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NO. 36175-2-II

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

STATE OF WASHINGTON, Respondent

v.

FLOYD ROCKY JENNINGS, Appellant

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00561-9

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The statement of facts, where necessary, will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that there was insufficient evidence of the elements of attempted murder in the second degree to allow this to go to the jury. Specifically, the claim is that there was no evidence to support a concept of a specific intent to cause the death of another person. (Brief of Appellant, page 15).

In a claim of insufficient evidence, a reviewing court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). Determinations of credibility are for the fact finder and are not reviewable on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court will defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005); State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

“Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all the circumstances surrounding the event.” State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). A jury may infer criminal intent from a defendant’s conduct where it is plainly indicated as a matter of logical probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The crime of attempted murder requires specific intent to cause the death of another person. State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). The defendant in our case asserts that there was insufficient evidence for the jury to find that he intended to kill Mr. Grigsby, the Good Samaritan who was coming to the aid of the defendant’s girlfriend while the defendant was assaulting her.

But it is not necessary for the State to show that the defendant verbalized or acted out his intent beforehand. State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). Rather, intent to kill may be inferred from all the circumstances surrounding the event. Gallo, 20 Wn. App. at 729. For example, in State v. Hoffman, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991), there was a sufficient basis for finding an intent to kill when the defendant had fired a weapon at a victim. This was based in part on the location and number of the bullet holes, the timing of the shots in relation

to the victim's appearance at the window, the proximity of the shell casings to the living room floor, and also the heated argument earlier in the day all of which together strongly supported an inference of intent to kill.

In our case, by way of amended information, the defendant was charged in count one with attempted murder in the second degree. (CP 4). The allegation was that on March 17, 2006, with the intent to commit the crime of murder in the second degree, he did an act which was a substantial step towards the commission of that crime. The victim named in the Information was Charles V. Grigsby and it was alleged that the defendant with the intent to cause the death of Charles Grigsby attempted to cause the death of that person. The Information also included a deadly weapon enhancement dealing with a knife.

The jury instructions that were given provided the elements of the attempted murder in the second degree and also provided the definitions of a completed murder in the second degree. The jury's instructions (CP 35) included as Instruction No. 9 the following:

To convict the defendant of the crime of attempted murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 17, 2006, the defendant did an act which was a substantial step toward the commission of murder in the second degree;

(2) That the act was done with the intent to commit murder in the second degree; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubts as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury instructions also provided the elements for a completed crime of murder in the second degree under Instruction No. 11 which reads as follows:

The crime of murder in the second degree would require proof beyond a reasonable doubt of each of the following elements:

(1) That on or about March 17, 2006, the defendant stabbed Charles V. Grigsby with a knife;

(2) That the defendant acted with intent to cause the death of Charles V. Grigsby;

(3) That Charles V. Grigsby; died as a result of defendant's acts; and

(4) That the acts occurred in the State of Washington.

To establish the elements of the attempted murder in the second degree, the State called as one of its witnesses the alleged victim, Charles Grigsby. Mr. Grigsby described for the jury the events that lead up to the

assault with the knife. He described the actions of the defendant when he (Mr. Grigsby) was coming to the aid of the defendant's girlfriend, Gretchen Alfrey, who the defendant was hitting. The testimony went as follows:

QUESTION (Deputy Prosecutor): When you say, "he was slapping her around," what specifically was he doing to her?

ANSWER (Charles Grigsby): He was, you know, slapping her.

QUESTION: Okay. You say, "slapping her," was he slapping her face, or was he slapping - -

ANSWER: Yes. Yes, the face and trying to take the purse from her.

QUESTION: Okay. Did you see him strike her in the face?

ANSWER: Yes.

QUESTION: Did you see him strike her once or more than once?

ANSWER: It was a couple times, I believe.

QUESTION: Was his hand open, or was his hand - -

ANSWER: Open.

QUESTION: - - closed?

ANSWER: Opened.

QUESTION: Okay. Where was the purse?

ANSWER: It was on her shoulder. It was on her shoulder.

QUESTION: What was she doing when he was trying to do this?

ANSWER: Fighting - - fighting him off.

QUESTION: Okay. More specifically, what sort of activity was she taking?

ANSWER: Well she was blocking him and telling him get away from her.

QUESTION: Okay. Were you able to hear what he was saying to her?

ANSWER: No, not really, no.

QUESTION: How - - this is what you viewed when you came right out of the door of the bar; is that correct?

ANSWER: Yes, sir.

QUESTION: When you saw this, what did you do?

ANSWER: Well, first thing I did, I held up my - - I held my hands and, you know, I said, "What's going on here?" you know, like that. "What's going on here?" By that time, I was walking around over there on the other side, right over there and - - and "Get your money back." And I said - - I said, "I don't want that money back." I said, "It's hers." She didn't have any money anyway. And I said, you know - - I said, "What's going on?" He says, "This is going on." And he, you know - - he - - I don't want to cuss in front of the jurors, but, you know, he said, "This is going on, M-F'r," you know? And that's when he pulled a knife on me.

QUESTION: All right. Let me stop you there and kind of move you back a little bit. All right, When you came out of the bar and walked toward the car, which direction were you walking toward?

ANSWER: In front of it. Right through - - right across the front, there's a sidewalk. I was going right around like that.

QUESTION: All right. And when did you actually make contact with Mr. Jennings?

ANSWER: Went over by the door right over there.

QUESTION: All right. What do you recall you actually said to him?

ANSWER: I just remember saying - - I said, "Hey, what's going on here?" you know, "What's going on?" And, you know - - you know, and that's really all I really said, you know, except for I - - you know, he's talking about going to get the money back, you know? I said, "I don't want the money back." I said - - I said, you know - - I said - - I said, you know, "What's all this trouble for?" you know? You know, it was no trouble a few minutes before I went out there, you know? It was a little bit, but nothing like that.

QUESTION: How did Mr. Jennings respond when you came forward and put your hands up - -

ANSWER: He was already angry. He was angry when I went up there. And when I said, "What's" - - that's when he flipped the knife out on me. He said, "This is going on, M-F'r," and that's when he pulled - - flipped a knife out on me.

QUESTION: Okay. Let me break this down a little bit. When he said, "This is going on" - - you said a couple times "M-F'r". Is that actually what he said, or did he say something - -

ANSWER: Oh, no. He was, you know - - you know, "motherfucker," you know?

QUESTION: Okay. Is that the exact terminology?

ANSWER: Yeah. That's exactly what he said, yeah.

QUESTION: All right. You've demonstrated two or three times now some sort of movement with your right hand across your body. Describe for the jury exactly what he did and what he came out with.

ANSWER: Well, I said, "What's going on?" My hands were both in the air like this. I was like this in a sign of a surrender thing, you know what I mean? I didn't want no trouble. I was just - - Saint Patrick's Day. I was having a couple beers, you know? And I said, "What's going on?" you know? "What's all the" - - and he, you know - - then, the next thing you know he just - - all of the sudden, I just seen the knife come right towards my belly.

QUESTION: All right. Do you recall where he drew the knife from?

ANSWER: No. I didn't see him draw the knife, I just seen the knife when it appeared in front of me.

QUESTION: Can you describe the knife for the jury?

ANSWER: I know it was approximately this big, dark in color with a fat blade on one side and a thin blade on the other side.

QUESTION: Okay.

ANSWER: You know, like, a beveled knife with a thick kind on the other side.

QUESTION: All right. So you're talking about an edged knife on one side with a - - the top of it, which is blocked off?

ANSWER: Yeah. Flat, yeah.

QUESTION: Okay, When he - - how did he - - what did he do with the knife in relation to you?

ANSWER: He - - I thought he was going to stab me, you know? I never - - and then he pulled it out like this and then I hit him, you know? I didn't know what else to do, you know? I was just - - and, you know, he come around with the knife and I hit him, trying to get away from it, you know?

QUESTION: Describe for the jury how you hit him.

ANSWER: All I remember is - - all I remember is hitting him in the forehead. I believe, the forehead.

QUESTION: Okay. And after you hit him in the forehead, what did he do?

ANSWER: Well, I don't remember not one thing really what happened. I know I was backing up the whole time, backing up - - backing up right around the car like this, you know, getting away from him. And then I got right here - - right there, and all the sudden my mind cleared up. And I remember he had his knife under his shirt sleeve like this - - like this, see here? His knife was underneath his shirt sleeve where I couldn't see it. I never been with no knife fight or nothing.

Anyway, I couldn't even see the knife, so when - - so then he had it under there and then - - so I remember hitting him again right there - - hitting him one more time right there. And then - - and then the next thing - - only thing I remember after that is I was behind the truck behind there - - over there - - and he was down - - he was down. I was sitting on his lap and I seen the knife about a foot from his hand over there, you know, and I was on top of him. And I don't remember anything, you know, my mind is blank right then.

There's something I can't remember because - - and then next thing I remember, he was standing up behind the truck, starting to walk away. I said - - I said, "You're going to go to prison for this." And that's the last thing I said to Mr. Jennings when - - that's the last - - then him and her - - she was already walking down the road at this time. And that's the last - - that was the last thing - - the situation - - the knifing, or whatever.

QUESTION: Do you remember Mr. Jennings hitting you?

ANSWER: No.

QUESTION: Before this event occurred, did you have any stab wounds in your body?

ANSWER: None.

QUESTION: You have described for the jury that you remember being on top of him, behind the vehicle.

ANSWER: Yes.

QUESTION: Okay. Was he face down or was he - -

ANSWER: No. He was - - he was - - he just - - his hand was just a couple - - about six, eight inches from the knife like this, and I was sitting - - I had gotten on his legs somehow, but I don't even remember how I did it, you know? And - - and then the knife is just about this far from his hand. I remember I was going to try to get the knife, but I don't remember anything from that point until he was walking away. I don't remember. Something in my mind didn't accept all the stab wounds I got and stuff.

QUESTION: All right.

ANSWER: That's seven times, I was stabbed.

(RP 98, L.2 – 104, L.23)

Mr. Grigsby went on to describe for the jury the nature of the seven stab wounds that he received. He discussed with the jury the fact that people at the bar had to apply pressure to stop the bleeding, he was taken by ambulance to the hospital, and had to undergo surgery. (RP 106-107).

Another witnesses called by the prosecution was Gretchen Alfrey. She was the woman that was outside with the defendant who was known as either "Floyd" or "Rocky". She indicated that Mr. Grigsby, the alleged victim, was just trying to calm down the situation between her and the defendant. (RP 70, L.4-9). She indicated that this was not really working and that the defendant was angry and agitated and yelling and telling Mr. Grigsby to stay out of it and that it was none of his business. (RP 70-71). She described that Charles was coming from behind the vehicle and that the defendant had moved back to meet him. (RP 71, L.22-25).

She said at that point she was not able to see either of them but that she heard noises. When she was finally able to get herself into a position where she could see what was happening, she described that they were pushing each other and that ultimately she saw the defendant had gotten Mr. Grigsby down on the ground and was on top of him. She did not see a knife, but she saw the defendant repeatedly punching Mr. Grigsby very

violently. (RP 73). She described that Mr. Grigsby was asking the defendant to please stop and that he was saying, "I don't want to hurt anybody". She again indicated that Mr. Grigsby had just been trying to help calm down the defendant and her. (RP 74). She indicated that when she left they were still on the ground. She left because she heard police sirens and she had a warrant for her arrest. (RP 75).

The State called as a witness to help establish its case Officer Kendrick Suvada. Officer Suvada was the one who initially arrested the defendant. He indicated that when he arrested him, the defendant was yelling that the girl didn't do anything that it was he (the defendant) that had done it. (RP 151). He also indicated that when they were putting him into the police car, they checked him and found a knife in his possession which was from an inside pocket and that the knife was locked in the open position. (RP 151).

The prosecution also called Officer Barbara Knoeppel. She assisted in the arrest of the defendant. During the process of arresting him in the field, she noted that he had blood on his hands and she asked him repeatedly if he wanted any medical attention. The defendant also told Officer Suvada that he didn't need it that he was fine. He told the officer that the blood on his hands was probably from the other guy. (RP 159-160).

The State also called Officer Jon Thompson. Officer Thompson indicated that he interviewed the defendant after advising him of Miranda rights and the defendant told him, "I stabbed the guy after he punched me in the mouth." (RP 252, L.10-11).

The State submits that there is ample evidence to establish the intent to kill for a reasonable juror to consider. You have angry words directed towards the alleged victim at the time that the defendant is also showing deadly force; you also have the nature of the seven stab wounds that the alleged victim received and you have the indications by the defendant that he stabbed an unarmed man because the unarmed man had punched him in the mouth. As demonstrated in the transcript, particularly the statements by Mr. Grigsby, that the defendant had multiple opportunities to back away from this. It was obvious that Mr. Grigsby was attempting to back away from it and all indications were that he was just trying to act as a good Samaritan to calm down the defendant and his girlfriend. The only show of deadly force was done by the defendant after he had expressed angry words towards the alleged victim. Clearly the totality of circumstances here would allow this matter to go to a jury to determine whether or not this was a substantial step towards the commission of a murder in the second degree.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel in two areas: failing to follow through with proposed instructions on self defense and failing to object to references to the person who was assaulted as being the “victim”.

The State and Federal constitutions guarantee a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail in an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must demonstrate that but for the deficient representation, the outcome of the trial would have differed. McNeal, 145 Wn.2d at 362. A decision concerning trial strategy or tactics will not establish deficient performance. State v. Herdrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007). The decision of when or whether to object to a question is a classic example of trial strategy. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

In our case, the defense had proposed jury instructions dealing with self defense (Defendant's Proposed Jury Instructions, CP 18), but withdrew the self defense instructions prior to submission to the jury. From the record, it is fair to assume that two matters were taken into consideration by the defense attorney: he would not have to put his client on the stand and thus be subject to cross examination, and that there was not sufficient evidence in the record to justify the self defense.

The trial court need not instruct the jury on self defense or defense of another if no reasonable person in the defendant's shoes could have perceived a threat of great personal injury. State v. Walker, 136 Wn.2d 767, 773, 966 P.2d 883 (1998). Before reaching such a conclusion, the trial court would have to determine whether the defendant produced any evidence to support his claim that he subjectively believed in good faith that another person was in imminent danger bodily harm and that this belief, viewed objectively, was reasonable. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). As the record in our case clearly demonstrates, there is absolutely nothing to indicate that self defense would be appropriate under these circumstances. Contrary to the defendant's claims in his appellate brief, all indications are that the defendant is the aggressor and demonstrating a showing of deadly force before any blows are struck.

Because the defendant precipitated the situation, he would have been obligated to retreat or abandon the encounter before he would have been permitted to assert self defense. State v. Currie, 74 Wn.2d 197, 198-199, 443 P.2d 808 (1968).

Knowing that self defense was probably not available under these circumstances, the defense attorney chose a different set of tactics to use which were demonstrated in his closing argument. Utilizing the information that had been received from the various witnesses that had observed what had been occurring, the defense attorney argued that the stabbing which actually caused the serious wounds to Mr. Grigsby, were not done by this defendant. His argument was as follows:

(Defense Attorney): We know that Mr. Jennings kept making statements that deflected the blame off of her - - we know that - - and putting it on himself. But this is a tavern, you know, and as the testimony went, Mr. Grigsby was all about the bar and who knows what happened. You know, if it was Ms. Alfrey or someone from the bar - - tavern - - that he pissed off. All we know is that if you look at the evidence, it's a different knife, a much larger knife and it happened after Mr. Jennings left the scene.

And that would explain why Mr. Grigsby doesn't remember. You recall Mr. Grigsby doesn't remember being stabbed. He was cold-cocked, lying on the ground. That would explain why he doesn't remember being stabbed and then all of the sudden sitting up and he's bleeding. That would explain it.

And then you have to look at that in the context of Mr. Ottenbacher, because that's important. He saw that part of

it and stated to you there was no weapons. Mr. Jennings had left the scene. He was there, did not have a weapon in his hand, and left it. And Mr. Ottenbacher saw that entire part of it.

I mean, obviously, we know that Mr. Grigsby was stabbed. I mean, that's obvious. Six times. It's just that the State took - - or the law enforcement took the easy way out. They ignored important lack of evidence. The first tip-off should have been - - I mean, the two tip-offs was when Detective Knoeppel noticed there was no blood on the knife and that the jacket that he was wearing - - the lack of blood.

Someone else did this. That's what it comes down to. Someone else did this. It wasn't Mr. Jennings. Thank you.

(RP 313, L.2 – 314, L.9)

The defense offered was a far cry from the concept of self defense. It was a tactical decision made by the defense attorney after realizing the strength of the State's case and that the defense of self defense would not be appropriate under these circumstances.

The other part of this claim of ineffective assistance deals with the use of the term "victim" by numerous witnesses when they were responding to questions. No objections were made to any of the questions or answers. None of the questions specifically referenced or wanted reference to the concept of "victim". Further, given the nature of the defense, there is no question but that Mr. Grigsby was the victim of a knife

assault. The claim by the defense is that it was not the defendant who had committed the criminal acts. Thus, there was no dispute that he was the victim of a violent crime merely a question of who – done – it.

The defendant in his appellate brief argues that this was improper opinion evidence. There was nothing in the answers to any of the questions asked that would indicate that the responding witness was believing, or disbelieving, Mr. Grigsby. Nor is there any indication that this witness was trying to impart some type of improper opinion of truthfulness to the juror. It appears that this is mere terminology that is used to describe the complaining witness. As set forth in State v. Nettleton, 65 Wn.2d 878, 880, 400 P.2d 301 (1965), the appropriate inquiry is directed at the effect of the statement. In other words, whether a new trial must be granted by asking whether the remark when viewed against the backdrop of all the evidence so tainted the entire proceeding that the accused did not have a fair trial. Nettleton, 65 Wn.2d at 880. The State submits that there is absolutely nothing in this record to support or document the concept that the phrase “victim” when viewed against the backdrop of all the evidence has tainted the entire proceedings to prevent the defendant from receiving a fair trial. Given the nature of the defense that was offered to the jury, it is immaterial what phraseology was used to describe the complaining witness.

IV. CONCLUSION

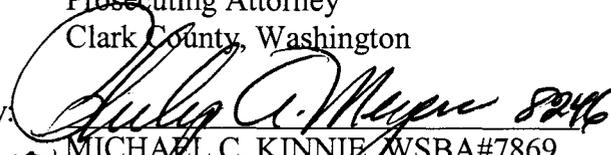
The trial court should be affirmed in all respects.

DATED this 29 day of January, 2008.

Respectfully submitted:

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Clark Co. No. 05-1-00561-9

FLOYD ROCKY JENNINGS,
Appellant.

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On January 30, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court Of Appeals, Division Ii 950 Broadway, Suite 300 Tacoma, Wa 98402-4454	John Hays Attorney At Law 1402 Broadway Suite 103 Longview WA 98632-3714
Floyd Jennings, DOC #960276 Washington State Penitentiary 1313 N. 13 th Avenue Walla Walla, WA 99362-1065	

DOCUMENTS: Brief of Respondent

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

Abby Rowland
Date: January 30, 2008.
Place: Vancouver, Washington.