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65609-1

NO. 65609-1-I

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

FILED  
APR 11 2007

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STATE OF WASHINGTON,

Respondent,

v.

JOHN F. WEIBLE,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

JOHN J. JUHL  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

The defendant was convicted of assaulting his ex-girlfriend after she had him served with a notice of eviction from her home. The consistent testimony of the eye witnesses was that the defendant entered the room where the victim was, pointed a .38 caliber revolver at the victim, fired several shots, paused, took aim and fired again. The evidence showed that the bullet striking the victim caused extensive injuries capable of producing significant permanent impairment of organs or causing death. Was there sufficient evidence to enable the jury to find beyond a reasonable doubt that the defendant intended to inflict great bodily harm?

## **II. STATEMENT OF THE CASE**

Defendant, John Weible, was charged by amended information with first degree assault, with allegations that he was armed with a firearm at the time of the commission of the crime, and that the victim was a family or household member, and the crime occurred within sight or sound of the victim's minor children under the age of 18 years. CP 128-129.

### **1. The Relationship Between Elaine Berger And John Weible Prior To July 8, 2009.**

Doris Elaine Berger and John Weible met through an on-line service, Senior People Meet; they had their first face to face date

on March 10, 2007, at the Village Restaurant in Marysville. A few months later, around July 2007, Weible moved into Berger's large, five bedroom home in Marysville, and Berger put Weible on her bank account. Prior to meeting Berger Weible lived in a double-wide mobile home in Gold Bar. Weible was immensely in love with Berger and his goal was to have a life with her. During his three years of military service Weible qualified on several weapons and learned to be "immensely" careful with guns. RP 76-81, 291-294, 303, 310-311, 313-314, 316.

In February 2009, Berger told Weible that it was not working out and he would have to move. Berger gave the following reasons for ending the relationship: Weible's flashes of temper and outbursts of anger including several road rage incidents, Weible grabbing her by the arm and yelling at her in a casino, Weible throwing a can of paint at her feet, and the numerous differences between who Weible said he was and what she observed him to be. When Berger told Weible that things were not working out between them, Weible stated that he was not moving back to Gold Bar. RP 88-90, 99.

On June 29, 2009, the two-year relationship had failed and Berger had her son serve Weible with an eviction notice giving him

30 days to move out of her house. Berger told Weible that other than the garage and attached bedroom he could not enter the rest of her house anymore. At that time Weible's living options were moving back to his double-wide mobile home in Gold Bar or moving to a 685 square foot apartment at Shag Housing in Lynnwood. Weible was also taken off Berger's bank account in June of 2009. RP 87, 91-93, 298-299, 303, 309, 315-316.

## **2. The Events Of July 8, 2009.**

The morning of July 8, 2009, Weible packed his suitcase and put it in his vehicle. In the suitcase Weible packed his last will and testament, his vehicle registration, his birth certificate, his daughter's birth certificate, a copy of the eviction notice, a zippered case for the .38 caliber Smith & Wesson and a bag of .38 caliber bullets. Weible owed Berger money and had only \$5 in his bank account. RP 309-310, 312, 318-321.

Around 12:20 p.m., Berger was at her home with her fourteen year old daughter Heidi, her thirteen year old daughter Kayla, and her friends Roger and Rosemary Nelson<sup>1</sup>. Rosemary and Heidi were sitting on the couch in the living room, Roger and Kayla were working on a puzzle at a small table in the living room,

and Berger was in the kitchen area by the dining table. Weible came out of the bedroom and Berger asked him, "What are you doing? You're not supposed to be in here." Weible replied, "Come here, I want to talk to you." Berger started walking towards Weible and grabbed a chair when she saw that he was pointing a gun at her. Roger saw the gun and told Weible to put the gun down. Weible was waving the gun at Berger saying, "What do you have to live for?" Weible fired several rapid shots and Berger crouched down. Weible paused, took aim at Berger and fired again. After he fired the last shot Weible left. Weible claimed that he had no intention of harming Berger and was just going to give the .38 caliber Smith & Wesson to Berger when the gun suddenly fired. RP 27-30, 45, 50, 64, 96-97, 99-104, 131-134, 146-152, 160-161, 304-308.

When Heidi saw Weible shoot her mother, she ran out of the house screaming. Roger saw Berger go down, went to her, saw blood, and had her lay down. Rosemary called 911. Weible made no effort to aid Berger. Police and medics arrived within minutes and determined that Berger needed to be air lifted to Harborview

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<sup>1</sup> Roger and Rosemary Nelson will be referred to by their first names for clarity; no disrespect is intended.

due to the life threatening nature of her injuries. CP 71; RP 30, 50, 58, 64, 132-134, 150.

Deputy Haldeman was in the north county around 12:30 p.m. when he heard dispatch sending officers to a Marysville shooting involving Weible. Dispatch advised that Weible had left the scene in a Ford Bronco. Deputy Haldeman was driving from Darrington when he saw Weible in a Ford Bronco and stopped him. Weible was driving into the Cascade foothills on State Route 530 northeast of Marysville, not towards Gold Bar which is southeast of Marysville. Weible told Deputy Haldeman where the gun was. A .38 caliber Smith & Wesson revolver was recovered from the center console of Weible's Ford Bronco. A bag of .38 caliber bullets, compatible with the revolver, was also recovered from the Bronco. RP 160-164, 167, 170-171, 203, 206-209, 235-236.

### **3. The Crime Scene Investigation.**

The main focal point of the investigation at the crime scene was the bullet strikes in the kitchen cabinetry. There were five separate bullet holes in the cabinetry; four on one cabinet and one on a higher cabinet. Four bullets were recovered from the house, one remained lodged in the wall, and a sixth bullet was recovered from Berger during surgery. The bullets recovered from the house

and from Berger were all fired from the gun recovered from Weible's Bronco. The gun used by Weible is capable of firing six shots without reloading. CP 69-73; EX 8, 47; RP 182-183, 185, 190-193, 207, 211-212, 218-222, 230-231, 262.

Exhibit 47 shows the bullet strikes on the cabinetry tagged with tape and the trajectory rods used in the investigation. Exhibit 8 is a diagram of Berger's house showing the trajectory lines of bullets. All five bullet strikes are in a general pattern of a straight line. EX 8, 47; RP 215, 221-222, 247-252, 254-256, 266-267, 273.

#### **4. The Gun.**

The .38 caliber Smith & Wesson used to shoot Berger is a double-action revolver. There are two ways to fire the gun; cock the hammer and then pull the trigger, or just pull the trigger. With the hammer is cocked it takes 3—4 pounds of pressure on the trigger to fire the gun. When you just pull the trigger to cock and fire the gun it takes 12—13 pounds of pressure. If you keep pulling the trigger, the gun will cock and fire until all six shots are fired. An analogy for trigger pull weight is that it takes 4—5 pounds to dent an empty pop can. CP 69-70; RP 230-231, 237.

## **5. The Medical Evidence.**

After being shot, Berger was treated by aid crew workers at her home and air lifted to Harborview Medical Center in Seattle, the major critical care hospital in the Pacific Northwest. At Harborview Berger was immediately taken in to the operating room. The bullet entered Berger's right shoulder, passed through her chest and entered her abdominal cavity causing several internal injuries; a significant laceration to her liver, a tear to her diaphragm, a laceration to her lung, a laceration of her bile duct, and transected the portal vein which carries blood to the liver. The path the bullet took was capable of causing a significant permanent impairment of Berger's organs. When lacerated, the liver bleeds rapidly and extensively. A transected portal vein can also lead to rapid blood loss and death in minutes. Berger needed three separate surgeries to repair the damage and was hospitalized for fourteen days. Doctors recovered the bullet inside Berger during surgery. The damage from the bullet produced great bodily harm and could have cause Berger's death. CP 71-73.

## **6. The Verdict.**

The jury found Weible guilty of 1<sup>st</sup> Degree Assault and returned special verdicts finding that Weible was armed with a

firearm and that the crime was an aggravated domestic violence offense. CP 44, 45, 46.

### **III. ARGUMENT**

#### **A. SUFFICIENCY OF THE EVIDENCE.**

Weible contends there was insufficient evidence to convict him of assault in the first degree; specifically that the evidence was not sufficient to show that he intended to inflict great bodily harm when he shot Elaine Burger with a .38 caliber handgun. Appellant's Brief at 7. Weible's argument ignores the evidence presented at trial.

##### **1. Legal Standards.**

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines 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. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All

reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). The court reviews the trial court's findings of fact for substantial evidence and its conclusions of law *de novo*. State v. Santacruz, 132 Wn. App. 615, 618, 133 P.3d 484 (2006); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

## **2. Elements Of The Offense.**

Assault in the first degree is defined by statute, in relevant part, as follows: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm ... assaults another with a firearm ...." RCW 9A.36.011(1)(a). In the present case, the jury was instructed that "great bodily harm" means 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. Instruction No. 9. CP 58; RCW 9A.04.110(4)(c). The jury was also instructed on the definition of intent: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." Instruction No. 10. CP 59; RCW 9A.08.010(1)(a).

Additionally, the jury was instructed that the State had to prove the following four elements beyond a reasonable doubt to convict Weible of First Degree Assault:

- (1) That on or about July 8, 2009, Weible assaulted Elaine Berger;
- (2) That the assault was committed with a firearm;
- (3) That Weible acted with intent to inflict great bodily harm; and
- (4) That the act occurred in the State of Washington.

Instruction No. 6. CP 55.

Assault in the first degree is a crime which consists of an act combined with a specific intent; the intent is just as much an element of the crime as is the act of assault. State v. Louthier, 22 Wn.2d 497, 501-502, 156 P.2d 672 (1945). “The applicable rule is that where a specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.” Id. While specific intent cannot be presumed, it can be inferred as a logical probability from all the facts and circumstances in evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Pierre, 108 Wn. App. 378, 386, 31 P.2d 1207 (2001). Intent, being a state of mind, can be inferred by the jury from all of the facts and circumstances surrounding the commission of an act or acts. State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966).

The jury was amply instructed that to convict of the crime of first degree assault the state had to prove beyond a reasonable doubt, that among other things, Weible committed the assault with the intent to inflict great bodily harm on Berger.

### **3. The Facts Of This Case Support The Finding That The Defendant Had The Requisite Intent For First Degree Assault.**

Under the facts of this case, it is difficult to avoid an inference that Weible could have possibly intended anything other than intending great bodily harm when he fired six shots from close range at Berger. The jury heard the details of the facts and circumstances of the crime; 1) from witnesses regarding the prior relationship between Weible and Berger, that Berger ended the relationship because of Weible's temper and had Weible served with an eviction notice to vacate her residence; that without provocation Weible fired six shots at Berger from close range, pausing to take aim at Berger for one shot, and that before firing the first shot at Berger Weible asked, "What do you have to live for?"; 2) the physical evidence showing that Berger was shot at close range with a .38 caliber handgun; and 3) the medical evidence that the gunshot wound Berger sustained was capable of causing significant permanent impairment of her organs and could lead to death from rapid blood loss.

Additionally, Weible served three years in the military where he qualified on several weapons and learned to be "immensely" careful with guns. RP 313-314. This evidence was sufficient for a

rational trier of fact to conclude that Weible knew there was a “logical probability” that shooting at someone from close range with a .38 caliber revolver would cause great bodily harm. See State v. Salamanca, 69 Wn. App. 817, 826, 851 P.2d 1242, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993). “Although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent as a matter of logical probability.” State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985); *citing* State v. Lewis, 69 Wn.2d at 124. Weible’s conduct was not patently equivocal; it plainly indicated his criminal intent as a matter of logical probability. From the evidence, a rational trier of fact could have found beyond a reasonable doubt that Weible had the requisite intent to cause great bodily harm to Berger when he assaulted her with the .38 caliber revolver.

Weible claimed that on July 8, 2009, he had no intention of harming Berger and was just trying to give the .38 caliber Smith & Wesson to Berger when the gun suddenly fired. RP 304-308. The jury did not believe him. That was its prerogative. State v. Koss, \_\_\_ Wn.2d \_\_\_, 241 P.3d 415, 417 (2010); State v. Walton, 64 Wn. App. at 415-16. Rather, the jury concluded that Weible intended to

cause great bodily harm to Berger when he fired six shots at her at close range; that finding is easily supported by evidence.

The cases cited by Weible do not support his contention that intent can only be inferred from motive. Appellant's Brief at 8. In fact, the law is to the contrary; intent can be inferred as a logical probability from all the facts and circumstances. State v. Delmarter, 94 Wn.2d at 638; State v. Pierre, 108 Wn. App. at 386; State v. Salamanca, 69 Wn. App. at 826. Weible's goal was to spend the rest of his life with Berger. RP 310-311. When Berger told Weible that things were not working out between them, Weible told her that he was not moving back to Gold Bar. RP 90. When Berger had him evicted his hope was crushed. The facts and circumstance in this case support an inference that Weible intended to cause great bodily harm to Berger in retaliation for her ending their relationship.

Finally, Weible's argument that the evidence was insufficient for the jury to find that he was guilty of first degree assault ignores the fact that the jury was instructed that, if they were not satisfied beyond a reasonable doubt that Weible assaulted Berger with intent to inflict great bodily harm, then they were to consider the lesser included offense of second degree assault. Instruction 11; CP 60. The jury was instructed that to convict Weible of Second

Degree Assault the State had to prove the following two elements beyond a reasonable doubt:

- (1) That on or about July 8, 2009, Weible assaulted Doris Elaine Berger with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

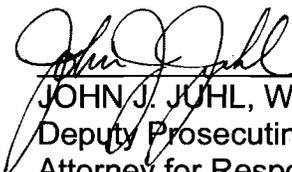
Instruction No. 12. CP 61; RCW 9A.36.021. Had the jury found the evidence lacking on the intent issue, they were instructed to find Weible not guilty of first degree assault and to consider the lesser charge of second degree assault. CP 60, 61. Jurors are presumed to follow the court's instructions absent evidence proving the contrary. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984); State v. Elmore, 154 Wn. App. 885, 898, 228 P.3d 760 (2010). The jury found that there was sufficient evidence to find Weible guilty of first degree assault.

#### **IV. CONCLUSION**

For the reasons stated above, the appeal should be denied.

Respectfully submitted on January 20, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
JOHN J. JUHL, WSBA #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent

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THE STATE OF WASHINGTON,  
  
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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20<sup>th</sup> day of January, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
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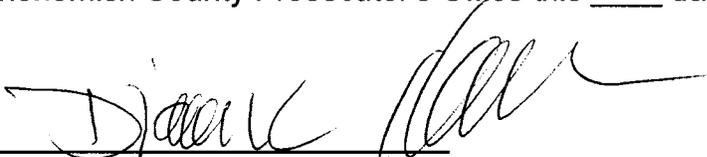
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1908 EAST MADISON STREET  
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 20<sup>th</sup> day of January, 2011.

  
\_\_\_\_\_  
DIANE K. KREMENICH  
Legal Assistant/Appeals Unit