

700456

70045-6

No. 70045-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WENDELL ADAMS, JR.,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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COURT OF APPEALS
DIVISION ONE
KING COUNTY

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A. ASSIGNMENTS OF ERROR

1. Wendall Adams was denied his right to jury trial in violation of the Sixth Amendment and Article I, sections 21 and 22.

2. In the absence of sufficient evidence to support each element of the offense, Mr. Adams's conviction deprived him of due process.

3. In the absence of sufficient evidence to support it, the trial court erred in entering Finding of Fact 22.

4. To the extent it is a finding of fact, and in the absence of sufficient evidence to support it, the trial court erred in entering Conclusion of Law II.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, sections 21 and 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a jury trial to a criminal defendant. The State has the burden to prove any waiver of that constitutional right was knowing, intelligent and voluntary. A waiver is knowingly made only when the person has knowledge of the consequences of the waiver. Here the record does not indicate Mr. Adams was ever advised that he had the right to a unanimous jury determination beyond a reasonable doubt of a firearm enhancement. Nor does the record reflect Mr. Adams waived that right.

Must Mr. Adams's convictions be reversed because he did not knowingly waive his constitutional right to a trial by jury?

2. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a reasonable doubt. A conviction of first degree assault requires the State prove beyond a reasonable doubt the specific intent to cause great bodily harm. Where the State's evidence, in its best light, does not establish Mr. Adams intended to inflict great bodily harm did his conviction deprive him of due process?

C. STATEMENT OF THE CASE

Mr. Adams and Everett Pitterson became embroiled in an argument after Mr. Pitterson and Carolyn Smith went to Mr. Adams's apartment to confront him about his use of Ms. Smith's car. 2/7/13 RP 87-88. According to Mr. Pitterson, as the argument became more heated, Mr. Adams came out of his apartment. *Id.* at 88. As he did so, Mr. Pitterson claimed Mr. Adams pointed a gun at him. *Id.*

Ms. Smith claimed she got between to the two men and encouraged Mr. Adams to put away the gun. 2/19/13 RP 17-19. Mr. Pitterson claimed, that as he continued to walk away, Mr. Adams pointed the gun in his direction and fired several shots. 2/7/13 RP 101.

One shot struck Mr. Pitterson, severing his femoral vein, and Mr. Pitterson fell to the ground. 2/7/13 RP 60; 2/19/13 RP 23.

Following several surgeries, Mr. Pitterson recovered from his injuries.

The State charged Mr. Adams with one count of first degree assault with a firearm enhancement and one count of unlawful possession a firearm. CP 24-25. Following a bench trial, the court found Mr. Adams guilty of as charged. Supp. CP __, Sub No. 82.

D. ARGUMENT

1. Because he did not knowingly waive his right to a jury trial Mr. Adams's convictions must be reversed.

a. *The record must establish a knowingly and intelligent waiver of the right to a jury trial.*

The right to a jury trial is guaranteed by the federal and state constitutions. U.S. Const. amend. VI; Const. Art. I, §§ 21, 22.

“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). A defendant may waive his right to a jury trial as long as the waiver is voluntary, knowing, and intelligent. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994); *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The State

must carry the burden of demonstrating the validity of a waiver. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 2041, 23 L. Ed. 2d 854 (1973)). “[A] court must entertain every presumption against waiver” of the right to a jury trial. *Acrey*, 103 Wn.2d at 207 (citing *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

While a colloquy is not required, the record must include “a personal expression of waiver from the defendant.” *Stegall*, 124 Wn.2d at 725. Thus, there must be personal expression by the defendant of an “intentional relinquishment or abandonment of a known right or privilege.” *Id.*; *Zerbst*, 304 U.S. at 464. That requirement was not satisfied here.

b. *The record does not establish Mr. Adams knowingly waived his right to a jury trial.*

Mr. Adams’s written waiver provides

My attorney and I have discussed my right to a jury trial. I understand that have the right to have a jury of 12 decide my case. I further understand that all 12 jurors would have to agree that the elements of the crime(s) with which I have been charged have been proved beyond a reasonable doubt before I could be found guilty. After discussing this right with my attorney, I have decided to waive my right to a jury trial.

CP 26.

Mr. Adams's waiver was based upon incomplete information regarding the consequences of his waiver. Nowhere was Mr. Adams's informed that he had the right to have the jury determine whether he was armed with a firearm in the commission of the offense. Nor was he informed that he was waiving that right.

The waiver does state Mr. Adams's understanding that, but for his waiver, a jury would determine the "elements" of the offenses. CP 26. However, a firearm enhancement is not an element of the offense. *State v. Kelley*, 168 Wn.2d 72, 81, 226 P.3d 773, 778 (2010). There is no similar explanation that Mr. Adams had the right to a jury determination of the enhancement as well.

The brief colloquy conducted by the court is equally lacking in any mention of the right a jury determination of the enhancement. 2/4/13 RP 3-6.

Because Mr. Adams did not personally express any knowledge of the full consequences of his waiver, the record does not demonstrate his waiver was valid. Because the waiver was invalid, Mr. Adams's conviction must be reversed and his case remanded for a jury trial. *Seattle v. Williams*, 101 Wn.2d 445, 457, 680 P.2d 1051 (1984).

2. The State did not prove each essential element of the crimes beyond a reasonable doubt.

a. *The State must prove each element of the charge beyond reasonable doubt.*

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process “indisputably entitle[s] a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. *The State did not prove each of the elements of first degree assault.*

RCW 9A.36.011 provides:

(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

...
(c) Assaults another and inflicts great bodily harm.

First degree assault requires a specific intent to cause great bodily injury to a specific person. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent is an intent to produce a specific result and not simply an intent to do some act that produces a result. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Here the court found Mr. Adams shot at Mr. Pitterson. Assuming for argument the evidence is sufficient to support that finding, by itself it is insufficient to prove first degree assault. What the evidence lacked was proof that M. Adams acted with the intent to inflict great bodily harm.

The trial court's conclusion seems to rest upon the view that assaulting another with a firearm necessarily constitutes first degree assault. But that is not the case. Simply assaulting someone with a firearm constitutes second degree assault. RCW 9A.36.021(1)(c); *State v. Walther*, 114 Wn. App. 189, 193, 56 P.3d 1001 (2002). Only if the assault with a firearm is accompanied by the specific intent to inflict great bodily injury is the person guilty of first degree assault. So too, even an assault with a firearm which results in great bodily injury

cannot constitute first degree assault without the specific intent to inflict such harm.

Accepting the trial court's findings, at least three shots were fired at very close range. To believe one witness two shots were fired as Mr. Pitterson lay on the ground and the shooter stood above him. Supp. CP __, Sub No. 82 (Finding of Fact 26). Yet neither struck Mr. Pitterson. That suggests the absence of an intent to actually strike or injure the person; i.e., the absence of an intent to cause great bodily harm. The mere fact that great bodily injury resulted from the act does not establish that the act was done with the intent to cause that result. The State did not prove each element of first degree assault beyond a reasonable doubt.

c. Because there is insufficient evidence of specific intent, the Court should reverse Mr. Adams's conviction of first degree assault.

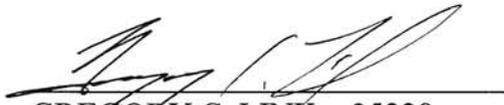
The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S.

794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove the necessary intent, it failed to prove first degree assault and the Court must reverse Mr. Adam's assault conviction.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Adam's convictions.

Respectfully submitted this 12th day of November 2013.


GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70045-6-I
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)	
WENDELL ADAMS, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710