

NO. 38916-9

COURT OF APPEALS
OF WASHINGTON

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

ISSAC CAVIL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 07-1-04914-4

BRIEF OF RESPONDENT

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

1. Did the State present sufficient evidence to convince a reasonable fact finder that defendant was guilty of three counts of assault in the first degree?
2. Did the trial court properly exercise its discretion when it denied defendant's motions for directed verdict and arrest of judgment as the State presented sufficient evidence of guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On September 20, 2007, the State charged ISAAC LEE CAVIL, hereinafter "defendant," with three counts of first degree assault, one count of drive by shooting, and two counts of first degree unlawful possession of a firearm in Pierce County Cause Number 07-1-04914-4. CP¹ 1-4. Defendant was charged as one of several co-participants of the crime. CP 1-4. Three of the co-participants were juveniles and entered

¹ Citations to Clerk's Papers will be to "CP." As the trial and sentencing transcripts are not numbered sequentially, citations to the trial verbatim report of proceedings will be to "RP" and the sentencing will be to "RP (02/20/09)."

guilty pleas to reduced charges² prior to trial. RP 174-76, 331-32, 373-74. Defendant's first trial ended in a mistrial. RP 3. Defendant's final co-participant, Frederick Singleton, entered a guilty plea after the mistrial. RP 5.

On January 12, 2009, defendant's second trial was held before the Honorable John A. McCarthy. RP 1. The court granted defendant's motion to bifurcate the two counts of unlawful possession of a firearm from the remaining counts. RP 8-11. The court considered additional argument regarding the bifurcation at the close of the State's case, but stood by its initial ruling. RP 536-38.

Once the State rested, defendant moved for a directed verdict regarding the three counts of first degree assault, arguing that the State did not present evidence that the principal actors intended to cause great bodily harm. RP 544-550. The court denied defendant's motion. RP 550.

In addition to the charged crimes, the court instructed the jury to consider the crime of second degree assault as lesser included offenses of first degree assault. CP 87-126. The jury found defendant guilty of three counts of first degree assault, as well as drive by shooting. RP 622-23; CP 127, 128, 129, 144. In addition, the jury found defendant was armed with

² Amanda Jordan entered a guilty plea to one count of drive by shooting and one count of unlawful possession of a firearm in the second degree. RP 331. Jacob Jordan and Osiris Younger entered guilty pleas to three counts of assault in the second degree, one count of conspiracy to commit drive by shooting, and one count of unlawful possession of a firearm in the second degree. RP 174-75, 373.

a firearm during the commission of the assaults. RP 623; CP 130, 131, 132. Defendant then entered a guilty plea to one count first degree unlawful possession of a firearm in exchange for the State's agreement to dismiss the second count. RP 628-32; CP 133-141.

At sentencing, defendant moved for an arrest of judgment on the theory that the principal actors could not have intended to inflict great bodily harm by shooting at the side of a house with no windows. RP (02/20/09) 8-15. The court reviewed the evidence presented at trial and denied defendant's motion. RP (02/20/09) 23-27.

The State argued for an exceptional sentence downward as the prosecutor believed defendant's standard range sentence of 528-642 months was excessive and recommended a sentence of 342³ months. RP (02/20/09) 5. Defendant requested 180 months for the firearm sentencing enhancements and a "nominal sentence for everything else that would be

³ Prior to these convictions, defendant had an offender score of two. The following chart outlines defendant's standard ranges and the State's recommendation:

Crime	Offender Score	Standard Range	FASE	State's Recommendation
I Assault 1	6	162-216	60	162 + 60
II Assault 1	0	93-123	60	0 + 60
III Assault 1	0	93-123	60	0 + 60
IV Drive by shooting	9+	89-116	0	116
V UPFA 1	7	67-89	0	89

below the standard range.” RP (02/20/09) 29-30. The court followed the State’s recommendation. RP (02/20/09) 38-39.

Defendant filed a timely notice of appeal. CP 168.

2. Facts

On September 17, 2007, defendant, his girlfriend Amanda Jordan⁴, Jacob Jordan, and Fredrick Singleton were socializing after Amanda got out of school. RP 265, 269-71. At one point, Amanda informed defendant of an earlier conversation she had with Regis Kindred. Amanda’s relationship with Regis is unclear from the record, but it suggests they had some form of romantic or sexual encounter. Amanda testified that Regis was merely a friend, but Regis testified he and Amanda were “fooling around” in a sexual way. RP 275, 448-49, 459. Upset by this information, defendant used Amanda’s cell phone to call Regis and confront him. RP 277-78, 384-85. Defendant and Regis’s conversation culminated in their agreement to fight at Regis’s apartment. RP 385, 447.

After talking to Regis, defendant phoned Osiris Younger and asked him to meet defendant for the fight. RP 133, 137. Defendant asked Osiris if he still had a shotgun and requested that he bring it with him. RP 134. Osiris put his shotgun in his car and met with defendant, Frederick, Amanda, and Jacob at the Lakewood Towne Center. RP 135, 135, 141.

⁴ As several of the people involved in this case share last names, the State is referring to all parties by first name for the sake of clarity.

When Osiris arrived, defendant confirmed that he had brought the shotgun. RP 144. Osiris put the shotgun in the back of defendant's Jeep and everyone got in. RP 144-45, 285-86. Defendant drove, with Frederick in the front passenger seat. RP 146. Amanda sat behind defendant, Jacob was behind Frederick, and Osiris was in the middle of the back seat. RP 146. Amanda gave defendant directions to Regis's apartment. RP 146.

As defendant drove past Regis's apartment, Osiris, Amanda, and defendant saw Regis and his friend, Tyrone, standing outside the apartment. RP 148-49, 290. They also saw a group of women sitting nearby. RP 149, 291. Defendant made a U-turn and stopped the car. RP 150-51.

Defendant pulled a 9 millimeter pistol from under the seat and handed it to Jacob. RP 151-52, 397. Jacob recognized the gun as one defendant regularly carried. RP 397-400. Defendant said he did not feel like fighting and that they were going to do a drive by instead. RP 397, 402. Defendant then told Jacob and Osiris, "you know what to do." RP 151-52. Frederick handed Osiris a .25 caliber pistol. RP 153, 401. All of the males in the car pulled black bandanas over the lower half of their faces. RP 156-57, 405.

Amanda told defendant that there was a small child living in the apartment, as well as Regis's sister and her husband. RP 298. Frederick responded that it was "a one in ten percent [sic] chance of hitting

somebody.” RP 298. Defendant agreed, stating that the moving vehicle lowered the accuracy of the shots. RP 299.

Defendant started driving and, when they reached the apartment for the second time, Jacob and Osiris started shooting. RP 159, 403.

Osiris aimed toward Regis and Tyrone, and saw them run into the apartment. RP 160. Osiris considered them to be the targets. RP 160. Amanda saw all the people who were nearby duck as soon as the shots started. RP 303. Jacob did not see anyone, but he was “trying to hit the victims” by aiming his gun at the apartment where Amanda said people were present. RP 409-10.

Mindy Daniels, a resident of the apartment complex, was outside with her nine year old son and her cousin when she heard what she initially thought were firecrackers being set off. RP 251-43. She did not realize they were bullets until she saw grass and dirt clods flying into the air. RP 243, 246. The dirt clods were flying close to where her son was located. RP 249.

Regis was living with his sister, Heidi Stewart, for the summer. RP 446. Heidi was in the apartment at the time of the shooting, together with her husband, Nathaniel Stewart, and two of their children. RP 524.

Regis had been expecting defendant to come over to fight him, so he was watching for defendant’s car. RP 447. Regis and Tyrone saw defendant’s car go by. RP 453. When Regis went inside to put away his dinner dishes, bullets started coming through the house. RP 453. Regis

heard bullets in the kitchen, his sister's room, and in the living room. RP 456. Heidi saw sheetrock dust in the dining room. RP 525. Later, she discovered a bullet hit a chair where her daughter had been sitting just moments before the shooting started. RP 529. When Heidi and Regis went outside, they found several people crying and in a state of panic. RP 457, 534.

Once the car was past the apartment, defendant told Jacob and Osiris that they had done a "good job." RP 413. Everyone in the car acted like nothing unusual had happened. RP 307. Osiris testified that he had not wanted to shoot anyone, but admitted he was aiming toward people. RP 168. Jacob believed that someone might have been hurt because he knew there were people in the house. RP 436. They returned to the Lakewood Towne Center and removed spent shell casings from the car. RP 164, 414. Osiris left for work, Frederick left in his own car, and defendant, Amanda, and Jacob left for home. RP 166, 309, 417.

The following day, officers called Amanda and informed her they were coming to her house for an interview. RP 325. When Amanda told defendant that the police were coming, defendant instructed Jacob to hide his car while he would hide inside the house. RP 325-26. Defendant told Amanda to deny everything and threaten the officers with a lawsuit if pressed. RP 326.

Jacob was arrested when he drove defendant's car away from the house. Amanda was also arrested that night. Jacob, Amanda, and Osiris

all testified for the State pursuant to plea agreements. RP 174-76, 331-32, 373-74.

Defendant did not testify on his own behalf, nor did he present any evidence at trial. RP 561.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVINC A REASONABLE FACT-FINDER THAT DEFENDANT WAS GUILTY OF THREE COUNTS OF ASSAULT IN THE FIRST DEGREE.

Courts review a challenge to the sufficiency of the evidence in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338, 851, P.2d 654 (1993). Courts will reverse a conviction for insufficient evidence only if no rational trier of fact could find that all of the elements were proved beyond a reasonable doubt. *State v. Peterson*, 145 Wn. App. 672, 676, 186 P.3d 1179 (2008) (citing *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007). Determinations of credibility are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d

821, 874, 83 P.3d 970 (2004) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

“A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm[, a]ssaults 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)(a).

In the present case, defendant challenges the sufficiency of the evidence to convict him of three counts of assault in the first degree only as to whether he knew of the shooters’ intent to inflict great bodily harm on the victims. *See* Appellant’s Brief at 9-10. As the State presented sufficient evidence to convince a rational fact-finder that defendant was a co-participant of the crime and intended for the shooters to commit an assault, defendant’s argument fails.

To convict defendant of first degree assault, the State had to prove:

- (1) That on or about the 17th day of September, 2007, the defendant or an accomplice assaulted [victim];
- (2) That the assault was committed with a firearm;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

CP 87-126 (Jury Instruction 13, 14, 15). Great bodily harm is bodily injury that causes the probability of death, or which causes significant, serious, permanent disfigurement, or that causes a significant, permanent loss or impairment of the function of any bodily part or organ. CP 87-126 (Jury Instruction 10).

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is an accomplice of such other person in the commission of the crime. CP 87-126 (Jury Instruction 7). A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he, or she either:

- (1) Solicits, commands, encourages, or requests another person to commit the crime; or
- (2) Aids or agrees to aid such other person in planning or committing the crime.

CP 87-126; *see also* RCW 9A.08.020(3). More than physical presence and knowledge of the criminal activity of another must be shown to establish a person is an accomplice. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Aid is defined as any assistance given by words, acts, encouragement, support or presence. *State v. Galista*, 63 Wn. App. 833, 839, 822 P.2d 303 (1992). “A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime.” *Id.*

Although accomplice liability is not strict liability, “[a]n accomplice need not have the same state of mind as a principal, but he or she must know that his or her actions will encourage or promote the principal’s commission of the crime.” *State v. Larue*, 74 Wn. App. 757, 762, 875 P.2d 701 (1994); *see State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 717 (2000). An accomplice need not participate in or have specific knowledge of every element of the crime nor share the same mental state

as the principal. *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). The defendant must merely act with the knowledge that he is aiding a particular crime. *State v. Whitaker*, 133 Wn. App. 199, 230, 135 P.3d 923 (2006).

In *State v. Rice*, the Washington Supreme Court held that “[s]pecific knowledge of the elements of the co-participant’s crime need not be proved to convict one as an accomplice.” 102 Wn.2d 120, 125, 683 P.2d 199 (1984). *Rice* involved felony murder where the defendants were intoxicated such that they may have been incapable of forming the requisite intent. The Court noted that the defendants’ conviction for felony murder would only require “their knowledge of their co-participant’s criminal assault on the victim. It would have been unnecessary for the State to prove the defendants’ actual knowledge of their co-participant’s possession of a deadly weapon or his mental intent.” *Id.* at 125-26.

Similarly in *Whitaker*, the defendant was accused of first degree murder. To convict Whitaker, the jury had to find that the defendant or “an accomplice acted with intent to cause the death of [victim],” and “that the intent to cause the death was premeditated.” *Whitaker*, 133 Wn. App. at 230. While Whitaker claimed that the State had to prove that he, himself, had the intent to kill the victim, the court disagreed, holding that the jury instruction held the State to its burden to “prove that Whitaker acted with knowledge he was aiding a premeditated murder.” *Id.*

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. See *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993). Washington courts have found that a defendant acted with the requisite intent when the defendant made threats prior to the assault and when under the circumstances of the assault, great bodily harm was a "logical probability." *State v. Salamanca*, 69 Wn. App. 817, 826, 851 P.2d 1242 (1993) (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)); see also *State v. Shelton*, 71 Wn.2d 838, 431 P.2d 201 (1967); *State v. Woo Won Choi*, 55 Wn. App. 895, 781 P.2d 505 (1989).

In *Salamanca*, the court held that there was sufficient evidence to support a jury's conclusion that the defendant was guilty of first degree assault with intent to inflict great bodily harm when the defendant pursued a vehicle at high speeds, allowing his companion to fire multiple shots into an occupied vehicle. 69 Wn. App. at 826. The court noted that Salamanca had been in several fights with the other car's driver and by "ke[eping] the [car] in close range" while his passenger fired into the vehicle, the defendant created a significant risk of "death or serious injury." *Id.*

Here, to find defendant guilty of first degree murder, the jury did not have to find that defendant knew whether Jacob and Osiris intended to inflict great bodily harm on a person. The jury merely had to be convinced that defendant had knowledge that the juveniles were going to

fire the guns he provided; at people on his command. The State provided ample evidence for the jury to determine that defendant had knowledge that Jacob and Osiris were committing first degree assault and that he defendant solicited, commanded, and encouraged the crime, as well as aided the juveniles in committing the crime by driving back by the intended targets.

Defendant handed Jacob a gun and drove past Regis's apartment. Defendant directed Jacob and Osiris to shoot when he knew people were present in and around the apartment. Defendant knew that there was a logical probability that shooting at people and into an occupied apartment could likely cause great bodily harm, yet he continued to encourage and support to Jacob and Osiris. By defendant's own actions he facilitated and encouraged his co-participants to commit these assaults and his knowledge of his co-participants' actual intent was not determinative of his guilt.

Moreover, the evidence presented at trial supported a reasonable inference that defendant's intent was to commit assault in the first degree. Defendant was upset with Regis for the conversation he had with Amanda, as well as for calling defendant "a bitch." RP 385, 460. Defendant informed all the other actors in the crime that his intent was to go to the apartment to fight the victim. He instructed Osiris to bring a shotgun, and he and Frederick both brought pistols. RP 139, 144. It was defendant's plan, not Jacob's or Osiris's, to go to Regis's apartment with guns to

engage in a fight with Regis. This is indicative of his intent to inflict great bodily harm.

When they arrived at the apartment, defendant saw Regis and Tyrone before he directed Jacob and Osiris to shoot. CP 149. Defendant and the only other adult in the car, Frederick, immediately passed pistols to the two juveniles. RP 153, 397. Defendant hid his face with a bandana, an action which he would not have performed for a mere fistfight. *See* RP 157. When he told Jacob and Osiris to shoot at the apartment, both juveniles understood that defendant meant them to shoot at people. RP 160, 185, 434-35.

Taken in the light most favorable to the State, it was reasonable for the jury to infer defendant intended for Jacob or Osiris to shoot Regis. Also, as credibility determinations are for the trier of fact, the jury was free to conclude that Jacob and Osiris, who knew defendant, were correct in their understanding of defendant's intention.

2. THE TRIAL COURT'S DENIAL OF
DEFENDANT'S MOTIONS FOR DIRECTED
VERDICT AND ARREST OF JUDGMENT WERE
PROPER WHERE THE STATE PRESENTED
SUFFICIENT EVIDENCE TO SUSTAIN A
GUILTY VERDICT.

Review of a trial court decision denying either a motion for directed verdict or a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. *State v. Longshore*,

141 Wn.2d 414, 420, 5 P.3d 1256 (2000). At the end of the State's case in chief, a court examines sufficiency based on the evidence admitted at trial so far. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). A directed verdict is appropriate if, after viewing the material evidence in the light most favorable to the nonmoving party, the court determines there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Id. citing Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

Criminal Rule 7.4 provides a defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime." CrR 7.4(a). At the end of all the evidence admitted at trial or on appeal, a court examines sufficiency based on all the evidence admitted at trial. *Jackson*, 82 Wn. App. At 608. The evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt. *Longshore*, 141 Wn.2d at 420-21, *citing State v. Bourne*, 90 Wn. App. 963, 967-68, 954 P.2d 366 (1998).

Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available. *Jackson*, 82 Wn. App. at 608. Therefore, a challenge to a trial court's denial of a defendant's motion for directed verdict or arrest of judgment is,

for all practical purposes, a challenge to the sufficiency of the evidence.

See Jackson, 82 Wn. App. at 608-09.

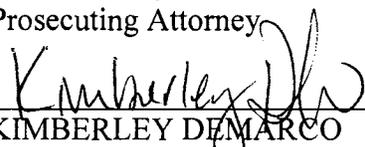
Defendant assigns error to the trial court's denial of his motion for directed verdict and motion arrest of judgment regarding the charges of assault in the first degree. As argued above, the State presented sufficient evidence in its case in chief for a reasonable fact finder to conclude that defendant knew that his presence would promote or facilitate Jacob and Osiris's conduct of first degree assault. Because the State presented sufficient evidence to support a conviction, the trial court acted properly in denying defendant's motions for directed verdict and arrest of judgment.

D. CONCLUSION.

As the State presented sufficient evidence to convince a reasonable fact finder that defendant was guilty as an accomplice of three counts of assault in the first degree, the State respectfully requests this court to affirm defendant's convictions.

DATED: JANUARY 19, 2010

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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.

12/10/19
Date Signature

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STATE OF WASHINGTON
BY em
DEPUTY