NO. 312445-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DAVID WAYNE HALLS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00156-5

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

The case is accurately summarized by the Brief of the Appellant at pages 6-13, with the following additions:

On February 10, 2012, the defendant was arraigned in Benton County Superior Court. (RP 02-10-12, 1-5). At that time, the defendant was apprised that he was charged with the crime of Assault in the Second Degree, Domestic Violence, and that he was facing a standard range

sentence of 63 to 84 months in prison if convicted. (RP 02/10/12, 2-3).

A bench trial was held on April 9, 2012. At trial, Rhonnda Harshman testified that on February 6, 2012, she and her live-in boyfriend, the defendant, got into an argument because the defendant had invited Jolene Nichols and Clayton Barcott over to their house against her wishes. (RP 04/09/12, 14-18). Ms. Harshman had made it clear that she did not care to be around either Ms. Nichols or Mr. Barcott, but the defendant was insistent that Ms. Harshman reconcile her differences with his guests. (RP 04/09/12, 48).

The defendant got angry and yelled at Ms. Harshman while swinging his belt at her. (RP 04/09/12, 48). He then grabbed her by her throat and pushed her down on the bed. (RP 04/09/12, 49). The defendant got his nunchucks and swung them around. (RP 04/09/12, 49). Ms. Nichols testified that it was obvious that the defendant was trying to be intimidating and "scare somebody." (RP 04/09/12, 49). Ms. Nichols testified that she felt uncomfortable, and left the room. (RP 04/09/12, 49). After the defendant was alone with Ms. Harshman, he picked up a glass candle holder. (RP 04/09/12, 18-19). He was angry, and told Ms. Harshman that she needed to have respect for Ms. Nichols, and threw the glass candle holder, hitting Ms. Harshman on the head. (RP 04/09/12, 18-19). As a result of being hit with the glass candle holder, Ms. Harshman

suffered a laceration on her forehead, which required suture with seven staples. (RP 04/09/12, 21). The injury on Ms. Harshman's forehead was still apparent at the time of her testimony in April 2012. (RP 04/09/12, 22).

The defendant was found guilty after a bench trial of Assault in the Second Degree with a Domestic Violence allegation. (RP 04/09/12, 79). The court then dismissed the assault third degree, which had been charged in the alternative. (RP 04/09/12, 82). After a discussion with the defendant regarding his sentencing, the court appointed counsel to represent the defendant at sentencing. (RP 04/09/12, 82).

On May 10, 2012, the defendant appeared in court with court-appointed counsel. (RP 05/10/12, 84–85). At the request of the defendant, the court ordered Eastern State Hospital (ESH) to conduct an evaluation of the defendant's competency. (RP 05/10/12, 84–85). The defendant and his counsel again appeared in court on August 29, 2012, after the ESH evaluation had been received. (RP 08/29/12, 28). In sum, the psychiatrist from ESH had concluded that the defendant was competent, did not suffer from a mental disease or defect, and in fact, felt the defendant was malingering symptoms. (CP 21–38). The defendant requested an additional two weeks to consider whether a second independent evaluation of the defendant's competence was warranted. (RP 08/29/12, 28;

09/05/12, 3).

On September 12, 2012, the defendant appeared before the court and a competency order was entered based upon the evaluation of ESH. (RP 09/12/12, 2). The defendant did not dispute the conclusions of the ESH evaluation, and his counsel signed off on the competency order. (RP 09/12/12, 2). The defendant then entered a plea of guilty to Tampering With a Witness charged in another cause number. (RP 09/12/12, 2).

On October 9, 2012, a sentencing hearing was held for both cases. (RP 10/09/12, 88-100). In exchange for the defendant's plea of guilty to the second case (witness tampering charge), and his agreement not to file an appeal in this matter, the State recommended the low end of the standard ranges for both cases, to run concurrent. (RP 01/09/12, 93). For the Assault in the Second Degree, Domestic Violence charge, the defendant was sentenced to 63 months in prison, and 18 months of community custody. (CP 49; RP 01/09/12, 98).

III. ARGUMENT

1. THE STATE PRESENTED SUBSTANTIAL EVIDENCE THAT THE DEFENDANT INTENTIONALLY ASSAULTED MS. HARSHMAN.

When a trial court's verdict after a bench trial is challenged for sufficiency of the evidence, the reviewing court must determine whether substantial evidence supports any challenged findings of fact, and whether

the findings of fact support the conclusions of law. *State v. Hovig*, 149 Wn. App 1, 8, 202 P.3d 318, *Review Denied*, 166 Wn.2d 1020, 217 P.3d 335 (2009). Importantly, the reviewing court does not retry factual issues, nor does it substitute its judgment for those of the trial court. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Instead, the appellate court will find that the evidence is sufficient to support a conviction if, after viewing the evidence and all reasonable inferences from it in the light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court will draw all reasonable inferences in favor of the State and interpret them most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d.219 (2005).

The defendant was convicted of Assault in the Second Degree, with a Domestic Violence allegation, under RCW 9A.36.021(1)(a) and RCW 10.99.020. To convict the defendant of Assault in the Second Degree, the State was required to prove that the defendant "did intentionally assault Rhonnda Harshman, . . . and thereby recklessly inflicted substantial bodily harm . . . ." The defendant does not dispute that Ms. Harshman suffered substantial bodily harm, but argues instead

that the State did not prove that he committed an intentional assault. (Appellant's Brief at 14).

Intent may be inferred from a defendant's conduct, and that inference may also stem from a presumption that a defendant intends the natural and probable consequences of his action. *State v. Bea,* 162 Wn. App. 570, 579, 254 P.3d 948 (2011). Furthermore, a finder of fact may infer intent where a defendant's conduct would allow such an inference through logical probability. *Id.*

Here, the testimony had been that the defendant and Ms. Harshman had been arguing, and he had been swinging around nunchucks "trying to be intimidating" and "trying to scare somebody." (RP 04/09/12, 49). He had also physically attacked Ms. Harshman by grabbing her by the throat and throwing her down on the bed. (RP 04/09/12, 49). He then picked up the glass candle holder as he was leaving the room and threw it, hitting Ms. Harshman on the head. (RP 04/09/12, 18-19). Based upon this evidence, the trial court could reasonably infer that the defendant intended the natural and probable consequences that stemmed from him picking up the candle holder and throwing the candle holder at the victim. Consequently, the defendant's conviction for Assault in the Second Degree, with a Domestic Violence allegation, should be affirmed.

2. THE DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL.

Washington case law has never required anything more than a written waiver to establish a valid waiver of a defendant's right to a jury trial. *State v. Brand*, 55 Wn. App. 780, 785, 780 P.2d 894 (1989). In fact, "the claim that an extended colloquy on the record is required for jury waiver has been rejected each time it has been presented." *Id* at 785. All that is required, is a personal expression of waiver from the defendant. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994).

The defendant acknowledges that he filed a written waiver of his right to jury. Nevertheless, he asks this Court to find that his waiver was not valid, because he was not advised that a jury's verdict must be unanimous. (Appellant's Brief at 19-20). The defendant's argument lacks merit. In addition to the defendant signing a written waiver, he also discussed his desire to waive jury directly with the court after having been provided the opportunity to consult with counsel. (RP 04/04/12, 9). The defendant was quite adamant when he appeared before the court on April 4, 2012, that he did not want to waive speedy trial, he wanted to represent himself, and he wanted his trial to be before a judge and not a jury. (RP 04/04/12, 2-20). Under the circumstances, his decision to waive jury could be considered sound trial strategy.

3. THE DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.

A defendant has a constitutional right to represent himself under both the United States and Washington State Constitutions. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "This right is so fundamental, that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *Madsen*, 168 Wn.2d at 503.

Nevertheless, in order to exercise this right, a defendant must first voluntarily, knowingly, and intelligently waive his right to counsel. *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984). Such a waiver must be prefaced on the trial court "informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction, and that technical rules exist that will bind the defendant in the representation of his case." *Acrey*, 103 Wn.2d at 211.

The defendant argues that the trial court abused its discretion when it granted his request to waive counsel, because he was not adequately informed of the charges against him. (Appellant's Brief at 22). In support of this argument, the defendant cites *State v. Buelna*, 83 Wn. App. 658,

922 P.2d 1371 (1996). The facts of the *Buelna* case are distinguishable, however, because the defendant in *Buelna* stated "at least three times" on the record that he "did not understand the charges." *Buelna*, at 660. Not only did Buelna communicate confusion about the charges, but the trial court had not confirmed Buelna's understanding of the potential punitive consequences he faced as a result of those charges. *Buelna*, at 659-60.

By contrast, the defendant in this case was apprised of the potential penalty he faced, and expressed no confusion about the charges. Although the court did not identify the charge by name during his colloquy with the defendant, the specific charges were discussed previously on the record at the defendant's arraignment hearing. (RP 02/10/12, 2). The court may look beyond the colloquy to find evidence on the record that shows the defendant's awareness of the consequences of self-representation. *City of Acrey*, 103 Wn.2d 203.

As stated by Justice Stewart,

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not

> rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.

Faretta v. California, 422 U.S. at 824 (citations ommitted).

The defendant also complains that his waiver of counsel was not knowingly, voluntarily, or intelligently made because he was not apprised of the maximum penalty of witness tampering. However, he was not charged with witness tampering in this case, and in making this argument the defendant is asking this Court to impose a requirement not currently recognized by law.

4. THE TRIAL COURT PROPERLY FOUND THE DEFENDANT COMPETENT.

In his brief, the defendant asserts that he was denied an opportunity to challenge the Eastern State Hospital (ESH) report, and as a consequence, his conviction should be reversed. (Appellant's Brief at 23). The record does not support the defendant's assertion.

A trial court's determination of competency is reviewed for abuse of discretion. *State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012); *State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009). The trial court based its competency determination on the uncontroverted evidence

presented in the ESH evaluation report, which provided sufficient grounds to support the court's order. (CP 39). The defendant was not denied a hearing, but instead, chose not to dispute the conclusions of the doctor from ESH. The defendant's intent to proceed without a contested hearing is obviously demonstrated by the fact that he also showed up in court that day prepared to enter a plea of guilty to another criminal charge. Prior to that court appearance, the defendant and his counsel took time to consider whether to challenge the findings of the ESH doctor before proceeding on his cases, as they set the matter over twice to ensure sufficient time to discuss the findings of the report. (RP 08/29/12, 28, 09/05/12, 3, and RP 09/12/12). The record makes clear that the defendant was given the opportunity to challenge the findings of the ESH doctor's report, and chose not to. (RP 09/12/12. 2-9).

5. THE ASSAULT THIRD DEGREE CHARGE WAS DISMISSED BY THE COURT.

Following the defendant's conviction for the greater crime, the trial court dismissed the charge of Assault in the Third Degree, Domestic Violence. (RP 04/09/12, 82). No further action is required.

6. THE DEFENDANT WAS SENTENCED TO 18 MONTHS OF COMMUNITY CUSTODY.

The defendant was sentenced to 18 months of community custody. (CP 49; RP 10/09/12, 98). The State agrees that the language of paragraph 4.5 of the defendant's Judgment and Sentence erroneously subjects him to a potential sentence of community custody in excess of 18 months. (CP 49). As a remedy, the State suggests that the language "for the longer of" found at paragraph 4.5(A) be stricken.

IV. CONCLUSION

Based upon the arguments above, the defendant's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of December 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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