d 1284. Instead, Pam distinguished a true firearm and a gun-like object incapable of being fired. Faust, 93 Wn. App. at 379, 967 P.2d 1284. Furthermore, State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980), the case Pam relied on, focused on a toy gun versus a gun in fact. Faust, 93 Wn. App. at 379-80, 967 P.2d 1284 (holding that the Tongate language Pam relied on did not limit the definition of a firearm to one capable of being fired during the crime. Rather, the distinction was between a toy gun and a gun “in fact”); Pam, 98 Wn.2d at 753-54, 659 P.2d 454 (citing Tongate, 93 Wn.2d at 755, 613 P.2d 121).

In the present case, there is no question that the firearm at issue was a gun in fact and not a toy gun. Witness Brian Lumsden testified that he was a “hundred percent sure” that the object Mr. Zamudio Jr. was holding was a handheld firearm and was “definitely a gun.” Deputy

DeMyer collected a black Walther PPS .40 caliber handgun when he executed the search warrant on Mr. Zamudio Jr.'s vehicle. The Walther PPS held a loaded magazine with six live .40 caliber rounds that Deputy DeMeyer cleared from the firearm. Defendant's challenge to the firearm enhancement imposed at sentencing is without merit and should be denied.

3.4 The State proved Mr. Zamudio Jr.'s assault on the victim by apprehension and fear beyond a reasonable doubt.

Mr. Zamudio Jr. asserts that the evidence presented by the State at trial was insufficient to support a finding by the jury that he placed the victim, Mr. Berndt, in a reasonable apprehension and imminent fear of bodily injury. Sufficient evidence supports the jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. State v. Montgomery, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and deference is given to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

In the present case, Mr. Zamudio Jr. was convicted of assault in the

second degree. Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury on another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003). When assault is alleged to have been committed by causing another to be in apprehension of harm, the State must prove both that the defendant had the specific intent to place the victim in apprehension of harm and that the victim was in apprehension of harm. State v. Eastmond, 129 Wn.2d 497, 500, 503-04, 919 P.2d 577 (1996). Defendant challenges only whether the State's evidence was sufficient to prove beyond a reasonable doubt that the victim, Mr. David Berndt, was placed in apprehension and fear of bodily injury when the victim did not testify at trial.

The victim, Mr. Berndt, was not required to testify about the incident for the jury to convict Mr. Zamudio Jr. of assaulting him. *See State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (Circumstantial and direct evidence are to be considered equally reliable in determining the sufficiency of the evidence). Mr. Lumsden was present and in very close proximity to both Mr. Zamudio Jr. and Mr. Berndt

during this entire incident. He described Mr. Zamudio Jr.'s angry demeanor and out of control behavior as Mr. Zamudio Jr. pulled a handgun out and held it six inches from Mr. Berndt's face in response to Mr. Berndt simply yelling at Mr. Zamudio Jr.'s passing truck to dim its bright lights. Mr. Lumsden also testified to witnessing a change in Mr. Berndt's demeanor as a result of Mr. Zamudio Jr.'s actions. Before this incident Mr. Berndt was playing with his dog, conversing with Mr. Lumsden, and in overall good spirits, but Mr. Lumsden observed his demeanor change when a handgun was pointed directly at him by an angry and hostile stranger inches from his face. Mr. Berndt was described as no longer being in good spirits but instead seemed frightened. Deputy Baker, who took Mr. Berndt's statement after the incident, described him as concerned about what had happened and about what he had been a victim of. The jury could reasonably infer from the testimony presented at trial that Mr. Berndt was in fear and apprehension of harm.

Mr. Lumsden further testified that he was personally fearful during the time Mr. Zamudio Jr. was pointing the pistol at Mr. Berndt's face, that he was frozen in place, and that he could not move or act. This fear was present even though Mr. Lumsden was not the one with the handgun pointed at him. Any rational trier of fact could conclude that Mr. Berndt, who did have a handgun pointed at him inches from his face, was also in

fear and apprehension of harm. The verdict indicates that the jurors believed Mr. Lumsden's account of these events. Credibility determinations are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Defense challenge should be denied because the evidence was sufficient to establish that Mr. Zamudio Jr. committed the offense of assault in the second degree by placing Mr. Berndt in a reasonable apprehension and imminent fear of bodily injury.

IV. CONCLUSION

The defendant's appeal should be denied for the reasons stated above.

Dated this 4th day of DECEMBER, 2014.

Respectfully Submitted by:



Jason Mercer, WSBA #42877
Deputy Prosecuting Attorney
Attorney for Respondent