NO. 44172-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MICHAEL BALE

Appellant.

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

The Honorable James Dixon, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that appellant intended to cause great bodily harm in the assault in the first degree charges.

2. The state failed to prove that appellant knew the gun he possessed was stolen.

3. Mr. Bale was denied his right to due process by the state's failure to allege all essential elements of unlawful possession of a stolen gun.

Issues Pertaining to Assignment of Error

1. Did the state fail to prove beyond a reasonable doubt that appellant intended to cause great bodily harm in the assault in the first degree charges, when he fled from the police while holding on to his gun?.

2. Did the state fail to prove that appellant knew the gun he possessed was stolen?

3. Did the state deny Mr. Bale his due process right to notice by failing to charge him with knowing the gun he possessed was stolen?

B. STATEMENT OF THE CASE

Jon Bale was charged by amended information with two counts of assault in the first degree with deadly weapon enhancements, and with one

count of possessing a stolen firearm. CP. 74-77. The charging document for count three is as follows.

> **Count III**
> **Possessing a Stolen Firearm**
>
> On or about July 2, 2012, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly possess, carry, deliver, sell, or have in his or her control a stolen firearm; contrary to the Revised Code of Washington 9A.56.310 and RCW 9A.56.140.
>
> (MAXIMUM PENALTY–Ten (10) years imprisonment and/or a $20,000 fine pursuant to RCW 9A.56.310(6) and RCW 9A.20.021(1)(b), plus restitution and assessments.)

CP 74-77. Following a jury trial, Bale was convicted as charged. CP 119-131. This timely appeal follows. CP 134.

Patrol officer Schandel responded to a dispatch involving allegations of narcotics activity involving three men. RP 144-145. Schandel asked the men for identification and Bale was unable to comply stating that he could not find his wallet. RP 147-148. Officer Mossirion arrived on scene and Schandel asked Morrison to obtain Mr. Bale's identification. RP 64-65, 148-149. Morrison grabbed Bale's wrist because Bale's nervousness and fumbling with his wallet caused Morrison to be afraid. RP 66.

When Morrison grabbed Bale, Bale ran. RP 67. Both Schandel and Morrison gave chase, leaving the other two men behind at the patrol car. RP 69, 149-150. During the chase, Morrison initially tackled Bale to the ground with Schandel joining in the tackle moments later. RP 71-72, 152. Morrison heard metal hit the ground and saw a gun in Bale's hand and yelled that Bale was armed. RP 71-72.

Morrison immediately grabbed the barrel of the gun with both hands believing the gun was cocked and Bale about to shoot. RP 73-73.
Morrison testified that he believed Bale was trying to point the gun at him but Morrison was able to stay out of range, but he was afraid. RP 75-78, 152. Morrison also testified that the gun was only inches from his chest. RP 77. Morrison was able to hold onto the slide to prevent Bale from firing and was also able to grab the gun away from Bale after the struggle. RP 73-78. As Morrison grabbed the gun, a 9mm semi-automatic firearm from Bale, he and Schandel could not contain Bale who ran again. RP 90-92, 111.

Schandel testified that he was afraid Bale would shoot Morrison and was afraid for his own safety as well. RP 152-154. Schandel testified that he did not ever see Bale point his gun at either officer. RP 169

> " No. We had taken the ground, and that's when I saw the weapon."
>
> Q. So when you were running, he didn't turn and point it at you guys?
> A. Not that I saw. We were taking -- like I said, I come up on his right side and, as I got up with him, took him to the ground. Where I found his holster 15 feet back, there's really -- in a foot pursuit, 15 feet is nothing. That's a couple steps. So the time it would take him to pull that out and even start to come around, we were on top of him by then, so he wouldn't have a lot of an opportunity to turn. And from my vantage point, I didn't see it. Because like I said, I come up right beside him, and I started to plow into him"

RP 169- 170.

Both officers gave chase again and Schandel fell and fractured several ribs leaving Morrison to continue the chase alone. RP 94, 158-160.

Bale never made any verbal threats to either officer, but continued to run from them. RP 135. Bale ran to one side of a car for cover while Morrison approached from the other side. Morrison told Bale to drop his gun and used his Taser gun on Bale three times when Bale did not respond. RP 100-101, 106-107. As Bale was being tased, Schandel approached and place Bale in handcuffs. RP 109.

Schandel found a black nylon ankle holster near where Bale had initially fallen. RP 163. The police department tested the 9mm gun and determined that it was operable. RP 194, 202.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT INTENDED TO COMMIT GREAT BODILY INJURY IN THE ASSAULT IN THE FIRST DEGREE CHARGES.

The state failed to present evidence that Mr. Bale intended to inflict great bodily injury, rather than intended to frighten the arresting officers. According to Morrison, Bale had the opportunity to shoot him but did not do so. RP 73-77. According to Schandel's testimony, Bale never had the ability to shoot because the officers jumped him and grabbed the gun and kept it pointed away from themselves and Bale could not turn and point at the officers during the struggle. RP 169-171.

To convict Bale of the two counts of assault in the first degree contrary to RCW 9A.36.011(1)(a), the state was required to prove Bale

intended to inflict great bodily harm; and he assaulted the officers with a firearm likely to produce great bodily harm or death. Id. CP 74-77.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009); *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom." *Salinas,* 119 Wn.2d at 201, 829 P.2d 1068. Circumstantial and direct evidence are equally reliable. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trier of fact determines "intent" by determining whether a person acts with the "objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a); *Elmi*, 166 Wn.2d at 216-217. The trier of fact also looks to "all of the circumstances of the case, including ..... the nature of the prior relationship and any previous threats" to determine intent. *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)).

In *Elmi,* the defendant opened gunfire on a house with multiple occupants intending to shoot a single occupant. Under those facts, the Court held Elmi was guilty of assault in the first degree against all of the

occupants, because the state proved his intent to cause great bodily injury from the shooting. *Elmi*, 166 Wn.2d at 218-219.

When a defendant fires a gun into a crowded area, courts have looked to the defendant's prior threats, behavior, and knowledge to determine if the defendant acted with intent to inflict great bodily harm. *Ferreira,* 69 Wn.App. at 468-691(defendant not guilty off first degree assault where he shot into area only likely to be occupied). Washington Courts have found that a defendant acted with the requisite intent to cause injury by such shooting a gun, after the defendant made threats to the intended victim. *State v. Salamanca,* 69 Wn.App. 817, 826, 851 P.2d 1242 (1993) (defendant drove car in chase allowing occupant to shoot into car being pursued, after defendant fought with the other car's driver).

In *State v. Mann,* 157 Wn.SApp. 428, 438-440, 2437 P.3d 966 (2010), the defendant, pursued by police, fired a shot in the police direction. This evidence was sufficient to find intent to inflict great bodily injury. Id.

By contrast in this case, Bale did not open fire although he had the opportunity. Rather Bale held on to his gun during the struggle. Mere possession of a firearm does not establish intent to inflict great bodily harm. Rather firing a gun in direction of victims establishes intent to inflict great bodily injury. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 230 (1994); *State v. Hoffman*, 116 Wn.2d 51, 84-85, 8-04 P.2d 577 (1991);

State v. Pedro, 148 Wn.App. 932, 951, 201 P.3d 398 (2009). Bale's acts did not constitute assault in the first degree but constituted assault in the second degree by intending to cause fear and causing fear. RCW (A.36.021(1)(c).

"A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... (c) Assaults another with a deadly weapon." RCW 9A.36.021(1). Assault in the second degree may be committed by putting a person in apprehension of harm with or without the intent or present ability to inflict harm. *Clark v. Baines,* 150 Wn.2d 905, 908 n. 3, 84 P.3d 245 (2004); *State v. Baker*, 136 Wn.App. 878, 151 P.3d 237, *review denied*, 162 Wn.2d 1010, 175 PP.3d 1092 (2007).

In *Baker,* the Court upheld the conviction for assault in the second degree finding that the defendant who rammed his car into a police vehicle intended to cause fear and did cause such fear. *Baker*, 136 Wn.App. at 882, 994.

By contrast in this case, Bale did not verbally communicate an intent to inflict harm, he did not strike or shoot anyone, but he did fight to retain possession of his gun while he attempted to flee police custody. Bale ran from police when he was detained; he was tackled and the police gained control of his gun; he ran again, and the police finally tackled Bale a second time and arrested him. At no point during his attempted escape

from police did Mr. Bale try to shoot his gun. Rather, Bale just held onto his gun and ran.

Morrison testified that Bale tried to point the gun at his chest and he feared for his life. RP 73-74, 78. Schandel testified that Bale could not and did not turn to point the gun at Morrison or himself but that Bale tried to point gun at Morrison, and Schandel feared Bale would shoot Morrison, and alternately testified that Bale pointed the gun at Morrison. RP 152-154, 157, 169-170.

These facts support a finding of assault in the second degree by intending to and causing fear by pointing a firearm. These acts do not amount to assault in the first degree which requires proof beyond a reasonable doubt that Bale intended to cause great bodily injury. RCW 9A.36.010; RCW 9A.36.021(1)(c). The state's failure to prove beyond a reasonable doubt the element of intent to cause great bodily injury requires this court to reverse and remand for entry of the lesser included offenses of assault in the second degree.1

2. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE THAT APPELANT KNEW THE GUN HE POSSESSED WAS STOLEN, AN ESSENTIAL ELEMENT OF POSSESSION OF STOLEN FIREARM UNDER RCW 9A.56.310.

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1 I f this Court reverses the first degree assault charges, it must also remand for a new sentencing hearing because assault in the second degree are not serious violent offenses sufficient to support the current sentence could not stand under the SRA.

The state alleged that Bale possessed a firearm and that it was stolen. CP 74. To prove illegal possession of a stolen firearm, the state was required to plead and prove that Bale knew the gun was stolen. *State v. Khlee*, 106 Wn.App. 21, 22 P.3d 1264 (2010); RCW 9A.56.310. "Knowledge" that the firearm is stolen is an essential element of possession of possession of a stolen firearm. *Khlee*, 106 Wn.App. at 22.

An information must state all of the essential elements of a crime so that the accused may understand the charges and prepare a defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); *State v. Kjorsvik,* 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991); *see also* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

"Elements" are "those facts the prosecution must prove beyond a reasonable doubt to establish that the defendant committed the offense." *State v. Johnstone,* 96 Wn.App. 839, 844, 982 P.2d 119 (1999). When a defendant challenges an information after the verdict, the court construes the information liberally in favor of validity. *Kjorsvik,* 117 Wn.2d at 102, 812 P.2d 86.

Under the first prong of the *Kjorsvik* test, the Court only examines the face of the information to determine if the essential elements of the crime appear in any form, or by fair construction, in the charging document. *Kjorsvik,* 117 Wn.2d 105. The information must be read "as a whole and in a [commonsense] manner." *Kjorsvik,* 117 Wn.2d 110–11.

Despite the liberal standard of interpreting the charging document in favor of validity, the charging document must "contain in some manner the essential elements of a crime". *State v. Moavenzadeh,* 135 Wn.2d 359, 363, 956 P.2d 1097 (1998).

Under a liberal construction, the Washington Supreme Court has twice found inadequate the charging of knowledge of stolen property in the manner utilized in this case: by alleging that the defendant possessed the property and the property was stolen but failing to allege that the defendant knew the property was stolen. *Moavenzadeh,* supra; *State v. Simon,* 120 Wn.2d 196, 840 P.2d 172 (1992).

In *Moavenzadeh* the information alleged that the defendant "did possess stolen property," but it did not allege that he *knowingly* possessed stolen property. *Moavenzadeh,* 135 Wn.2d at 361. The Court held that the information was defective because it failed to allege that the defendant knew the property was stolen. *Moavenzadeh,* 135 Wn.2d at 363-64.

In *Simon,* the information alleged that the defendant "did knowingly advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and did advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." *Simon,* 120 Wn.2d at 197-98. One element of the crime, which was not alleged, was knowledge that Bartol was under the age of 18. The court reasoned that "[n]o one of common understanding reading the information

would know that knowledge of age is an element of the charge of promoting prostitution of a person under 18." *Simon,* 120 Wn.2d at 199.

Most recently, the Supreme Court in *State v. Zillyette*, ___P.3d ___, 2013 WL 3946066, reaffirmed *Moavenzadeh* holding that "[d]espite the liberal standard of interpreting the charging document in favor of validity, '[i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.'" *Zillyett*e, at page 12, quoting, " *Moavenzadeh,* 135 Wn. 2d at, 363 (1998) (quoting *State v. Campbell,* 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

In *Zillyette*, under a liberal construction the Supreme Court reversed, holding that merely listing the elements of the crime of possession of a controlled substance without naming the substance, or just listing the numerical code section were insufficient to satisfy the essential elements rule. *Zillyette* at page 5; 12. In the absence of specificity regarding the knowledge component or the nature of the substance, Court's presume that the defendant is prejudiced by the omission of the essential element. Id.

In the instant case, as *Moavenzadeh,* the failure to allege that Bale knew he possessed a stolen firearm was insufficient to provide Bale with his due process right to notice of all the essential elements of the charge. *Kjorsvik,* 117 Wn.2d at 101-02, 812 P.2d 86 (1991); U.S. CONST. amend.

VI; WASH. CONST. art. I, § 22.

Failure to notify Bale of the essential element of knowledge that the gun was stolen is prejudicial requiring reversal of the conviction and dismissal of the charge. *Zillyette*, supra, *Moavenzadeh,* supra.

3. THE STATE FAILED TO PROVE THAT APPELANT KNEW THE GUN HE POSSESSED WAS STOLEN.

The state presented evidence that Bale possessed a gun. The state did not however present evidence that Bale knew the gun was stolen. The state's evidence was insufficient to prove beyond a reasonable doubt that Bale knew the gun was stolen. *Elmi*, 166 Wn.2d at 214; *Salinas,* 119 Wn.2d at 201.

John Hageson, the owner of the gun found in Bale's possession, testified that he knew Bale's family for years and he "believe[d]" that his stepson Ben Roberts had contact with Bale around July 1, 2, 2012. RP 173-177. Hageson had not looked at his gun for months prior to realizing around June 25, 2012 that his gun was missing RP 177. After questioning Robberts about the gun, Roberts supposedly made a comment to his mother that he could get the gun back. RP 178.

Hageson had no information that Bale was ever in his home and had no knowledge that Bale and Roberts saw each other around June or July 2012. RP 178-179. Hageson also had no knowledge that Bale would

have known the weapon was stolen, but believed that Bale would have known that Roberts should not have had that particular weapon. RP 180.

As stated, possession of a stolen weapon requires proof that the possessor, Bale, knew the gun was stolen. RCW 9A.56.310; *State v. McPhee*, 156 Wn.App. 44, 62, 230 P.3d 284, *review denied* 169 Wn.2d 1028, 241 P.3d 413 (2010); *Khlee, supra*. Bale's mere possession of the gun was insufficient to prove the possessor knew the gun was stolen. *McPhee*, 156 Wn.App. at 62. Taking the evidence in the light most favorable to the state, the evidence presented does establish beyond a reasonable doubt that Bale knew the gun was stolen. For this reason, this conviction must be reversed and remanded for dismissal with prejudice for insufficient evidence. *Salinas, supra*.

D. CONCLUSION

Mr. Bale respectfully requests this Court reverse his conviction for possession of a stolen firearm and remand for dismissal with prejudice and reverse his two convictions for assault in the first degree for insufficient evidence and find the acts constituted assault in the second degree and remand for a new sentencing hearing.

DATED this 6th day of September 2013.

Respectfully submitted

LAW OFFICES OF LISE ELLNER

Lise Ellner

_____
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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor kcpa@co.kitsap.wa.us andJon Bale John Bale DOC# 845543 Coyote Ridge CC PO Box 769 Connell, WA 99326_a true copy of the document to which this certificate is affixed, on September 6, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Bale and electronically to the prosecutor.

Lise Ellner

_____Signature

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