

NO. 34074-7

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RITHY TEM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-03089-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there sufficient evidence for the jury to find defendant guilty of two counts of attempted assault in the first degree?

B. STATEMENT OF THE CASE.

1. Procedure

On June 22, 2005, the Pierce County Prosecutor's Office filed an information in Cause No. 05-1-03089-7, charging appellant, RITHY TEM, hereinafter "defendant," with one count of indecent liberties and two counts of attempted assault in the first degree. CP 1-4. The Pierce County Prosecutor's Office amended this information on September 22, 2005, charging the same crimes, but changing the details of the indecent liberties charge. CP 5-7. The matter proceeded to a jury trial on the same day (September 22, 2005) before the Honorable Brain Tollefson. RP 1. The jury found defendant guilty of all three counts and returned special verdict forms finding that defendant used a firearm in committing the two counts of attempted assault in the first degree. RP 241-244; CP 14-18.

The court sentenced defendant to 84 months for each count of attempted assault plus 36 months for each count for firearm enhancement to run consecutively. RP 250-251, 255; CP 25-37. Defendant was sentenced to 34 months for indecent liberties to run concurrently with the attempted assault sentences. RP 250-251, 255; CP 25-37. Defendant was

thus sentenced to a total of 120 months with credit for 134 days served. CP 25-37. The court also ordered defendant to pay a \$500 crime victim penalty, \$400 in DAC recoupment costs, a \$100 DNA fee, and \$110 in court costs. RP250-251, 255; CP 25-37. From entry of this judgment, defendant filed a timely notice of appeal. CP 19-24.

2. Facts

On January 15, 2006, Sara Bunting was visiting her then-fiancée Jason Russell at an apartment Mr. Russell shared with Jason Hatfield in building N of the Lakeshore Apartment complex. RP29-30. The apartment has a front door and a back door. RP 46-47, 74-75. The living room and kitchen are in the rear portion of the apartment. RP 46-47, 74-75. The area outside the back door of the apartment cannot be easily accessed from the street because the parking lot is in front of building N. RP 63. This parking lot is circular and when a person enters it, he may not be able to see another person exit. RP 75. To reach the back door, people park in front of building N and then walk down a hill to the back of the building. RP 45, 93, 126.

Late on the evening of January 15, 2006, Mr. Hatfield went to bed in his own room. RP 62. Ms. Bunting then went to sleep in Mr. Russell's bed at sometime between 10:00 p.m. and 11:00 p.m. RP 30-31. After midnight, Rovelio Eslava, Elvin Zamalea, Noel Pascual and defendant

Rithy Tem came over to the house to play dominoes and drink beer. RP 80-81, 101-102. Defendant was Mr. Eslava's co-worker and friend. RP 101-102.

Sometime after defendant arrived, he went into Mr. Russell's bedroom and inappropriately touched Ms. Bunting. RP 31, 86. Ms. Bunting told Mr. Russell and the other men in the living room what defendant had done and Mr. Russell began yelling at and fighting with defendant. RP 86, 106, 187. Ms. Bunting then woke up Mr. Hatfield, who broke up the fight and sent defendant out the back door of the apartment. RP 38, 62, 86, 106. While defendant was outside, he took a small grill that was behind the apartment and threw it through the apartment's kitchen window. RP 31, 39, 63, 87. Mr. Hatfield then attacked defendant behind the apartment, and Mr. Russell joined Mr. Hatfield in the fight. RP 63, 106. At some point during these two fights, defendant reached into his waistband as if he had a gun. RP 86, 106, 187. He did not have a gun at the time, but he did shout multiple times that he was going to get a "nine" and blast the people in the apartment. RP 39, 62-63, 86-87, 90, 189. Mr. Russell laughed at defendant and made fun of his threats; defendant then ran around the house to where his car was parked and drove away. RP 87-88.

Mr. Russell's neighbor Claudia Pena called the police at 2:42 a.m. because she had seen the fight that occurred behind the apartment. RP 119, 208. Deputy Byron Brockway responded to the call at about 3:00

a.m. RP 123. He looked around buildings N and O and then spoke to Mr. Hatfield, Ms. Bunting, and Mr. Russell about the fight before leaving. RP 124.

After Deputy Brockway left, Mr. Russell and Ms. Bunting sat in the living room and talked while Mr. Hatfield took the three guests back to Mr. Zalamea's house in his car. RP 106, 190. Mr. Hatfield was gone for about 10 minutes. RP 88, 190. Ms. Bunting sat on the sofa and Mr. Russell sat on a folding chair on the other side of the living room. RP 42, 127. At the time, the living room window's drapes were drawn and the light was on in the living room, the dining room, the kitchen, and Mr. Hatfield's room. RP 41-42.

After Mr. Hatfield left, but before he returned, defendant fired four gunshots from outside the apartment through the living room window. RP 42, 67, 91-93. One of the bullets passed between Ms. Bunting and Mr. Russell, passing only one foot from Ms. Bunting's head. RP 42-43, 49, 91-93. One bullet hit a wall in the apartment. RP 49. Another went through the bathroom wall and hit a water pipe. RP 74, 94. After the first shot was fired, Ms. Bunting jumped up and froze in a terrified state, but Mr. Russell brought her to the ground and locked the doors of the apartment. RP 42, 93. Mr. Russell heard a car pull away after the shots were fired. RP 94.

When Mr. Hatfield returned home, he called the police at 3:44 a.m. RP 67-68, 208. Deputy Brockway and his partner Deputy Brand

responded at 4:04 a.m.; they spoke to Mr. Russell, Mr. Hatfield, and Ms. Bunting and took photos of the scene. RP 125. Deputy Brockway noted that the bullet holes in the living room window were five to six feet off the ground and that the angle of the bullets was such that the bullets could easily have struck a person inside the apartment. RP 126.

The police officers also collected four bullet casings that were found ten feet away from the living room window outside Mr. Russell's apartment. RP 68, 126. Pierce County Sheriff's Department range master Patrick McCormick testified that the casings came from .380 automatic bullets, which have a diameter of 9mm and will fire from a 9mm handgun. RP 177¹.

Defendant called one witness on his behalf. His girlfriend Aneshia Kudrin-Mello testified that she lived with defendant at the time of the shooting in an apartment one to two blocks away from the Mr. Russell's apartment. RP 193, 197. She was working on the night of the shooting and cannot remember if she arrived home at 12:30 a.m. or between 2:30 a.m. and 3:00 a.m. RP 196, 198-201. She testified that defendant arrived home 10 to 20 minutes after she did and that he looked as if he had been in

¹ .380 automatic bullets are shorter than standard 9mm bullets; if a person uses .380 automatics in a 9mm handgun, however, the slide on the gun will not come all the way back after each shot is fired. RP 177. Thus, a person using .380 automatics in a 9mm handgun must manually pull the slide back between each shot. RP 179-180.

a fight. RP 194, 198-201. She testified that defendant did not own a gun.

RP 197.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF TWO COUNTS OF ATTEMPTED ASSAULT IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

"A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial

step toward the commission of that crime.” RCW 9A.28.020(1). To constitute a “substantial step,” the conduct must be “strongly corroborative of the actor's criminal purpose.” State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002); State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978)). Mere preparation to commit a crime is not a substantial step. Workman, 90 Wn.2d at 449-50.

A person commits Assault in the First Degree when he 1) intends to inflict great bodily harm to a person and 2) assaults a person using a firearm. RCW 9A.36.011(1)(a). Great bodily harm is “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. The term “assault” is not statutorily defined, so Washington courts apply the common law definition to the crime. State v. Aumick, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). An assault is an attempt, with unlawful force, to inflict bodily injury upon another, whether or not the victim is actually harmed. State v. Aumick, 126 Wn.2d 422; CP 66-91.

The State thus had to prove that defendant took a substantial step toward completing the crime of assault in the first degree by acting in a way that strongly corroborated that criminal purpose. Defendant would have committed assault in the first degree by intentionally shooting at Mr. Russell and Ms. Bunting with the intent to inflict great bodily harm on them.

a. Intent to Commit Assault in the First Degree

There is evidence that defendant intended to use a gun to shoot the people in Mr. Russell's apartment. Defendant had motive to shoot at the apartment because two men had just fought him there, defendant was caught taking advantage of Ms. Bunting there, and Mr. Russell made fun of defendant there in front of defendant's coworker and friend. RP 63, 86, 87, 106, 187. Defendant was so angered by this incident that he threw a grill through the kitchen window. RP 63, 106. Every witness who was present at the fight heard defendant make multiple threats to bring back a gun and "blast" the people in the apartment. RP 39, 62-63, 86-87, 90, 189. He even specified the caliber of the gun he would use: a "nine." RP 86-87. Before leaving the apartment, defendant reached for his waistband like he had a gun, either emphasizing that he intended to use a gun against the people in the apartment later or indicating that he thought he had a gun at that moment and was trying to use it. RP 86, 106, 187.

There is evidence to support the conclusion that defendant intended to inflict great bodily harm on anyone in the house, including Ms. Bunting and Mr. Russell. Defendant fired the gun from only ten feet away and at an angle and height that could easily injure any people that were in his line of fire. RP 68, 126. He fired four times into a living room window. RP 42, 67, 91-93. Defendant knew there were people in the living room because there were lights on in the living room and because, when the defendant left the apartment, Mr. Hatfield, Mr. Pascual, Mr.

Eslava, Mr. Zamalea, Ms. Bunting, and Mr. Russell were all awake and present in the apartment. RP 41-42, 106, 190. Defendant's argument that he believed that the house was vacant because his friends needed a ride home is not a reasonable inference. It is unreasonable to assume that Mr. Russell, Mr. Hatfield and Ms. Bunting would all need to escort Mr. Zamelea, Mr. Eslava, and Mr. Pascual home. Defendant could only reasonably expect one person to drive the three guests home; he must reasonably have expected that at least two people would have been in the apartment. Defendant made multiple threats to come back and shoot the people in the apartment and reached threateningly into his waistband. RP 39, 62-63, 86-87, 90, 106, 187, 189. The jury was allowed to infer that by firing a gun into a house he knew was occupied, defendant demonstrated his intent to inflict an injury that could create a probability of death. This conclusion is further supported by the fact that a bullet passed near the victims and defendant told the victims that he intended to "blast" them.

Defendant relies on State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993), to argue that he did not intend to inflict bodily injury on Mr. Russell and Ms. Bunting. Mr. Ferreira was an accomplice to a drive-by shooting during which an accidentally fired bullet hit the victim, who was in her living room at the time. The he living room lights were on and the shades were drawn. Id. at 467-469. The target of the drive-by shooting, however, was standing outside the house and there was no evidence that Ferreira had ever been in the house. Id. Ferreira is distinguishable from

the present case. In the present case, defendant aimed at Mr. Russell's apartment because it was the apartment he had just left and the place he knew the victims were staying; defendant did not aim at a person in front of the house and accidentally fire into the apartment as in Ferreira. Also, defendant was in Mr. Russell's apartment moments before the shooting, so he knew that several people were there and that at least two people would still be there when he returned. Both the fact that defendant fired at Mr. Russell's apartment specifically and repeatedly and the fact that defendant knew that people would be in the apartment before he fired into it support the conclusion that defendant intended to inflict great bodily harm on Mr. Russell and Ms. Bunting.

Viewed in the light most favorable to the State, the evidence proved that defendant intended to commit assault in the first degree against the two people in Mr. Russell's apartment at the time of the shooting by showing that defendant intended to use a gun to shoot the people in Mr. Russell's apartment and to inflict great bodily harm on them.

b. Substantial Step Toward Commission

Defendant took a substantial step toward completing assault in the first degree by (1) threatening to shoot the people in the apartment, (2) leaving to retrieve a gun, (3) returning to shoot at an apartment that he

knew was occupied, and (4) firing into the occupied apartment several times, nearly striking Ms. Bunting and Mr. Russell.

There is ample evidence that defendant was the one who shot at Mr. Russell's apartment. Defendant threatened the occupants of the apartment and had motive to harm them. Defendant specified that he would use a "nine," and the recovered rounds were consistent with a 9mm semi-automatic. RP 86-87. The shots came from the back of the apartment, which is the side of the apartment from which defendant left and which is not easily accessible to people on the street. RP 38, 45-47, 62, 63, 74-75, 86, 93, 106, 126. The back side of the apartment is also the side where defendant would expect people to be congregating because he knew that the living room was in the rear of the apartment.

The timeline also supports the conclusion that defendant fired the gunshots. Ms. Pena called the police during the fight in the backyard at 2:42 a.m. RP 119, 208. Defendant fired the four shots between 3:34 a.m. and 3:44 a.m. when Mr. Hatfield returned home. RP 88, 190, 208. Thus, the shots were fired less than an hour after defendant fought Mr. Hatfield and Mr. Russell. Because less than an hour passed between the fight, defendant's threats, and the gunshots, it is reasonable to conclude that defendant had time to go to his apartment only one block away in order to retrieve a gun and that he was still angry about the fight.

The way defendant fired the gun corroborates defendant's purpose of inflicting great bodily harm on them. Defendant did not have a gun at

the apartment, but took the time to leave and retrieve one. RP 62, 87, 189. He fired at the living room window of the apartment that he knew belonged to Mr. Russell and that he knew was occupied. The bullets passed through the living room and bathroom – places where a person could easily be located – and one bullet passed between Mr. Russell and Ms. Bunting in the living room. RP 42-43, 49, 67, 74, 91-94. Defendant used a 9mm caliber weapon, just as he had threatened, and stood only ten feet from the apartment when he fired. RP 86-87, 126. He fired at an angle and height that could easily have hit anyone who stood inside the apartment. RP 126. He fired four separate times, and because he used .380 automatic bullets, he had to manually pull back the slide of the gun after each shot, indicating that he consciously considered and fired each of the four bullets separately. RP 126, 179-180.

The State proved that defendant took a substantial step toward committing assault in the first degree by showing that he retrieved a gun and fired it in such a way as to corroborate his intent to inflict great bodily harm. The State thus proved a count of attempted assault in the first degree for each person in the apartment: one for Mr. Russell and one for Ms. Bunting.

c. The Nexus Analysis Does Not Change The Outcome Of This Case.

A defendant is armed when a weapon is easily accessible and readily available for either offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Further, “in a constructive possession case” the State must establish a nexus “between the defendant...and the weapon, and the crime” in order to establish that the person was armed during the crime. State v. Schelin, 147 Wn.2d 562, 568, 572, 55 P.3d 632 (2002). However, “the State need not prove a nexus between the defendant, the weapon, and the crime when the defendant actually possesses the firearm.” State v. Easterlin, 126 Wn. App. 170, 174, 107 P.3d 773 (2005), review granted, 155 Wn.2d 1021 (2005); see State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005) (stating that the nexus test is used “where the weapon is not actually used in the commission of the crime.”).

The nexus analysis does not apply to this case because defendant actually possessed the firearm and used it to commit the crime by firing four bullets through Mr. Russell’s living room window. Because the nexus test only applies to constructive possession cases, that analysis is inappropriate for this case in which the State pursued and proved actual possession. See State v. Easterlin, 126 Wn. App. 170.

Defendant’s nexus analysis merely rehashes the identity issue. As discussed above, the State proved that defendant committed attempted

assault in the first degree by proving that defendant fired four bullets into Mr. Russell's apartment with the intent of inflicting great bodily harm on the people in that apartment. There is most certainly a nexus between the weapon, the gun, and the person when the person uses the gun to assault two victims in an apartment. The only argument that defendant makes regarding the nexus analysis is that he was not the shooter, which is a reiteration of his initial identity argument. Because the State presented sufficient evidence to convict defendant of attempted first degree assault with a handgun, it necessarily presented sufficient evidence to prove that defendant was the person who fired that handgun.

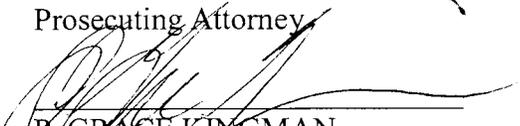
Even if the nexus test applied to cases of actual possession, the State would satisfy that test because there is clearly a nexus between defendant, a gun, and attempted first degree assault when defendant attempts to commit first degree assault by shooting into an occupied residence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: JUNE 16, 2006

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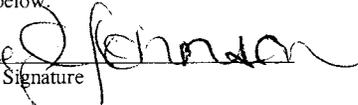
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/27/06 
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