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JAN 02, 2013

Court of Appeals
Division III
State of Washington

No. 31005-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JESUS TORRES,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
JUVENILE DEPARTMENT
Honorable Evan E. Sperline, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....4

Jesus’ right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where there was insufficient evidence to prove the specific intent to inflict great bodily harm.....4

D. CONCLUSION.....11

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).....	5
<u>State v. Anderson</u> , 72 Wn. App. 453, 864 P.2d 1001 (1994).....	8
<u>State v. Baeza</u> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	4, 6
<u>State v. Baker</u> , 136 Wn. App. 878, 151 P.3d 237, <i>rev. den.</i> , 162 Wn.2d 1010 (2007).....	8
<u>State v. Collins</u> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	5
<u>State v. Elmi</u> , 166 Wn.2d 209, 207 P.3d 439 (2009).....	1, 6, 7
<u>State v. Ferreira</u> , 69 Wn. App. 465, 850 P.2d 541 (1993).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	5
<u>State v. Mitchell</u> , 65 Wn.2d 373, 397 P.2d 417 (1964).....	8
<u>State v. Moore</u> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	5
<u>State v. Myers</u> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	6
<u>State v. Partin</u> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	6
<u>State v. Pierre</u> , 108 Wn. App. 378, 31 P.3d 1207 (2001).....	8
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	5, 6
<u>State v. Taplin</u> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	5
<u>State v. Theroff</u> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 5 Wn.2d 385, 622 P.2d 1240 (1980).....	6
<u>State v. Walther</u> , 114 Wn. App. 189, 56 P.3d 1001 (2002).....	11

<u>State v. Ware</u> , 111 Wn. App. 738, 46 P.3d 280, 282 (2002).....	6
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	6, 7
<u>State v. Woo Won Choi</u> , 55 Wn. App. 895, 781 P.2d 505 (1989), <i>rev. den.</i> , 114 Wn.2d 1002, 788 P.2d 1077 (1990).....	7

Constitutional Provisions and Statutes

U.S. Const. amend. 14.....	4
Const. art. 1 § 3.....	4
RCW 9A.04.110(4)(c).....	7, 8
RCW 9A.08.010(1)(a).....	7
RCW 9A.36.011(1)(a).....	6
RCW 9A.36.021(1)(c).....	11
RCW 10.61.003.....	11

Other Resources

6/18/12 General Order of Division III.....	4
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following findings of fact and conclusions of law on adjudicatory hearing:

2.13 The South Side Locos are rivals to the street gang Pacheco Valley Locos (PVL). (CP 55)

2.34 Jesus Torres intended to cause great bodily harm to the victims. (CP 56)

3.6 Jesus Torres, with intent to cause great bodily harm, assaulted the group in the cul-de-sac with a firearm. (CP 57)

3.7 Under State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009), intent to cause great bodily harm to one person transfers to all those who were assaulted by the shooter. (CP 57)

3.11 The respondent is guilty of counts 2–7. (CP 57)

2. There was insufficient evidence of intent to inflict great bodily harm to support appellant's first degree assault convictions.

Issue Pertaining to Assignments of Error

Was appellant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where there was insufficient evidence to prove the specific intent to inflict great bodily harm?¹

¹ Assignments of Error 1, 2.

B. STATEMENT OF THE CASE

Jesus Torres, 15 years old² at the time of the incident, was charged by information with two counts of first degree assault, with special allegations of firearm use. CP 1–3. After a declination hearing, the Juvenile Department, Grant County Superior Court, retained jurisdiction. CP 21–31, 32–33. The State amended the information to charge seven counts of first degree assault with firearm allegations and one count of first degree unlawful possession of a handgun. CP 40–46. After hearing, the court adjudicated Jesus guilty as charged of all but the first assault count. CP 58; 6/27/12 RP 15–205; 7/3/12 RP 206–292. Jesus was given a standard range sentence committing him to DSHS, Juvenile Rehabilitation Administration until his 21st birthday. CP 61, 63. This appeal followed. CP 73.

At the adjudicatory hearing, the State presented the following pertinent evidence. On December 2, 2011, six members of an extended family, including I.L.³, were playing a game of “Quarters” in a cul-de-sac near their homes. CP 55 at ¶ 2.2. C.O.⁴ was outside his home located near the entrance to the cul-de-sac. CP 55 at ¶¶ 2.3, 2.4. I.L. and C.O. were

² Jesus’ date of birth is December 12, 1995. CP 59.

³ I.L.’s date of birth is December 21, 1994. CP 42.

⁴ C.O.’s date of birth is January 14, 1999. CP 41.

members of the street gang Pancho Vito⁵ Locos (“PVL”) and happened to be wearing red clothing that day. CP 55 at ¶¶ 2.5, 2.13, 2.14, 2.15.

A canal in a valley lay between the cul-de-sac and Jesus and his brother Jonathan’s home. CP 55 at ¶¶ 2.6, 2.7, 2.8, 2.9. Jesus, Jonathan and Yajiro Calzada were members of a rival street gang, South Side Locos (“SSL”), which claimed the color blue. CP 55 at ¶¶ 2.11, 2.12, 2.13. On that day, Jonathan and Calzada (whose street name is “Peewee”) were outside the home, and looking across the valley they saw two individuals wearing red. Calzada decided he wanted to challenge them to a fight. Jonathan went to get Jesus, and the three walked down to the canal bank. There, Calzada challenged I.L. to a fight but I.L. did not accept the challenge. CP 56 at ¶¶ 2.26, 2.27; 7/3/12 RP 206.

Jesus handed a gun to Calzada, asking if he wanted to shoot at the group. Calzada declined, saying he’d been recognized, and handed the gun back. Jesus then fired seven or eight shots at the group. CP 56 at ¶¶ 2.28, 2.29, 2.30. The shot impacted within a few feet of some of the victims. CP 56 at ¶ 2.33.

⁵ Assignment of Error 1 at CP 55, ¶ 2.13. The finding refers to the street gang “Pacheco Valley Locos”. The correct name appears to be “Pancho Vito Locos” or “Pancho Villa Locos”. 6/27/12 RP 196; 7/3/12 RP 211.

I.L. didn't know who pointed the gun and was shooting at the group, and was not familiar with Jesus at all. 6/27/12 RP 55, 57. Although 13-year-old O.C. recognized Jesus because he'd seen before at school, he'd had a prior encounter only with Jonathan and Peewee, who had once chased him. 6/27/12 RP 25–27, 31–32. I.L.'s father was present during the shooting but didn't recognize any of the three males. 6/27/12 RP 72–75. I.L.'s brother, E.L.R.⁶, did not know them. 6/27/12 RP 82–87. I.L.'s three uncles also apparently did not know them. 6/27/12 RP 93–98, 100–08, 109–16.

C. ARGUMENT

Jesus' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where there was insufficient evidence to prove the specific intent to inflict great bodily harm.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488,

⁶ Per 6/18/12 General Order of Division III, this witness' initials are being used. Although the amended information uses E.L.R.'s full name and gives no date of birth, it is unclear from the record whether E.L.R. is over the age of eighteen.

670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."

Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)). While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646.

On appeal, the juvenile court's findings of fact are reviewed "to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." State v. Ware, 111 Wn. App. 738, 742, 46 P.3d 280, 282 (2002).

The mens rea of first degree assault is the specific intent to inflict great bodily harm. RCW 9A.36.011(1)(a); State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994); *see also* State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Great bodily harm" means "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(4)(c).

Under RCW 9A.08.010(1)(a), a person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. Although specific intent can be inferred as a logical probability from all the facts and circumstances, it can never be presumed from a defendant's actions. Wilson, 125 Wn.2d at 217. Evidence of intent " 'is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.' " State v. Ferreira, 69 Wn. App. 465, 468, 850 P.2d 541 (1993) (quoting State v. Woo Won Choi, 55 Wn. App. 895, 906, 781 P.2d 505 (1989) *rev. den.* 114 Wn.2d 1002, 788 P.2d 1077 (1990)). Specific intent cannot be presumed simply from the fact of the assault, even if the assault is with a deadly weapon. Wilson, 125 Wn.2d at 217. Finally, while the defendant need not intend to inflict great bodily harm on each specific victim, he must still intend to inflict great bodily harm on some person that can then at least be transferred to the unintended victim(s). Elmi, 166 Wn.2d at 216-18.

In order to sustain Jesus' convictions for first degree assault, the evidence must show that he acted with the specific intent to cause great bodily harm. That is, he must have actually intended to cause "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(4)(c). It is not sufficient to establish that he knew he would cause great bodily harm or that he was recklessly indifferent to the possibility of causing great bodily harm.

Intent has been inferred from the manner and act of inflicting the wound where a defendant repeatedly kicked a bleeding and unconscious store clerk in the head to the point of severe and permanent brain damage. State v. Pierre, 108 Wn. App. 378, 383-87, 31 P.3d 1207 (2001). Intent has also been inferred based on a defendant's previous threats and a tumultuous prior meretricious relationship. State v. Mitchell, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). Similarly, intent to inflict great bodily harm was inferred from the circumstances where an inmate assaulted an officer in his attempt to escape. State v. Anderson, 72 Wn. App. 453, 457, 864 P.2d 1001 (1994); accord, State v. Baker, 136 Wn. App. 878, 151 P.3d 237, *rev. denied*, 162 Wn.2d 1010 (2007). Each of these cases has a

common thread that is not present here: the intent could be inferred from a motive to proceed with some action, either for purposes of pursuing a crime, a continuing conflict in a relationship, or for escape.

Here there are no such motives. There was no evidence of a prior relationship. Six victims were not familiar with Jesus at all, and the 13-year-old seventh victim recognized him only because he'd seen him before at school. 6/27/12 RP 25–27, 31–32, 55, 57, 72–75, 82–87, 93–98, 100–08, 109–16.

The State's theory was that the shooting was gang-related, simply because Jesus, Jonathan and Calzada were members of the street gang SSL and two of the victims were members of a rival gang, PVL. However, the evidence does not establish motivation from which one could infer as a matter of logical probability that Jesus had the specific intent to inflict great bodily harm. Calzada and Jonathan, not Jesus, noticed two of the group members across the canal wearing the rival color red; the two decided to check it out and only then invited Jesus along, and it was Calzada who unsuccessfully challenged one of the group members to a fight.

Although Jesus did fire at the group after Calzada declined to do so, there was no evidence that he intended to inflict great bodily harm on

anyone. The court found only that the “shots impacted within a few feet of some of the victims”⁷, and there was no evidence of any bodily injury. In its oral ruling, the court mused that

the evidence of time, place and distance, the collection of people who were gathered in the cul-de-sac and so on, would pretty clearly establish an intent to inflict great bodily harm. It really comes down to good shot or bad shot ... “It’s not about whether you’re a good shot”.

And that would especially be true if Mr. Calzada’s statement to Officer Judkins is accepted, ... where [Jesus] is alleged to have said, just before the shooting, ... “I’m going to dump on them. It’s about time they ... know that I’m not messing around.

7/3/12 RP 283. But specific intent cannot be presumed simply from the fact of the assault, even if the assault is with a deadly weapon. Wilson, 125 Wn.2d at 217. Jesus could indeed be an excellent shot and may have accomplished his goal of just scaring the group by gunshots, without a specific intent to inflict great bodily harm.

It is significant that the State presented no testimony about gang behavior in general or the relationship between these SSL and PVL gangs, other than to call them rival gangs. There is no relevant context in which to interpret what Jesus may have meant by wanting to “dump on them” so they “know that I’m not messing around”. It offends due process to allow these convictions to stand based solely on the artifice that “one knows a

⁷ CP 56 at ¶ 2.33.

gang-related crime when one sees it". Here, the evidence fails to show that Jesus acted with the specific intent to inflict great bodily harm.

On the other hand, second-degree assault can be established where, even without intent to inflict great bodily harm, a person assaults another with a deadly weapon. RCW 9A.36.021(1)(c). "Any assault with a deadly weapon is at least a second degree assault." State v. Walther, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002). Here, the evidence viewed, as required, in a light most favorable to the State, showed that Jesus at most committed second-degree assault.⁸ Thus, Jesus' convictions for first degree assault should be reversed.

D. CONCLUSION

For the reasons stated, Jesus' first-degree assault convictions should be reversed because there is not sufficient evidence that he intended to inflict great bodily harm.

Respectfully submitted on December 31, 2012.

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⁸ Pursuant to RCW 10.61.003, a defendant can be found guilty of a crime that is an inferior degree of the crime charged.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 31, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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