

FILED

MAY 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290573

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

RAMIRO CHAVEZ, JR.,

Respondent.

REPLY BRIEF OF APPELLANT-CROSS RESPONDENT

THE HONORABLE MICHAEL SCHWAB, JUDGE

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I. ASSIGNMENT OF ERROR ON CROSS REVIEW

A. ISSUE PRESENTED BY ASSIGNMENT OF ERROR.

1. Whether sufficient evidence supported the jury's verdict of guilty on one count of second degree assault?

B. ANSWER TO ASSIGNMENT OF ERROR.

1. The jury's general verdict was supported by sufficient evidence as to both alternative means, as the defendant, Mr. Chavez, caused lacerations to the victim's person by assaulting him, and also assaulted him with a deadly weapon, a knife. Furthermore, the deadly weapon element and enhancement definitions are distinguishable, and the verdicts are not inconsistent. Even if they were inconsistent, that would not render the general verdict invalid.

II. SUPPLEMENTAL STATEMENT OF THE CASE

At the conclusion of the trial in this matter, the jury's verdicts were read, and the jurors polled. The verdicts were received by the court, Mr. Chavez having been found guilty of the offense of second degree assault, but the jury answered 'no' on the deadly weapon enhancement special verdict form. (3-2-10 RP 238-44; CP 31, 32) Sentencing was continued on March 4, 2010, as counsel and the court discussed the possibility of a motion for a new trial. (3-4-10 RP 2-11) The court denied the motion for

a new trial, and continued the sentencing hearing again, on April 8, 2010. **(4-8-10 RP 2-27)** The record does not reflect that the defense objected to inconsistent verdicts.

Officer Sanchez testified at trial that he observed fresh lacerations, still bleeding, on the person of the victim, Mr. Monciviaz, and that he was wearing what appeared to be a bloody shirt. **(3-1-10 RP 97)**

III. ARGUMENT.

1. **Sufficient evidence supports the jury's general verdict.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). 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, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, the State alleged that Mr. Chavez committed the offense of second degree assault by either intentionally assaulting Mr. Monciviaz, and recklessly inflicting substantial bodily harm, or by assaulting him with a deadly weapon. **(CP 1)** Accordingly, the jury was instructed that each juror had to be convinced beyond a reasonable doubt that at least one of the alternative means had been proven. **(CP 13)**

The fact that Mr. Monciviaz had apparently bled in significant amounts from lacerations on his person is evidence such that a rational trier of fact could have found Chavez guilty under the "substantial bodily harm" alternative.

Furthermore, the fact of the negative response on the special verdict does not mean that insufficient evidence supports the general verdict. First of all, the deadly weapon as an element definition is found at RCW 9A.04.110(6): ". . . any other weapon, device, instrument, article,

or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm . . .” That statutory language was incorporated in Instruction No. 5 (CP 16)

The definition of a deadly weapon for purposes of a sentencing enhancement is quite different: “. . . an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death . . . any knife having a blade longer than three inches . . .” RCW 9.94A.825. (CP 28)

The definition for a deadly weapon as an element of second degree assault is thus much broader than that for the enhancement. Indeed, the jury could have been persuaded beyond a reasonable doubt that the knife in question was capable of causing substantial bodily harm, but were not so persuaded that from the manner in which it was used, it was likely to produce death. Contrary to Chavez’ assertion in his response brief, the fact that the jury answered ‘no’ on the special verdict form does not mean that no juror could have found that he assaulted Monciviaz with a deadly weapon.

Also, assuming for the sake of argument that the general and special verdicts are inconsistent, it does not follow that the general verdict is invalid and must be reversed. Indeed, even where verdicts are

inconsistent, convictions should be upheld “where the jury’s verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt.” State v. McNeal, 145 Wn.2d 352, 358, 37 P.3d 280 (2002), *quoting* State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988).

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction, but remand for resentencing within the standard range.

Respectfully submitted this 5th day of May, 2011.



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