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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GILFORD SMITH, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Viewing the evidence in the light most favorable to the State, did the State provide sufficient evidence such that any rational trier of fact could find the Appellant guilty beyond a reasonable doubt of assault in the third degree? Specifically, did the State provide sufficient evidence at trial to establish that the Appellant intended to assault Dyan Fix, a Metro Transit Operator?

B. STATEMENT OF THE CASE

On the morning of October 15, 2008, Dyan Fix, a coach operator for King County Metro Transit, was wearing her transit operator's uniform while driving the number 48 bus in Seattle, Washington. RP 8, 14, 137. Dyan Fix was operating one of three buses bunched up in traffic driving the same route along 23rd Ave. RP 9. As the three buses approached a stop at 23rd Ave. and Cherry St., Dyan Fix noticed two black male juveniles at that bus stop. RP 10-11. According to policy and procedure, Dyan Fix passed the stop at 23rd and Cherry St., allowing the buses behind her to service the stop. RP 9-10. Dyan Fix continued along 23rd and serviced another stop, at 23rd and Jefferson. RP 10. In the meantime, one of the buses that had serviced the stop at 23rd Ave.

and Cherry St. had passed Dyan Fix's bus and was also stopped at 23rd Ave. and Jefferson St. Id.

As Dyan Fix was stopped at 23rd Ave. and Jefferson St., loading passengers, she noticed two black juvenile males standing directly outside the bus' door. RP 11, 15. Dyan Fix had passed youths at the bus stop at 23rd Ave. and Cherry St. wearing the same style and color of clothing, so she assumed they were the same juveniles. RP 11. One of the juveniles yelled, "Bitch, you passed me up," and threw some items at Dyan Fix. RP 11. At that moment, the juvenile that threw the items was standing outside the open front door of the bus. RP 11-12. The juvenile had thrown a bottle cap and a cigarette at Dyan Fix. RP 12-13. Two small items hit Dyan Fix in the face. RP 13. The contact, between Dyan Fix's face and the items, was unwanted. RP 13. Dyan Fix was hit in the lip with one of the objects, causing the inside of her lip to bleed. RP 14, 18.

When Dyan Fix was hit with these objects, the bus, which was loaded with 40 to 60 people, was stopped solely as a result of Dyan Fix's foot being pressed on the foot brake. RP 14. The person that threw the items at Dyan Fix was a black male teenager wearing a black hoody and a black backpack. RP 15-16.

After being hit in the face with the objects, Dyan Fix put on the emergency break, got off the bus, and briefly perused the juvenile. RP 16-17. However, the juvenile that had thrown the objects at Dyan Fix fled on foot. RP 17. Dyan Fix got back on the bus, drove a few blocks, and then reported the incident. RP 17. Dyan Fix then continued driving the bus for approximately 20 to 25 minutes, met with her supervisor, and returned to the base. RP 19.

Seattle Police Officer Dentinger responded to a dispatch that potential suspects were seen at an AM/PM store at 23rd Ave. and Cherry St. RP 45. A description was provided that the suspect was a black male, 17 years old, 5'6", 140 pounds, wearing a black beanie, black jacket and blue jeans, accompanied by a black male in his teens wearing a grey hoody and jeans. RP 45. This description was provided by King County Metro. RP 47. Upon arriving in the area Officer Dentinger saw two individuals matching the description. RP 45. The two individuals were contacted by police. RP 46, 56.

KCSO Deputy Barnes also responded to the report of a black male, who was wearing a black beanie and carrying a black backpack, who assaulted a Metro Transit operator. RP 70-71. KCSO Deputy Barnes spoke to a female bus operator and her

supervisor to get a description of the suspect. RP 72. When KCSO Deputy Barnes arrived at the scene Seattle Police officers had already detained two suspects. RP 72. Dyan Fix then met police at 23rd Ave. and Jefferson where she was asked if she recognized either of the two detained individuals. RP 19-22. Dyan Fix positively identified the male that threw items at her. RP 25. It was important to Dyan Fix to make sure her identification was correct. RP 35. The police had two individuals stopped, but Dyan Fix only identified one of them, specifically the person that threw the cigarette at her. RP 73.

After Dyan Fix identified Gilford Smith, the Appellant, as the individual who threw items at her, KCSO Deputy Barnes arrested Gilford Smith and read him his Constitutional Rights. RP 74-75. Gilford Smith signed a Constitutional Rights form indicating he understood his rights and waived his rights. RP 75. Gilford Smith also signed the additional juvenile admonishment. RP 75.

Gilford Smith then provided a statement. RP 76. Gilford Smith said he threw a cigarette at the bus driver because she passed him up. RP 76. Gilford Smith said, "That mother-fucking bitch didn't stop for us so I threw a cigarette at her ass." RP 77. Gilford Smith went on to say that he was going to beat this little

case and that it was a joke. RP 77. KCSO Deputy Barnes identified Gilford Smith in court as the same person he arrested October 15, 2008, for assaulting Dyan Fix and the same person who admitted to throwing a cigarette at the bus driver. RP 80.

At trial, Gilford Smith testified that he thought the bus driver intentionally drove past him because she was being a racist. RP 131. This made Gilford Smith angry as he felt disrespected. RP 132, 136. Gilford Smith also testified that he has anger issues and could not control himself that day. RP 132-33, 138. Gilford Smith further testified that he was so upset that he got off the bus that had picked him up to confront the female driver of the bus that had passed him by. RP 132-33, 136-37. Gilford Smith testified that he picked up a cigarette off the ground and threw it at the bus. RP 134, 138.

C. ARGUMENT

The elements of assault in the third degree – assault of a transit operator - are that the Appellant did: 1) intentionally assault; 2) a transit operator, employed by a public or private transit company; 3) who at the time of the assault was performing his or

her official duties, and; 4) that the Appellant acted with knowledge of that official status. RCW 9A.36.031(1)(b).

Appellant contends that there was insufficient evidence presented at trial to support a finding of guilt. See Brief of Appellant (hereinafter "Appellant's Brief"). More specifically, Appellant argues that there was insufficient evidence that he intended to assault Dyan Fix, a Metro Transit Operator. Id. at 10-11.

Appellant does not appear to contest the sufficiency of the evidence with regards to any element of assault in the third degree other than intent. Id. at 2, 10-12.¹

Appellant has not contested the CrR 3.5 or CrR 3.6 Findings of Fact or Conclusions of Law. Nor has Appellant argued that evidence admitted at trial should have been suppressed. See Appellant's Brief.

¹ Appellant at trial testified that the female he confronted was a bus driver, wearing her uniform, while she was driving a bus. RP 136-37. Accordingly, the Appellant at trial admitted to all elements of the crime, with the sole exception of his intent. See RCW 9A.36.031(1)(b). Additionally, Appellant has assigned error to the trial court's JcCR 7.11(d) Findings of Fact 4,9, and Conclusions of Law II. Appellant's Brief at 1. These Findings of Fact and Conclusions of Law are not relevant to Appellant's intent; rather, they pertain to the identity and stop of the suspect. The Appellant admitted after his arrest and at trial that he was the individual that threw the items. Therefore, even if the trial court erroneously entered into Findings of Fact 4,9, and/or Conclusions of Law II (which the State does not concede), the error is harmless. Appellant has not argued that the trial court's CrR 3.5 or 3.6 rulings were erroneous, nor has Appellant requested suppression of any evidence. See Appellant's Brief.

Appellant's argument must fail. The State presented sufficient evidence at trial such that a reasonable trier of fact could find that Appellant intended to assault a Metro Transit operator.

1. THE APPROPRIATE STANDARD OF REVIEW.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). An appellant's claim of insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Also, "all reasonable inference from the evidence must be drawn in favor of the State and against the Appellant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201).

In reviewing for sufficiency, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Credibility determinations are for the finder of fact and are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850

(1990). Thus, an appellate 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). Furthermore, reviewing courts need not themselves be convinced of an appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact could so find. Gallagher, 112 Wn. App. at 613. The appellate court may affirm for any basis apparent in the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).

2. GIVEN THE APPROPRIATE STANDARD OF REVIEW, THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE TRIER OF FACT COULD INFER AND CONCLUDED THAT THE APPELLANT INTENDED TO ASSAULT A METRO TRANSIT OPERATOR.

An assault is an intentional touching or striking of another person that is harmful or offensive. WPIC 35.05. A touching or striking is harmful or offensive if it would offend an ordinary person who is not unduly sensitive. Id. A person acts with intent when "he or she acts with the objective or purpose to accomplish a result

constituting a crime.” RCW 9A.08.010(1)(a). Short of a statement of admission by a person as to what he or she intended, direct evidence of intent is essentially impossible to come by. However, it has long been recognized that intent can legally be inferred from the facts and circumstances of a case. See, e.g., State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (citing, *inter alia*, State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993); State v. Louthier, 22 Wn.2d 497, 156 P.2d 672 (1945)). A finder of fact may infer intent from the facts and circumstances surrounding an act. State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966) (citing State v. Willis, 67 Wn.2d 681, 685, 409 P.2d 669 (1966)). "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." Lewis, 69 Wn.2d at 123.

In the instant case, the Appellant provided direct evidence of his intent when he stated, "That mother-fucking bitch didn't stop for us so I threw a cigarette at her ass." RP 77. This admission alone is sufficient to guarantee that this appeal must fail.

However, in addition to Appellant's admission of intent, the facts and circumstances surrounding the incident give rise to an inference that the Appellant intended to assault Metro Transit

Operator Dyan Fix. At trial, Gilford Smith testified that he thought the bus driver intentionally drove past him because she was being a racist. RP 131. This made Gilford Smith angry as he felt disrespected. RP 132, 136. Gilford Smith also testified that he has anger issues and could not control himself. RP 132-33, 138. At trial, Gilford Smith said he was so upset that he got off the bus that picked him up to confront the female driver of the bus that had passed him by. RP 132-33, 136-37. Gilford Smith testified that he picked up a cigarette off the ground and threw it at the bus. RP 134, 138.

Dyan Fix testified that Appellant yelled at her, "Bitch, you passed me up," and flicked items at her, including a cigarette and a bottle cap. RP 11-13. Two small items hit Dyan Fix in the face. RP 13. The contact, between Dyan Fix's face and the items, was unwanted. RP 13. As a result of being hit in the face by these objects, Dyan Fix suffered a small cut to her lip. Id. The items striking Dyan Fix's face constitute an assault.²

² Appellant's contention that, "The issue is whether the [Appellant] intended to create in Ms. Fix's mind "a reasonable apprehension of harm" is misguided. Appellant's Brief at 11. In this case, Appellant actually touched or struck Dyan Fix with an object. RP 13. Accordingly, this was not an assault by "apprehension," but rather an assault by a harmful or offensive touching or striking. WPIC 35.50.

While Appellant did testify that he never meant to hit the driver, RP 135, his testimony was directly contradicted by his own statement to KCSO Deputy Barnes in which he said, "That mother-fucking bitch didn't stop for us so I threw a cigarette at her ass." RP 77.

These facts and circumstances give rise to the inference that the Appellant intended to assault a Metro Transit operator. Appellant was angry as a result of what he perceived to be the Metro Transit operator's racist act of passing him by. Feeling disrespected, Appellant then confronted the Metro driver, yelled obscenities at her, and intentionally threw items at her, striking her in the face. Accordingly, there is sufficient evidence to substantiate the trial court's JcCR 7.11(d) Findings of Fact 15, CP 6 (FF 15), and Conclusions of Law IV and VI, CP 7 (CL IV and VI). After viewing all the evidence and making determinations of credibility, the court determined beyond a reasonable doubt, that the Appellant intended to assault Dyan Fix, a Metro Transit Operator.

The role of the appellate court in the instant case is to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, all the essential elements of the crime.

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The State provided sufficient evidence at trial, when viewed in a light most favorable to the State; to prove beyond a reasonable doubt that the Appellant intended to assault a transit operator. This appeal must fail.

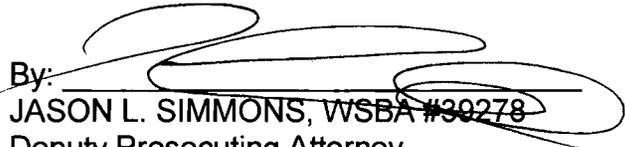
D. CONCLUSION

There was sufficient evidence from which a reasonable trier of fact could find that Appellant intended to assault a Metro Transit operator. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this 6th day of December, 2010.

Respectfully submitted,

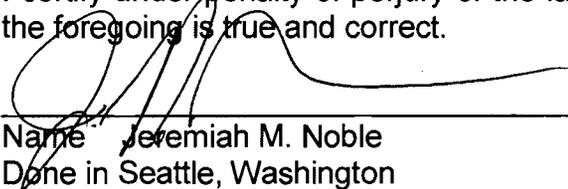
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa M. Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GILFORD SMITH, JR., Cause No. 64999-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Jeremiah M. Noble
Done in Seattle, Washington

12.7.10
Date 12/07/2010