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Court of Appeals
Division III
State of Washington
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No. 36411-9-III

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

STATE OF WASHINGTON,
Respondent,

v.

JOSHUA DAVIS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
STEVENS COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00372-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence to convict the defendant of the crimes of Assault in the First Degree and Unlawful Possession of a Firearm.

B. STATEMENT OF THE CASE

On December 9, 2017, Scott Stroud was at a coffee shop in Loon Lake, Washington (VRP 37). While he was there, he ran into the defendant and Les Deville (VRP 38). While talking with the defendant, they asked him if he wanted to go hunting (VRP 39). Stroud agreed, and asked if he could stop by his house to get warmer clothes, but Deville told Stroud they had warmer clothes he could borrow to wear (VRP 41). Deville testified that he wasn't present while the defendant and Stroud talked, but that Stroud asked him for a ride home. Deville stated he could give him a ride home, but that Deville needed to go to his house first to start his barbeque (VRP 134).

All three went to Deville's house, and on the way discussed where they would hunt (VRP 42, 136). Deville provided them with information on where a good spot to hunt was across from his property (VRP 136).

When they arrived at Deville's house, Stroud and the defendant went inside a trailer together. The defendant retrieved coveralls for the defendant to wear. The defendant retrieved two shotguns, and Stroud expressed concern about hunting with shotguns, but the defendant indicated they had slugs for the shotguns (VRP 43 – 46). Deville confirmed that they were in the trailer

together, because he could hear them talking. Mr. Deville didn't know when they left, or if they left together, but that when he returned outside they were gone (VRP 136 – 139).

Stroud and the defendant leave to go hunting. Deville did not go hunting with them. They went walking, and ended up in a remote area. Stroud could see a fence in the distance and could hear noises that sounded like someone lived in the distance. The defendant suggested they not go any further in the direction they were headed, due to concerns of trespassing. Stroud agreed and pointed out a deer trail, to which both start to walk toward the trail (VRP 47).

As Stroud was headed up the trail, he stepped in front of the defendant. Stroud stepped over the log, ducking under a branch. It was at that time the defendant shot him in the back of the head (VRP 47).

Stroud was knocked down, but he opened his eyes and realized what happened. He got up and started running towards the highway. (VRP 48). As he was running away, the defendant shot Stroud again, hitting him in the back of the leg (VRP 49).

Stroud made it to the highway, and flagged down a passerby. Brandon Leliefeld picked up Stroud. Leliefeld drove Stroud to the four corners junction, where he made contact with fire trucks already present (VRP 126 – 127).

Police and ambulances respond to four corners junction, and Stroud was transported to the hospital (VRP 52). Stroud saw a doctor and x-rays were taken. He was released that day (VRP 52-53). Dr. Coomes treated Stroud at Sacred Heart Medical Center for gunshot wounds to his posterior left thigh and top of his head (VRP 70). X-rays confirmed the diagnosis of a gunshot wound to the skull and femur (VRP 72 – 76).

Sgt. Gowin of the Stevens County Sheriff's Office responded to the Four Corners junction and met with Stroud prior to his transport to Sacred Heart. Stroud identified the suspect to Sgt. Gowin and indicated he had been at Deville's house. Sgt. Gowin responded to Deville's home. (VRP 104 – 105). Trooper Evers of the WSP Patrol and his Trooper Cadet Gillette responded to Deville's home as well, as an agency assist (VRP 90). Trooper Evers got out of his vehicle and made contact with Deville with Sgt. Gowin. Trooper Cadet Gillette remained in the vehicle (VRP 91).

While sitting in Trooper Ever's unmarked patrol car, Trooper Cadet Gillette observes a large male suspect, walking slowly, looking in the vehicles as he passes, walking about 100 feet farther and crouching down behind debris (VRP 84 – 85). Cadet Gillette radioed to Trooper Evers what he had observed. Trooper Evers and Sgt. Gowin had initially made contact with Deville, but responded to the vehicle. Cadet Gillette pointed out the suspect in the debris (VRP 85). The defendant was apprehended from the bushes by Trooper Evers and Sgt. Gowin (VRP 106 – 107).

Sgt. Gowin placed the defendant under arrest. During a search incident to arrest, a meth pipe was located (VRP 108). The lab tested the contents of the pipe, which tested positive for methamphetamine (VRP 184).

After placing the defendant under arrest, Sgt. Gowin gave *Miranda* warnings, which the defendant waived. The defendant agreed to speak to Sgt. Gowin. The defendant told Sgt. Gowin that he had hidden in the bushes because he had just returned from a walk, had seen the patrol cars and didn't want to get shot. He further stated that he had been gone from the property because he had gone for a walk and was trying to hitchhike on HWY 292 (VRP 228). He also stated that he had returned from hitchhiking because no one picked him up; and admitted to Sgt. Gowin that he had talked to Stroud about going deer hunting (VRP 229).

Sgt. Gowin returned to Deville's property in the days following to discuss firearms that Deville had on his property. Deville admitted to having two working shotguns on his property, and told Sgt. Gowin he would locate them. When Sgt. Gowin attempted to retrieve them, Deville indicated that he couldn't locate any of them (VRP 188 – 189).

Later, Stroud met with Sgt. Gowin and Detective Bitton. He identified the defendant as the person who shot him from a photo lineup (VRP 56 – 57). Stroud identified the defendant in court as the person who shot him on December 9, 2017 (VRP 59).

Stroud clarified that even though he was shot from behind, he was sure it was the defendant (VRP 67).

The defendant testified at trial. The defendant testified that he did see Stroud at the coffee shop on December 9, 2017, but that he invited him over to the house to eat barbeque. On their way to Deville's house, they stopped at Stroud's trailer so Stroud could get his clothers (VRP 204 – 205). The defendant confirms that he provides Stroud with coveralls (VRP 206). The defendant testified that at that point, he left the trailer to walk down to the river to smoke meth (VRP 207). When he returned he saw the vehicles, but didn't realize it was a police car, he just thought it was people over for the barbeque (VRP 209). He then looked into one of the vehicles to see if it was a police car, and then went to the flatbed trailer and sat down (VRP 210). He denied talking to Stroud about going hunting (VRP 212). He denied having a conversation with Stroud inside the trailer (VRP 214). He denied telling Sgt. Gowin he had gone hitchhiking and returned when no one picked him up (VRP 222).

The defendant was convicted on all counts (VRP 280 – 284).

Sentencing was held on October 23, 2018 (VRP 289). The Court sentenced the defendant to 228 months of confinement on Count 1, a 168 month standard range sentence plus 60 months for the firearm enhancement; 22 months of confinement on Count 2, and 12 months of confinement on Count 3 (VRP 301). The court imposed 36 months of community custody.

The defendant timely filed this appeal.

C. ARGUMENT

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the jury’s verdict, any rational jury could find the essential elements of a crime beyond a reasonable doubt.” *State v. McCreven*, 284 P.3d 793, 809, 170 Wn.App.444 (2012) (emphasis added) (citing *State v. Johnson*, 159 Wn.App. 766, 744, 247 P.3d 11(2011) (internal citations omitted).

A sufficiency review is a limited inquiry which addresses whether “the government’s case was so lacking that it should not have even been submitted to the jury.” *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed 2d 1(1978). A narrow sufficiency review does not override the jury’s role concerning how the jury weighs the evidence or what inferences they draw from evidence. *Musacchio v. United States*, 577 U.S. _____, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016). The Supreme Court outlines that a reviewing court on a sufficiency of the evidence review has a narrow role, where they make a “*limited* inquiry tailored to ensure that a defendant receives the minimum that due process requires: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt; and that a “sufficiency challenge is for the court to make a ‘legal’ determination whether the evidence was strong enough to reach a jury at all” *Id.* (emphasis added) (quoting *Jackson v.*

Virginia, 443 U.S. 307, 314-319, 99 S.Ct.2781, 61 L.Ed. 2d 560 (1979)).

Washington case law follows suit. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) explains that the job of the court when conducting a sufficiency review is not to “reweigh the evidence and substitute judgment” but rather “because [the jury] observed the witnesses testify first hand, we defer to the jury’s resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given to the evidence.”

All reasonable inferences that could be made from the evidence “must be drawn in favor of the verdict and interpreted strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Joy*, 121 Wash.2d 333, 339, 851 P.2d 654 (1993). The “jury is the sole and exclusive judge of the evidence.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

When conducting a sufficiency of the evidence review, the only question should be if there was enough evidence to send to the jury; it is not the job of the reviewing court to make determinations on the evidence. See *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012); *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11(2011); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Walton*, 64 Wn.App.410, 824 P.2d 533 (1992); *Jackson v. Virginia*, 443 U.S. 307,

314-315 (1979).

The Court assumes the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it. *State v. Wilson*, 71 Wash. App. 880, 891, 863 P.2d 116 (1993), *rev'd on other grounds*, 125 Wash.2d 212, 883 P.2d 320 (1994).

The trier of fact is deferred to when resolving any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. *State v. Boot*, 89 Wash. App. 780, 791, 950 P.2d 964 (1998).

a. The State presented sufficient evidence to prove that the defendant committed the crime of Assault in the First Degree.

To convict the defendant of Assault in the First Degree in this instance, the state must prove that the defendant assaulted the victim with a firearm and committed that assault with the intent to inflict great bodily harm. RCW 9A.36.011.

The appellant argues that there is insufficient evidence to convict because the victim was shot from behind; therefore, the victim could not have seen his shooter at the time he was shot. The appellant is asking this court to weigh the evidence and supplant the conclusion of the jury with its own conclusion that there is no way the victim could have identified the defendant.

Scott Stroud addressed this issue directly during his testimony. He

testified that it was only himself and the defendant who went hunting. He was asked if he knew who shot him from behind, and he identified the defendant. What the appellant is leaving out is the fact that Mr. Stroud was shot twice, once in the head from behind and again as he was running. Mr. Stroud did not waver on his identification, and made the identification over and over again – both in court, the day of the incident, and with a photo line-up. The jury heard the defense stress the fact that Mr. Stroud was shot from behind. The jury concluded that Mr. Stroud could, and did, identify the defendant as the one that assaulted him.

The appellant points to alleged contradictions as reasons to not believe Mr. Stroud. The appellants brief states “Les Deville testified that Mr. Davis and Mr. Stroud did not leave his property after they arrived for the barbecue.” (Brief of Appellant, 11). This isn’t an accurate statement. Mr. Deville actually testified that he could hear them in the trailer, because he could hear voices talking (VRP 137 – 138); but then he went outside to check on the fire and they were no longer present. Mr Deville indicated he didn’t see them leave, he didn’t know if they left together or not, he just knew they were gone (VRP 139). The appellants brief also states that Mr. Deville didn’t have any functioning shotguns on his property during the time in question; but Sgt. Gowin testified that Mr. Deville specifically told him he had two working shotguns on his property (VRP 188 – 189).

The appellant argues that he established a credible alibi because of

his self-serving testimony; but urges this court to dismiss the testimony of the victim because “the only evidence the state presented that suggests Mr. Davis was the person who shot Mr. Stroud is Mr. Stroud’s own testimony . . .” (Brief of Appellant, 10). Similarly, the only piece of evidence establishing any alleged alibi is the testimony of the defendant. The appellant insinuates that the defendant is more credible than the victim because he admitted to smoking methamphetamine. However, Mr. Stroud was equally as open and honest when discussing the crimes he committed – snorting suboxone, unlawfully possessing a firearm, and unlawfully hunting, both without a license and out of season. Regardless, the decision of who is more credible and which version of events to believe is left for the jury to decide.

The appellant wants the court to look at the fact that Mr. Davis testified consistently with the account that Mr. Deville gave regarding the conversation about going down to the river. However, the appellant leaves out the fact that Mr. Deville consistently contradicts the testimony of the defendant. Mr. Deville testified that Mr. Stroud was not invited over for barbeque; he testified that they talked about going hunting on the drive to his house, and specifically where to go hunting across from his property because he didn’t want them hunting on his property; he testified that they did not stop at any trailer to pick up anything of Mr. Strouds – all testimony that directly contradicts that of the defendant.

It is clear that the jury had to weigh the credibility of Mr. Stroud against that of the defendant. There was plenty of evidence that was presented to corroborate Mr. Stroud's testimony, including the x-rays that clearly demonstrated he had been shot. It is not this court's place to re-weigh that evidence. It is not the place of this court to analyze which testimony is more persuasive than another, as all testimony is evidence.

The appellant argues that the testimony of Mr. Stroud does not establish beyond a reasonable doubt that the defendant assaulted him. This is not the question this court needs to answer; but rather if there was enough evidence presented that any reasonable juror could find that the assault occurred beyond a reasonable doubt.

The appellant also argues that there was insufficient evidence to prove that the defendant intended to commit great bodily harm when he shot Mr. Stroud. The state demonstrated sufficient evidence of this with testimony that Mr. Stroud was shot twice, which was corroborated by medical records. A victim testifying that he was shot in the head, and then shot again as he tried to run away is more than sufficient evidence of intent. It is arguable that is evidence of attempted murder. Most importantly, this very point was argued to the jury.

The appellant points to the fact that the defendant used birdshot in his rifle, and that shows that he didn't have any intent to inflict great bodily harm. Mr. Stroud testified about the fact that he and the defendant discussed

what kind of ammunition to use. It was clear that Mr. Stroud thought that the rifles were loaded with a slug, and potentially the defendant made a mistake when loading the rifles, given the discussion about ammunition. While there may be a question of why the rifle was loaded with birdshot, the more important question is why someone shoots another person not once, but twice – once in the head and once when the victim is running away. The appellant argues that it could have been a misfire of the rifle; however, if it was simply a hunting accident, there shouldn't have been two shots. Regardless of the debate regarding what this evidence means, it is obvious that there was enough evidence presented to send the question to the jury.

It should be noted that in closing arguments, the defense argued that the state did not prove that there was no great bodily harm or intent to commit great bodily harm. The jury not only disagreed, but they were presented with evidence through testimony and medical records that they could base their verdict on regarding the intent element.

b. The State presented sufficient evidence to prove that the defendant committed the crime of Unlawful Possession of a Firearm in the Second Degree.

To convict the defendant of the crime of Unlawful Possession of a Firearm in the Second Degree, the state must prove that the defendant (1) knowingly had a firearm in his possession and (2) had previously been

convicted of a felony. RCW 9.41.040.

The appellant argues that because the State did not produce the shotgun that was possessed there was insufficient evidence to convict the defendant of the crime.

WPIC 5.01 states that evidence may be either direct or circumstantial. Further, “[t]he term ‘direct evidence’ refers to evidence that is given by a witness who has directly perceived something at issue in this case.” Here, Mr. Stroud testified that he saw the defendant in possession of a firearm. The state produced corroborating evidence of the firearm through medical records. The appellant continually argues that the witness isn’t credible, but that doesn’t mean that sufficient evidence wasn’t presented. Disagreeing with the fact that the jury found the evidence compelling doesn’t mean the evidence doesn’t exist or wasn’t presented.

The appellant goes on to argue again that Mr. Deville disclosed that he had “two inoperable 12-gauge shotguns stored . . .” (Brief of Appellant, 15); however, Sgt. Gowin testified that he indicated he did have working shotguns on his property, he just wasn’t able to locate them.

While the appellant may argue that Mr. Stroud’s “uncorroborated” testimony shouldn’t be trusted; the fact remains that his eye-witness account that the defendant possessed a firearm is sufficient to send to a jury. The victim was clearly testifying to something directly as he perceived it. WPIC 1.02 instructs that “[t]he evidence you are to consider during your

deliberations consists of the testimony that you have heard from witnesses during the trial.” Further, “[the jury is] the sole judges of the credibility of each witness. [The jury is] also the sole judges of the value or weight to be given to the testimony of each witness.” These issues were all for the jury to decide.

D. CONCLUSION

Because the only question that should be answered when conducting a sufficiency of the evidence review is whether or not there was enough evidence to send to the jury, convictions for Assault in the First Degree and Unlawful Possession of a Firearm should be upheld on a sufficiency of the evidence basis.

There was enough evidence presented at trial to show that the defendant assaulted Mr. Stroud with a firearm with intent to commit great bodily harm when he shot him in the head and then in the leg when Mr. Stroud was running away. There was sufficient testimony that the defendant was the shooter; there was no evidence that contradicted Mr. Stroud’s testimony that the defendant was with him in the woods other than the testimony of the defendant. There is sufficient evidence presented to prove that the defendant possessed a firearm, based on the testimony of Mr. Stroud and the corroborating medical records.

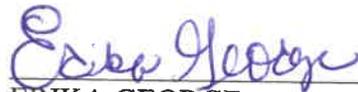
It is the sole duty of the jury to weigh the credibility of the testimony between witnesses. The appellants entire argument is based on

pointing out contradictions in evidence and weighing the credibility of the witness; asking this court to supplant its own opinion of the evidence for that of the jury's. Caselaw mandates that the only question is if there was enough evidence to send to the jury; not to make determinations from that evidence.

The convictions should be upheld.

Respectfully submitted this 31st day of May, 2019.

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