

FILED

MAR 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29482-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

M.P. (DOB 01/28/1993),

Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR FRANKLIN COUNTY**

The Honorable Jerri Potts

BRIEF OF APPELLANT

**THOMAS M. KUMMEROW
Attorney for Appellant**

**WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711**

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A. SUMMARY OF ARGUMENT

M.P. went to J.G.'s house with three others to "check" J.G. M.P. stood in J.G.'s yard holding a baseball bat. J.G. did not come outside his house and M.P. and the others left when J.G.'s mother came home. M.P. was originally charged with attempted second degree assault. The information was later amended to second degree assault by intentionally assaulting J.G. with a deadly weapon. M.P. was found guilty as charged.

M.P. submits there was insufficient evidence to support the juvenile court's verdict, as the State failed to prove the baseball bat was a deadly weapon and failed to prove M.P. intended to create a reasonable apprehension of substantial bodily harm in J.G. by merely standing in his yard, without more. M.P. is entitled to reversal of his conviction with instructions to dismiss.

B. ASSIGNMENTS OF ERROR

1. The juvenile court's verdict was not supported by substantial evidence.

2. In the absence of substantial evidence, the juvenile court erred in entering Finding of Fact 3 to the extent finds M.P. created a reasonable apprehension of bodily harm in J.G.

3. In the absence of substantial evidence, the juvenile court erred in entering Finding of Fact 3 to the extent it finds the baseball bat was used in a manner capable of causing substantial bodily harm.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove each of the essential elements of the charged offense beyond a reasonable doubt. Assaulting another by placing that person in reasonable apprehension of substantial bodily harm is an essential element of second degree assault as charged and argued by the State. Where the State proved M.P. stated he wanted to “check” J.G. and stood in J.G.’s yard holding a baseball bat, was the juvenile court’s verdict supported by substantial evidence?

2. Where the State charged M.P. with assaulting J.G. with a deadly weapon but did not prove the baseball bat was used in a manner capable of causing substantial bodily harm, is M.P. entitled to reversal of his conviction for second degree assault based upon assault with a deadly weapon?

D. STATEMENT OF THE CASE

J.G. was at home with his friend V.G. when V.G. received a phone call. RP 61-62. V.G. saw A.P. and appellant M.P. standing outside of J.G.'s house. RP 27. V.G. went outside and spoke to M.P., who told V.G. he, "Carlos" and "Chuckie" were there to "check" J.G. RP 27, 62.¹ V.G. went into the house and relayed this information to J.G. RP 62. J.G. looked out the window and saw M.P. holding a baseball bat. RP 63. J.G. locked the doors, locking V.G. out, and armed himself with a knife. RP 63.

J.G.'s mother, Sonia Perez, arrived home as these young people were standing in her yard. RP 40. The young men and woman ran into a nearby van and left. RP 41. Ms. Perez contacted the police after speaking to her son. RP 44. M.P. was later stopped while riding in the van. RP 14. Inside the van, the police retrieved a red metal baseball bat. RP 16.

M.P. was initially charged with attempted second degree assault for threatening J.G. with the baseball bat. CP 21. The information was later amended to charge second degree assault

¹ To "check" someone apparently in this milieu means to "beat him up." RP 28.

based upon the same facts. CP 16.² Following a fact-finding hearing, the juvenile court found M.P. guilty of the assault count. CP 13-14.

E. ARGUMENT

M.P.'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT ENTERED A VERDICT THAT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a juvenile prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; JuCR 7.11(a); *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational

² M.P. was also charged with residential burglary in the amended information. CP 16-17. Following the fact-finding hearing, the Commissioner made no finding regarding this count, thereby implicitly acquitting M.P. of this offense. See *State v. Hescocock*, 98 Wn.App. 600, 609-11, 989 P.2d 1251 (1999) (juvenile court's failure to convict under the second alternative means in its written findings was an implicit acquittal on that charge).

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

This Court reviews the juvenile court’s findings to determine whether they are supported by substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993); *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). If the factual findings are not supported by substantial evidence they must be stricken. *Truck Insurance. Exchange v. Merrell*, 23 Wn.App. 181, 596 P.2d 1334 (1979). Substantial evidence is that sufficient quantity of evidence necessary to persuade a fair-minded, rational person of the truth of the allegation. *Echeverria*, 85 Wn.App at 783.

2. The State failed to prove M.P. intended to commit a reasonable apprehension of bodily harm in J.G. The State’s theory at trial was based solely on the “reasonable apprehension” prong of assault: that M.P.’s holding a potentially deadly weapon, the

baseball bat, created a reasonable apprehension of fear in J.G. RP 114.

A person is guilty of the crime of second degree assault if he “assaults another with a deadly weapon.” RCW 9A.36.021(c). A “[d]eadly weapon’ is any ... weapon, device, instrument, article, or substance [that] is used, attempted to be used, or threatened to be used [that] is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). Since there is no statutory definition for the term assault in Washington, courts use the common law definition. *Clark v. Baines*, 150 Wn.2d 905, 908 fn. 3, 84 P.3d 245 (2004); *see also State v. Aumick*, 126 Wn.2d 422, 426 fn. 12, 894 P.2d 1325 (1995); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942). Washington’s common law recognizes three means of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) *assault by placing the victim in reasonable apprehension of bodily harm.* *State v. Hall*, 104 Wn.App. 56, 63, 14 P.3d 884 (2000) (emphasis added), *citing State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995).

Neither the juvenile court's oral or written findings are a model of clarity: the findings are merely conclusory statements without specific findings as to each element of the offense.³

Nevertheless, M.P. submits the State failed to prove he assaulted J.G. with the baseball bat.

a. The State failed to prove that M.P. intended to create a reasonable apprehension of substantial bodily harm in J.G.

"To convict a defendant of second degree assault, the jury must find specific intent to create reasonable fear and apprehension of bodily injury." *State v. Ward*, 125 Wn.App. 243, 248, 104 P.3d 670 (2004), *abrogated on other grounds by State v. Grier*, ___ Wn.2d ___, 2011 WL 459466 (February 10, 2011). "[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *Byrd*, 125 Wn.2d at 712-13.

A defendant's "intent may be inferred from *pointing* a gun, but not from mere *display* of a gun." *Ward*, 125 Wn.App. at 248 (emphasis added), *citing State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

³ The juvenile court's written findings are merely a verbatim repetition of its oral ruling. CP 13-14; RP 125-26.

The juvenile court's findings fail to state that M.P. specifically intended to create a reasonable apprehension of substantial bodily harm. Thus, by failing to find this element of the offense of second degree assault as charged, the court necessarily found that the State failed to carry its burden of proving this element beyond a reasonable doubt. See *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue."). Thus M.P. is entitled to reversal of his conviction.

Further, the evidence established merely that M.P. was in J.G.'s yard in possession of a baseball bat. The State did not prove M.P. made any threatening gestures to J.G. with the baseball bat or held the baseball bat in a menacing manner. The evidence failed to establish M.P. intended to assault J.G. with the bat.

What the State may have proven was an *attempted* assault based upon M.P.'s statements related to J.G. by V.G. This was the offense charged in the original information before it was amended to charge a completed assault. Washington courts have recognized the lesser-included offense of attempted second degree assault is committed by placing the victim in reasonable

apprehension of bodily harm. *State v. Music*, 40 Wn.App. 423, 432, 698 P.2d 1087 (1985); *Hall*, 104 Wn.App. at 64-65. Because the “apprehension” type of assault lacks an attempt element, it is feasible to convict someone of attempting an assault by such means. *Music*, 40 Wn.App. at 432.⁴

In *Music*, several witnesses saw Mr. Music wielding what appeared to be a gun. Although no gun was ever recovered, police recovered a .22 caliber pistol holster and 19 rounds of .22 caliber ammunition from Mr. Music's car. Mr. Music also admitted “point[ing] a pistol at [the victim] and threaten[ing] to blow his head off.” 40 Wn.App. at 431. This Court determined that that was sufficient standing alone to establish a factual basis for the crime of *attempted* assault in the second degree under the reasonable apprehension prong. *Id.*

Here, similar to *Music*, there was evidence of a threat by M.P. to “check” J.G. RP 27. But, there were no threatening

⁴ In *Music*, this Court explained that there is no logical barrier to a conviction for attempted assault where the “apprehension-type” assault is recognized:

[S]ince there is no attempt element in the second type of assault, a charge of attempted assault within that definition is not an “attempt to attempt.” There is no logical conflict in charging one with attempting to put another in apprehension of harm.

40 Wn.App. at 432.

gestures by M.P. with the baseball bat similar to the act of the pointing of the gun in *Music*. Thus, even assuming everything M.P. did was true, the State proved only an attempted assault. Thus, since the evidence was not sufficient to support the offense charged, M.P. is entitled to reversal of his conviction.

b. The State failed to prove the baseball bat was a “deadly weapon.” A deadly weapon is:

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, 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.

RCW 9A.04.110(6); *State v. Hoeldt*, 139 Wn.App. 225, 228-29, 160 P.3d 55 (2007). Explosives or firearms are deemed deadly *per se* regardless of whether they are loaded. *State v. Carlson*, 65 Wn.App. 153, 158, 828 P.2d 30, *review denied*, 119 Wn.2d 1022 (1992). A baseball bat, which is not defined as a deadly weapon *per se*, may still meet the statutory definition of “deadly weapon” if the State proves it was used in a manner “capable of causing . . . substantial bodily [harm].” *State v. Shilling*, 77 Wn.App. 166, 171, 889 P.2d 948 (1995), *quoting* RCW 9A.04.110(6).

The juvenile court did not find that the baseball bat was used in a manner capable of causing substantial bodily harm. CP 13-14. As argued, *supra*, by failing to find the essential element that the baseball bat constituted a “deadly weapon,” the court necessarily found that the State failed to carry its burden of proof on this element. *Armenta*, 134 Wn.2d at 14.

In addition, a baseball bat is not a deadly weapon *per se*, thus in order to prove it was a deadly weapon, the State bore the burden of proving it was used in a manner capable of causing substantial bodily harm. The sum total of the proof offered by the State was that M.P. was standing in J.G.'s yard holding the baseball bat. There was no evidence M.P. threatened J.G. with the bat or made threatening gestures with the bat. Thus there was no evidence M.P. “used” the bat in a manner capable of causing substantial harm.

3. M.P. is entitled to reversal of his conviction with instructions to dismiss. Since there was insufficient evidence to support M.P.'s conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States

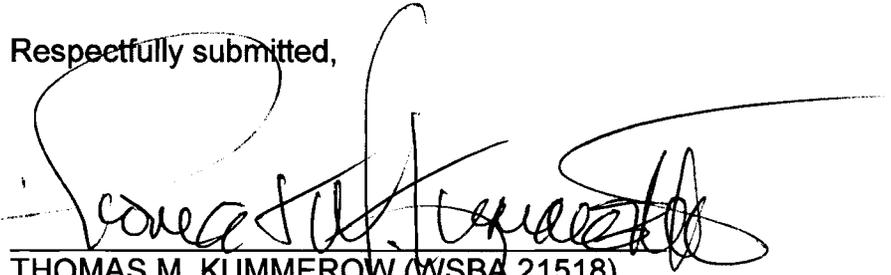
Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

F. CONCLUSION

For the reasons stated, M.P. requests this Court reverse his conviction with instructions to dismiss.

DATED this 17th day of March 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', with a large, sweeping flourish extending to the right.

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