

66538-3

66538-3

NO. 66538-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROY PORTER,

Appellant.

2011 OCT 26 PM 1:05
COURT OF APPEALS DIV I
STATE OF WASHINGTON
SP

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HAYDEN

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. 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 the crime of Assault in the First Degree (with a deadly weapon enhancement)?

B. STATEMENT OF THE CASE

On February 10, 2010 the Appellant spent the day with his mother, Chloe Porter. RP 6 at 62-63.¹ Darryl Peterson is the fiancé of Chloe Porter, who is the mother of the defendant. RP 6 at 61-62. At the time of this incident, Roy Porter was not welcome in their shared home because of her fiance's request because of things that have happened in the past between them. RP 6 at 62, RP 6 at 10-11.

Chloe Porter was outside at the time the incident occurred. RP 6 at 62. A family friend, George Jordan was at the house that

¹ There are seven volumes of the record in this proceeding including motions, jury selection, testimony, closing argument, and sentencing. For the purposes of this brief, these records will be referred to by number. RP 1 will be pre trial motions from 11/15/10, RP 2 will be the transcript from 11/16/10, RP 3 will be the second transcript from that day, RP 4 will be the first transcript from 11/17/10, RP 5 will be the second transcript from that day, RP 6 will be the record from 11/18/10, and RP 7 the proceedings on 1/10/10.

day. RP 6 at 11-14. Jordan is a family friend who has come over to the house with some frequency prior to this incident, and who knows Chloe Porter, Darryl Peterson, and Chloe's children. RP 6 at 9. Jordan and Peterson had known each other for approximately forty years at the time this occurred. RP 6 at 9.

Despite being told that he was not welcome at the house, on February 10, 2010 Mr. Porter returned to the house with his mother. RP 6 at 63. He was there when Darryl Peterson returned home. RP 6 at 13-14. Darryl Peterson first realized that Mr. Porter was in the house when he was unpacking groceries in the kitchen. RP 6 at 14. Darryl Peterson first saw Mr. Porter in his bedroom. RP 6 at 14. Peterson told Porter "I want you to leave." RP 6 at 15. He then called out to George Jordan, who started to come to his aid. RP 6 at 15. Before George Jordan got there, however, there was a gunshot. RP 6 at 16.

The shot occurred at the point in time when Darryl Peterson had just gotten the phone so he could call the police. RP 6 at 17, 21. When the shot came towards him, he dropped to the ground and dropped the phone. RP 6 at 21.

At the time the shots were fired, Darryl Peterson estimated that Mr. Porter was "three of four feet" from him in the bedroom. RP

6 at 25. And, when asked by the prosecutor "And what did you do when you first saw the gun?" he said "I believed I'd been shot, .." RP 6 at 25. He went on to explain that he "ducked" right after the trigger was pulled because he didn't want to get hit. RP 6 at 25. After the smoke cleared, he was able to tell where the bullet went. RP 6 at 25-26.

The bullet struck the closet door, which was between three and five feet from where he had been standing. RP 6 at 26. Mr. Peterson indicated that he believed that had he not ducked down the bullet would have hit him, and he would have been shot. RP 6 at 26. Roy Porter then ran out the front door. RP 6 at 26.

Mr. Porter was convicted of first degree assault with a deadly weapon enhancement and unlawful possession of a firearm in the second degree (as he was a previously convicted felon at the time he possessed and fired the gun at Mr. Peterson). CP 57-59.

C. ARGUMENT

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. THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE TRIER OF FACT COULD INFER AND CONCLUDE THAT THE APPELLANT INTENDED TO COMMIT GREAT BODILY HARM WHEN HE ASSAULTED THE VICTIM.

The elements of assault in the first degree are that the defendant "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." RCW 9A.36.011(1). "Presence of firearm does not elevate crime of second-degree assault to first-degree assault as firearm is not necessary element for any degree of assault; instead, two degrees of assault are distinguished on basis of intent." West's RCWA 9A.36.010, 9A.36.020, State v Adlington Kelly, 95 Wash.2d 917, 631 P.2d 954 at 954 (1981). Three definitions of assault are recognized in Washington: (1) attempted battery-attempt, with unlawful force, to inflict bodily injury upon another; (2) actual battery-unlawful touching with criminal intent; and (3) common-law assault-putting another in apprehension of harm whether or not

actor intends to inflict or is capable of inflicting that harm. State v. Wilson, 125 Wash.2d 212, 883 P.2d 320 Wash., (1994), State v Bland, 71 Wash.App. 345, 353, 860 P.2d 1046 (1993) (citing State v. Walden, 67 Wash.App. 891, 893-94, 841 P.2d 81 (1992)); State v Aumick, 73 Wash.App. 379 at 382, 869 P.2d 421 (1994); see also 13A Royce A. Ferguson, Jr. & Seth A. Fine, Wash.Prac., *Criminal Law* § 404, at 49 (1990).

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). “**Evidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.**” (emphasis added) State v Ferreira, 69 Wash.App. 465, 468, 850 P.2d 541 (1993) (quoting State v Woo Won Choi, 55 Wash.App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wash.2d 1002, 788 P.2d 1077 (1990)). Specific intent cannot be presumed, **but it can be inferred as a logical probability from all the facts and circumstances.** (emphasis added) State v. Louthier, 22 Wash.2d 497, 502, 156 P.2d 672 (1945); State v. Salamanca, 69 Wash.App.

817, 826, 851 P.2d 1242, *review denied*, 122 Wash.2d 1020, 863 P.2d 1353 (1993).

The term "great bodily harm" is defined as "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". RCW 9A.04.110(4)(c).

Under penalty enhancement provisions of Uniform Firearms Act, if defendant uses firearm to commit crimes of assault in first, second or third degree, he will receive mandatory minimum sentence of five years in prison. West's RCWA 9.41.025, 9A.36.010, 9A.36.020., Adlington-Kelly at 954-955. That is what occurred in this case, as the State charged with the firearm enhancement, and defendant was convicted of the charge and found to be in possession of a firearm. CP 57-59.

Appellant contends that there was insufficient evidence presented to the trier of fact to support a finding of guilt. See Brief of Appellant at 4 (hereinafter "AB"). More specifically, Appellant argues that there was insufficient evidence with regards to his intent. Id.

Appellant's argument must fail. The State presented sufficient evidence at trial such that a reasonable trier of fact could find that Appellant did intend to cause great bodily harm, both through testimony as well as through logical conclusion based on the actions of the defendant.

Counsel, in essence, argues that we can not "know" what was in the defendant's mind at the time he committed the crime and guesses that the defendant could have meant to only "scare" the victim rather than hit him with a fired bullet. AB at 5. He then goes on to indicate that, at best, there was evidence of reckless endangerment. Id.

Were parties to adopt this philosophy, it would in essence require any defendant to take the stand and admit they were shooting to kill or harm. As this Court well knows, defendants often choose not to testify, and juries often infer intent from the presented evidence, as they did in this case. And, the evidence, when looked at in the light most favorable to the State, shows that the defendant intended to shoot the victim, and likely would have hit him, but for the victim ducking. RP 6 at 25. Counsel wants this Court to believe that the defendant was intentionally using the gun as a scare tactic, instead of the more likely scenario, which is that he

was a decent shot at close range who would have had likely success in hitting the victim with a bullet had the victim not responded defensively to protect himself from being shot.

In this case, the shot occurred at the point in time when Darryl Peterson had gotten a phone so he could call the police. RP 6 at 17, 21. When the shot came towards him, he dropped to the ground and dropped the phone. RP 6 at 21.

At the time the shots were fired, Darryl Peterson estimated that Mr. Porter was "three or four feet" from him in the bedroom. RP 6 at 25. And, when asked by the prosecutor "And what did you do when you first saw the gun?" he said "I believed I'd been shot, .." RP 6 at 25. He explained that he "ducked" right after the trigger was pulled because he didn't want to get hit. RP 6 at 25. After the smoke cleared, he was able to tell where the bullet went. RP 6 at 25-26. The Court is allowed to use this testimony and the fact of where the bullet went in conjunction with where the victim was, as well as the information about the prior relationship between these parties and the fact that previous issues existed such that the Appellant was not welcome in the home.

As noted above, case law indicates that logical conclusions and assessments based on facts can be used to determine intent.

Based off of the testimony of the victim, placement of where the shot was fired, and the fact that the victim testified that, had he not ducked right when the firing of the gun occurred, he would have been shot, it is reasonable to determine there was intent to commit an assault of a serious nature on the victim.

Testimony in the trial was that the bullet struck the closet door, which was between three and five feet from where the victim had been standing when he started to call police to report the unwanted presence of the defendant. RP 6 at 26. Mr. Peterson indicated that he believed that had he not ducked down the bullet would have hit him, and he would have been shot. RP 6 at 26.

D. CONCLUSION

There was sufficient evidence from which a reasonable trier of fact could find that Appellant intended to commit great bodily harm. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this 26 day of October 2011.

Respectfully submitted,

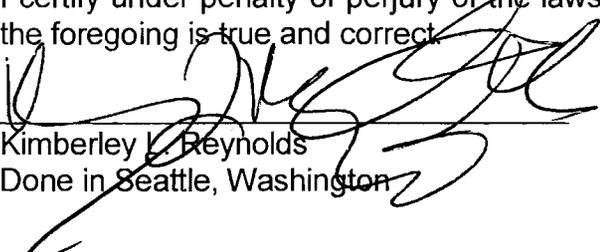
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, 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. ROY PORTER, Cause No. 66538-3-1, 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.



Kimberley L. Reynolds
Done in Seattle, Washington

10/20/11
Date