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Court of Appeals
Division III
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NO. 36411-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA DAVIS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

The Honorable Jessica T. Reeves, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Davis intentionally shot Mr. Stroud because there is insufficient evidence placing Mr. Davis at the scene of the shooting.

2. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Davis acted with the intent to inflict great bodily harm by allegedly shooting Mr. Stroud with bird shot pellets.

3. The state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Davis possessed a firearm on December 9, 2017 when it did not produce the alleged shotgun at trial, could not link Mr. Davis to any firearm through forensic evidence, and all the shotguns on the property were accounted for and inoperable.

Issues Presented on Appeal

1. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Davis assaulted Mr. Stroud when it failed to produce sufficient evidence placing Mr. Davis at the scene of the shooting?

2. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Stroud intended to inflict great bodily harm on Mr. Stroud when the evidence Mr. Stroud testified he went deer hunting with Mr. Davis which requires lead rather than the bird shot pellets that hit Mr. Stroud?

3. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Davis possessed a firearm on December 9, 2017 when it could not produce the shotgun at trial, the record contains no physical evidence linking Mr. Davis to a firearm, no one saw Mr. Davis handle a shotgun, and the shotguns on the property where Mr. Davis was found were accounted for and inoperable?

B. STATEMENT OF THE CASE

Substantive Facts

On December 9, 2017 Joshua Davis and Les Deville were preparing to have a barbecue at Mr. Deville's house. RP 133. As they were driving home from the store, they stopped to get coffee at an espresso stand in Loon Lake, Washington. RP 133. While they were drinking coffee, Mr. Deville noticed that Scott Stroud was

outside. RP 37-38, 134. Mr. Stroud was an acquaintance of both men, but they did not know him well. RP 38, 202-03. Mr. Davis contacted Mr. Stroud and invited him to the barbecue. RP 204. Mr. Stroud accepted the invitation and Mr. Deville's offer to drive him home later in the day. RP 134, 204.

The record contains differing accounts of the conversation that took place in Mr. Deville's truck on the way to his house. According to Mr. Stroud, Mr. Deville and Mr. Davis discussed deer hunting near Mr. Deville's property and invited Mr. Stroud to join them on a hunt that day. RP 39-42. Mr. Deville and Mr. Davis testified that they discussed deer hunting but never discussed going on a hunt that day and never invited Mr. Stroud to accompany them on a hunt. RP 136, 224. While on the way to the barbecue, Mr. Stroud asked to stop at a trailer so he could get a new set of clothes, but the trailer was locked, and he was not able to enter. RP 205. The men eventually arrived at Mr. Deville's property. RP 42. Mr. Deville's property houses multiple trailer homes and there are typically several people staying there at any given time. RP 106.

Mr. Davis and Mr. Stroud entered Mr. Davis's trailer to look

for a change of clothes for Mr. Stroud. RP 43, 206. As Mr. Davis was looking for clothes, he noticed Mr. Stroud snorting a line of an unidentified substance. RP 206. After they found clothes for Mr. Stroud, accounts of what happened next diverge. Mr. Stroud testified that Mr. Davis retrieved a pair of shotguns from an unknown location and so they could go on a hunt. RP 44-45. According to Mr. Davis, he left the trailer to go smoke methamphetamine near a river on Mr. Deville's property. RP 206-07. Mr. Deville testified that he was working on the barbecue and did not know where Mr. Davis and Mr. Stroud were, but that he could hear them inside Mr. Davis's trailer at one point. RP 138. He also testified that Mr. Davis had approached him and asked him if he could go down to the river to smoke methamphetamine. RP 136-38.

Mr. Stroud testified that after Mr. Davis retrieved the shotguns, he and Mr. Davis proceeded to go across the highway and started to hike up a dirt road towards a meadow where they could hunt deer. RP 46-47. As Mr. Stroud was walking up the hill, he ducked below a tree branch and was shot in the back of the head. RP 47-48. Mr. Stroud was initially dazed, but quickly got up

and began to run towards the highway. RP 49. As he was running, he was again shot in the back of his right leg. RP 49. Mr. Stroud continued to run and eventually made it to the highway where he attempted to flag down drivers for aid. RP 49. A driver stopped and drove him to a nearby gas station where a fire truck was refueling. RP 50, 127.

The crew from the fire truck began to treat Mr. Stroud for his wounds and police were called to the gas station. RP 50-52. After speaking with Mr. Stroud, the police went to Mr. Deville's property to search for Mr. Davis. RP 105. Medics transported Mr. Stroud to the hospital where he was admitted to the emergency room and treated for superficial wounds to his head and leg. RP 54. Police visited Mr. Stroud in the hospital and showed him a photo lineup containing Mr. Davis's picture. RP 57. Mr. Stroud identified Mr. Davis as the person who had shot him. RP 57.

Police arrived at Mr. Deville's property and contacted Mr. Deville. RP 106. They placed him in handcuffs and began to question him about firearms on his property. RP 142. Mr. Deville disclosed that he had inoperable 12-gauge shotguns in two places on his property. RP 144. The officers asked him to verify they were

still where he had left them, and he confirmed that they were still on his property. RP 144. Officers then asked him about a 20-gauge shotgun and Mr. Deville informed them that he used to own a 20-gauge shotgun, but it had been stolen some time ago. RP 144.

At this point, Mr. Davis was walking back to Mr. Deville's trailers from the river after he went to smoke methamphetamine. RP 209. As he approached Mr. Deville's trailers, he noticed SUVs parked in the driveway. RP 209. Mr. Davis initially thought that they belonged to other people attending the barbecue but noticed that they were police vehicles once he got close to them. RP 210. After noticing the police presence, Mr. Davis sat down next to a flatbed trailer and waited because he was high on methamphetamine and had a pipe on his person. RP 211.

A cadet from the Washington State Patrol was sitting in one of the police SUVs when Mr. Davis later approached to examine them. RP 83-84. He noticed Mr. Davis looking into the police SUV and radioed to deputies at the scene that an unknown individual was on the property near the police cars. RP 84-85. The deputies ran back to the police vehicles and held Mr. Davis at gunpoint as he sat beside the trailer. RP 92. He was taken into custody and

searched. RP 108. The officers did not discover any firearms on his person but discovered a glass pipe in his pocket. RP 108. Residue inside the pipe later tested positive for methamphetamine. RP 184; Ex. 6.

Police seized Mr. Davis's clothes to check them for evidence. RP 169. There was no blood spatter on Mr. Davis's clothing, and it was not tested for gun powder residue. RP 169-70. The police accompanied Mr. Stroud back to the location where he claims Mr. Davis shot him on two occasions but were not able to find a shotgun or shotgun shell anywhere in the area. RP 161. When questioned, Mr. Davis told police that he went on a walk down by the river on Mr. Deville's property and eventually ended up hitchhiking on Highway 292. RP 228. He went on to say that when no one picked him up, he walked up the driveway back to Mr. Deville's property. RP 228-29.

Procedural Facts

The state charged Mr. Davis with one count of Assault in the First Degree with a firearm enhancement, one count of Unlawful Possession of a Firearm in the Second Degree, and one count of Unlawful Possession of a Controlled Substance. CP 20-22. Mr.

Davis proceeded to a jury trial. CP 67. Mr. Davis stipulated to the fact that he has a prior felony conviction, an essential element of the Unlawful Possession of a Firearm charge. CP 66.

The jury found Mr. Davis guilty on all counts and answered “yes” on the special verdict form asking whether Mr. Davis was armed with a firearm at the time he assaulted Mr. Stroud. RP 280-81. The trial court sentenced Mr. Davis to a mid-range sentence of 168 months plus 60 months for the firearm enhancement to total 228 months of confinement. RP 301; CP 86. Mr. Davis filed a timely notice of appeal. CP 88-89.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF ASSAULT IN THE FIRST DEGREE WHEN IT FAILED TO PROVE MR. DAVIS INFLICTED OR INTENDED TO INFLICT GREAT BODILY HARM ON MR. STROUD

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307,

317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of Assault in the First Degree, the state must prove that the defendant (1) assaulted another person, (2) that the assault was committed with a firearm or deadly weapon, or by force likely to produce great bodily harm or death, (3) and that the defendant acted with the intent to inflict great bodily harm. RCW 9A.36.011(1).

In this case, the state presented insufficient evidence to prove three elements of Assault in the First Degree. First, the record contains insufficient evidence to prove Mr. Davis assaulted Mr. Stroud with a shotgun. Second, the record contains insufficient evidence to conclude beyond a reasonable doubt that Mr. Davis intentionally shot Mr. Stroud, and third, that Davis acted with the intent to inflict great bodily harm when he allegedly shot Mr. Stroud.

- a. The state presented insufficient evidence to find that Mr. Davis assaulted Mr. Stroud

An "assault" is defined as "an intentional shooting of another person that is harmful or offensive." WPIC 35.50; CP 40. To meet its burden as to the first element of Assault in the First Degree, the state must prove that Mr. Davis intentionally shot Mr. Stroud. CP 38-39. The only evidence the state presented that suggests Mr. Davis was the person who shot Mr. Stroud is Mr. Stroud's own testimony, but Mr. Stroud was hit from behind and could not have seen Mr. Davis at the time he was shot. RP 59. Mr. Davis may or may not have been in the vicinity of Mr. Stroud when he was shot, but even if he was in the area, but this would be insufficient to prove that Mr. Davis shot Mr. Stroud.

Follow-up investigation did not reveal any physical evidence establishing that Mr. Davis shot Mr. Stroud. Police returned to the scene of the alleged shooting two times, including once with Mr. Stroud, to look for evidence but were not able to find a shotgun or any shells. RP 160-61. They also seized the clothing Mr. Davis wore that day and did not find any blood spatter on them. RP 159. Investigators declined to test the clothing for gunpowder residue. RP 160.

The record contains other evidence establishing that Mr.

Davis was not actually present at the location where Mr. Stroud was shot. Les Deville testified that Mr. Davis and Mr. Stroud did not leave his property after they arrived for the barbecue. RP 137-38. Furthermore, according to Mr. Deville, he did not have any functioning shotguns on his property at the time they arrived for the barbecue. RP 144. When contacted by officers, Mr. Deville disclosed that he had two 12-gauge shotguns on his property, but they were not operational. RP 144. He also discussed a third shotgun and how it had been stolen some time ago. RP 144. The 12-gauge shotguns were in their storage places on the night of the incident. RP 143-44.

Mr. Davis testified that he was on Mr. Deville's property smoking methamphetamine and not out hunting before the police arrived to arrest him. RP 206-07. Thus, Mr. Davis established a credible alibi by not only describing his whereabouts, but openly admitting to possessing a controlled substance as part of that description when he could have fabricated some other explanation. RP 207. Mr. Davis's testimony also aligns with Mr. Deville's recollection of a conversation earlier in the day where Mr. Davis asked him permission to go down on his property near the river. RP

136-37.

On the other hand, Mr. Stroud's testimony is contradicted by other evidence in the record and fails to establish beyond a reasonable doubt that Mr. Davis assaulted him. Primarily, based on Mr. Stroud's description of being struck from behind, it would have been impossible for him to identify the shooter. Without being able to identify Mr. Davis as the shooter, and without a weapon or any evidence connecting Mr. Davis to a weapon, the state presented insufficient evidence to prove beyond a reasonable doubt that Mr. Davis shot Mr. Stroud, that he acted with intent to shoot and with intent to inflict great bodily harm.

The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Davis's conviction for Assault in the First Degree and order dismissal of that charge.

- b. The state presented insufficient evidence to find that Mr. Davis acted with the intent to inflict great bodily harm on Mr. Stroud

Washington law requires that a person committing first

degree assault act with a specific intent to inflict great bodily harm. *State v. Wilson*, 125 Wn.2d 212, 218-19, 883 P.2d 320 (1994). In determining intent, the trier of fact should look to all the circumstances in the case, including the nature of any prior relationship and any previous threats. *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989)).

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a). “Great bodily harm” is the objective or purpose of assault in the first degree. “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

Even assuming for the sake of argument alone, that Mr. Davis shot Mr. Stroud while hunting, the circumstances of this case do not establish that Mr. Davis acted with the intent to inflict great bodily harm, rather than accidentally misfiring. According to Mr. Stroud, Mr. Davis retrieved the shotguns, that typically lead “slugs”

to hunt larger game like deer, but Mr. Stroud was shot with pellets. RP 45-46, 73.

The record establishes that Mr. Stroud, Mr. Davis, and Mr. Deville are knowledgeable about hunting, specifically how to hunt deer. RP 40, 45-46, 136. Mr. Stroud even testified that he and Mr. Davis discussed the ammunition they were going to use before leaving to hunt. RP 45. It defies explanation why Mr. Davis, a knowledgeable hunter, would substitute bird shot for an actual slug if he intended to inflict great bodily harm on Mr. Stroud.

If someone intended to hunt for deer or to create great bodily injury, the hunter would have used lead slugs. RP 40, 45-46, 136. The only absolute fact in evidence that is established beyond a reasonable doubt is that someone shot Mr. Stroud with pellets. This evidence, when considered in the light most favorable to the state does not establish that Mr. Davis intended to shoot Mr. Stroud with the intent to inflict great bodily injury. The evidence presented at trial is insufficient to find Mr. Davis guilty of Assault in the First Degree, therefore this court should reverse his conviction and dismiss the charge. *Hickman*, 135 Wn.2d at 103.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DAVIS POSSESSED A FIREARM ON DECEMBER 9, 2017

To convict a defendant of Unlawful Possession of a Firearm in the Second Degree, the State must prove that (1) the defendant knowingly owned or possessed a firearm, (2) the defendant has previously been convicted of a felony, and (3) that the possession occurred in Washington. RCW 9.41.040(2). The only issue disputed is the state's failure to prove beyond a reasonable doubt that Mr. Davis possessed a firearm.

The state was never able to produce the shotgun Mr. Davis allegedly possessed at trial because no physical evidence was found at the scene where Mr. Stroud claims the shooting occurred. RP 160-61. The police questioned Mr. Deville about firearms on his property and he disclosed that he had two inoperable 12-gauge shotguns stored, and that he previously owned another shotgun that was stolen long before this incident occurred. RP 142-44. Mr. Deville checked his property for the inoperable shotguns that night and found them in their storage places. RP 144.

The police also seized Mr. Davis's clothing to test it for evidence and did not find any blood splatter and chose not to test it for gun powder residue despite the availability of such testing. RP 159. There was no evidence linking Mr. Davis's clothing to a firearm. The record does not contain any evidence of Mr. Davis possessing a firearm other than Mr. Stroud's uncorroborated testimony. Police were not able to find a shotgun at the scene or a functioning shotgun on Mr. Deville's property. The state presented insufficient evidence to find beyond a reasonable doubt that Mr. Davis possessed a firearm on December 9, 2017. Accordingly, this court should reverse his conviction and dismiss count two. *Hickman*, 135 Wn.2d at 103.

D. CONCLUSION

As a matter of law, the state presented insufficient evidence to prove the elements of Assault in the First Degree and Unlawful Possession of a Firearm in the Second Degree. The state failed to prove Mr. Davis assaulted Mr. Stroud because there was no evidence that Mr. Davis was present at the scene of the alleged shooting except for Mr. Stroud's testimony that is contradicted by other witnesses. Additionally, the state was unable to produce any

physical evidence of Mr. Davis being involved in a shooting.

The state also failed to present sufficient evidence that Mr. Davis intended to inflict great bodily harm on Mr. Stroud. Even taking the evidence in the light most favorable to the state and assuming Mr. Davis and Mr. Stroud went hunting that day, the evidence does not establish an intent to shoot or an intent to harm.

In sum, the state failed to present sufficient evidence to prove the elements of Assault in the First Degree and Unlawful Possession of a Firearm in the Second Degree. Mr. Davis respectfully requests this court reverse his convictions and remand for dismissal with prejudice.

DATED this 2nd day of April 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor's Office trasmussen@stevenscountywa.gov and Joshua Davis/DOC#770662, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326a true copy of the document to which this certificate is affixed on April 2, 2019. Service was made by electronically to the prosecutor and Joshua Davis by depositing in the mails of the United States of America, properly stamped and addressed.



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LAW OFFICES OF LISE ELLNER

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