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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WENDELL ADAMS, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant's waiver of his right to a jury trial is deemed to be knowingly, intelligently, and voluntarily made, and is therefore valid, if the record contains a personal expression of waiver by the defendant. In this case, Adams executed a written waiver of his right to a jury trial, Adams' counsel detailed the extensive discussions he had had with Adams about the issue, and the court engaged in a colloquy to verify Adams' understanding of his jury trial right and his desire to waive it. Did Adams validly waive his right to a jury trial?

2. The evidence is sufficient to support a conviction if, when the evidence and all reasonable inferences that can be drawn from it are viewed in the light most favorable to the State, a rational trier of fact could find that each element of the crime has been proven beyond a reasonable doubt. A defendant's intent may be inferred from his actions and the surrounding circumstances. The evidence in this case showed that the defendant was angry at the victim and fired a gun directly at him multiple times, hitting the victim once in the abdomen, and then continued shooting at the victim as he lay on the ground. Was the evidence sufficient to support the trial

court's finding that the defendant intended to inflict great bodily harm?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Wendell Adams, Jr., with one count of assault in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 24-25. Following a bench trial, the trial court found Adams guilty as charged on both counts and the firearm enhancement. CP 58. Adams was sentenced to 240 months in prison for the assault in the first degree, concurrent with 67 months for the unlawful possession of a firearm, and an additional consecutive 60 months for the firearm enhancement. CP 43. Adams timely appealed. CP 49.

2. SUBSTANTIVE FACTS.

a. Facts Of The Crime.

Everett Pitterson went to the apartment complex where the defendant, Wendell Adams, Jr., lived in order to help repair a car that had broken down in the parking lot. 2/19/13 RP 12. The car

belonged to Carolyn Smith, the mother of Pitterson's close friend, but Adams had been the last person to use it. 2/19/13 RP 6-11. Pitterson went to the apartment complex with Smith and Smith's daughter, Shanika Mayes, who had been dating Adams. 2/19/13 RP 7-12. While attempting to fix the car, Mayes asked Pitterson and Smith to come with her to try to locate Adams. 2/7/13 RP 80. They did so, and after initially being unsuccessful they eventually identified the apartment in which Adams lived. 2/7/13 RP 80-82.

Pitterson and Mayes knocked on Adams' door. 2/7/13 RP 86. When Adams opened the door, Mayes told him her mother needed to speak with him. 2/7/13 RP 87. Adams went back inside the apartment before emerging several minutes later holding a gun. 2/7/13 RP 88. Adams confronted Pitterson, who was now in the parking lot. 2/7/13 RP 90. Adams appeared angry, and was asking Pitterson why he was there and what he wanted. 2/7/13 RP 90-95. Witnesses heard loud male voices raised in what sounded like an argument. 2/6/13 RP 100-02. Pitterson backed away from Adams, and Smith stepped in between them and attempted to calm Adams down. 2/7/13 RP 89-90. Adams said something to Pitterson about Pitterson disrespecting him, and then pointed the gun at Pitterson and fired multiple times. 2/19/13 RP 22-24, 34. Pitterson had

turned to walk away from Adams, but as soon as he heard the first shot, Pitterson turned to face Adams. 2/7/13 RP 100. Pitterson was then struck in the abdomen by one of the shots fired by Adams. 2/7/13 RP 100-01. The bullet traveled all the way through Pitterson's body, striking his femoral vein and bladder before exiting out his buttock. 2/7/13 RP 53-60; 2/11/13 RP 14. After he was shot, Pitterson fell to the ground. 2/7/13 RP 101. Adams then stood over Pitterson and fired more shots at him before fleeing the scene on foot. 2/6/13 RP 103-08; 2/19/13 RP 26-27. In total, all but one of the shots fired by Adams missed Pitterson. 2/11/13 RP 13-14. Adams was later identified by Pitterson and Smith as the shooter. 2/21/13 RP 29, 52.

Witnesses and a responding police officer attempted to control Pitterson's bleeding until paramedics arrived. 2/6/13 RP 129; 2/11/13 RP 15. Pitterson was transported to the hospital by ambulance, and had to be intubated on the way. 2/7/13 RP 51. He underwent emergency surgery at the hospital, and would have bled to death from his wound if not for the prompt medical attention he received. 2/7/13 RP 58-59.

b. Jury Trial Waiver.

On the morning of trial, Adams' defense attorney, Walter Peale, told the trial court that Adams wished to waive his right to a jury trial. 2/4/13 RP 3. Peale informed the court that he and Adams had had "extensive conversation during the pendency of this case" regarding whether to submit the case to a jury or a judge, and that he had made Adams aware of "all the details and circumstances that I thought were significant" in making the decision. 2/4/13 RP 3-4. Peale stated that this included "all aspects of jury selection, presentation of the case to a jury, the difference in the procedural presentation of evidence and pretrial rulings," and the fact that in a bench trial "the judge makes both the decision[s] of law and . . . decision[s] of fact during the course of the trial, and then ultimately, and individually, makes the decision whether the State's proved guilt beyond a reasonable doubt." 2/4/13 RP 4. Peale also reported discussing with Adams the fact that in a jury trial, the jury is "not hearing the deliberations on the law and only knowing what the conclusion is and being responsible for making decisions of fact." 2/4/13 RP 4. Finally, Peale stated that he had explained to Adams that all twelve jury members must be unanimous about whether the State had or had not proved its

case beyond a reasonable doubt in order to reach a verdict of guilty or not guilty, and that a "hung jury" and mistrial would otherwise result. 2/4/13 RP 4-5.

Adams also submitted a written jury trial waiver, which stated:

My attorney and I have discussed my right to a jury trial. I understand that I have the right to have a jury of 12 decide my case. I further understand that all 12 jurors would have to agree that the elements of the crime(s) with which I have been charged have been proved beyond a reasonable doubt before I could be found guilty. After discussing this right with my attorney, I have decided to waive my right to a jury trial.

CP 26; 2/4/13 RP 5. The written waiver was signed by both Adams and Peale. CP 26.

Following Peale's statements to the trial court, the court questioned Adams about his understanding of his rights. 2/4/13 RP 5. The court asked Adams whether he had had "enough time to discuss what waiving a jury really means" with his attorney, and whether he understood everything his attorney had just described, including that a bench trial would mean having the judge decide both the law and the facts, rather than a jury of twelve people decide the facts. 2/4/13 RP 5. The court also asked whether Adams understood that making the judge the fact-finder removed

the possibility for a “no verdict” scenario, and whether he had had a “full discussion” with his counsel about the consequences of waiving his right to a jury trial and had all of his questions answered. 2/4/13 RP 5-6. Finally, the court asked whether Adams had any remaining questions, and whether, knowing everything that had been discussed, Adams still wished to waive his right to a jury trial. 2/4/13 RP 6. Adams responded to each of the court’s questions with an unequivocal “yes.” 2/4/13 RP 5-6. The trial court then found that Adams was making a knowing, voluntary, and intelligent waiver of his right to a jury trial, and signed the waiver form. 2/4/13 RP 6; CP 26. The parties then proceeded with a bench trial and Adams was eventually found guilty as charged. 2/27/13 RP 5-6.

C. ARGUMENT

1. ADAMS VALIDLY WAIVED HIS RIGHT TO A JURY TRIAL.

Adams claims that his waiver of his right to a jury trial was invalid because the record does not show that he was explicitly informed that he had the right to a jury trial on the firearm enhancement. This claim is without authority and should be

rejected. The record is more than sufficient to establish that Adams validly waived his right to a jury trial.

The Sixth Amendment to the United States Constitution and Article 1, Sections 21 and 22 of the Washington State Constitution guarantee a criminal defendant the right to trial by jury. A defendant may waive that right as long as he does so knowingly, intelligently, voluntarily, and free from improper influences. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). This Court reviews the validity of a jury trial waiver de novo. State v. Cham, 165 Wn. App. 438, 447, 267 P.3d 528 (2011).

The amount of inquiry by the court that is required to establish a valid waiver is not the same for every constitutional right. Stegall, 124 Wn.2d at 725. When a defendant wishes to waive nearly all of his constitutional rights, such as in a guilty plea, or a right that is fundamental to ensuring a fair trial, such as the right to counsel, the court must generally engage in an extended colloquy with the defendant on the record to ensure not only that the waiver is made voluntarily and intelligently, but that it is made with an understanding of the direct consequences of the waiver. Id.; State v. Brand, 55 Wn. App. 780, 785-86, 780 P.2d 894 (1989).

In contrast, a lower bar applies when a defendant wishes to waive rights such as the right to trial by jury, the right to remain silent, or the right to confront witnesses. Brand, 55 Wn. App. at 786. These rights are treated differently because the choice to waive one or more of them is often a legitimate trial strategy that does not impinge on the defendant's right to a fair trial. Id. When a defendant wishes to waive his right to a jury, no colloquy by the court or on-the-record advisement of the consequences of the waiver is required in order for the waiver to be valid. Stegall, 124 Wn.2d at 725. Instead, the record need only contain a personal expression of waiver from the defendant. Id. A written waiver is required by CrR 6.1(a), and is "strong evidence" that a defendant validly waived his right to a jury trial. State v. Woo Won Choi, 55 Wn. App. 895, 904, 781 P.2d 505 (1989). A defense attorney's representation that his or her client's waiver is knowing, voluntary, and intelligent is also relevant when evaluating the validity of a waiver. Id.

In this case, the record is more than sufficient to establish that Adams validly waived his right to a jury trial. Not only did Adams sign a written waiver, but, with Adams' permission, defense counsel put on the record the substance of the "extensive

conversations” he had had with Adams about his decision, and the trial court also engaged in a colloquy on the record. CP 26; 2/4/13 RP 3-6. The written waiver, which was also signed by Adams’ counsel, acknowledged Adams’ understanding of his right to have a jury of twelve people unanimously determine that “the elements of the crime(s) with which I have been charged” had been proved beyond a reasonable doubt before he could be found guilty. CP 26. The waiver declared that Adams had discussed this right with his attorney and had decided to waive it. CP 26.

Defense counsel, in turn, told the court that he and Adams had had “extensive conversation during the pendency of this case” regarding whether to submit the case to a jury or a judge, and that he had made Adams aware of “all the details and circumstances that I thought were significant” in making the decision. 2/4/13 RP 3-4. This included discussion of: all aspects of jury selection; differences in the presentation of evidence; differences in the fact-finder’s knowledge of pre-trial rulings; the fact that in a bench trial the judge makes both the legal and factual decisions, whereas a jury would not hear the legal arguments and would only hear the conclusion and be responsible for making findings of fact; the requirement of jury unanimity; the requirement of proof beyond a

reasonable doubt; the fact that if the jury is not unanimous there would be a mistrial. 2/4/13 RP 4-5.

The trial court then conducted a colloquy with Adams on the record. 2/4/13 RP 5-6. When asked, Adams unequivocally confirmed that he had had enough time to discuss the issue with his attorney, that he understood everything his attorney had just described, that he understood that making the judge the fact-finder removed the possibility for a “no verdict” scenario, and that he had had a “full discussion” with his counsel about the consequences of waiving his right to a jury trial and all of his questions had been answered. 2/4/13 RP 5-6. After Adams stated that he had no last-minute questions and still wished to waive his right to a jury trial, the court found that Adams was making a knowing, voluntary, and intelligent waiver of the right. 2/4/13 RP 6; CP 26.

This evidence of Adams’ understanding of his right to a jury trial clearly establishes that he knowingly, intelligently, and voluntarily waived his right to a jury trial. Indeed, all the factors the courts have commonly looked at in evaluating the validity of a jury trial waiver are favorably present here: written waiver, colloquy by the court, no concerns about mental competency or language ability, representation by defense counsel that defendant’s decision

is made knowingly, voluntarily, and intelligently, and an explicit finding of the same by the trial court. See, e.g., Woo Won Choi, 55 Wn. App. 895; Brand, 55 Wn. App. 780.

Adams nevertheless claims, without citation to any authority, that his waiver was invalid because the record does not affirmatively establish that he knew he had, and knew he was giving up, the specific right to have the jury determine whether the firearm sentencing enhancement had been proven. It is worth noting that Adams does not claim that he was in fact unaware that he had the right to have a jury determine whether the sentencing enhancement had been proven, nor that he would have acted differently if he had known. He simply argues that because a consequence of waiving his right to a jury trial was not explained on the record, his waiver is automatically invalid. Appellant's Brief at 5. This argument necessarily fails, as the Washington Supreme Court has already made clear that an on-the-record advisement of the consequences of a jury trial waiver is not required in order for the waiver to be valid. Stegall, 124 Wn.2d at 725; cf. State v. Pierce, 134 Wn. App. 763, 773, 142 P.3d 610 (2006) (holding that record need not demonstrate defendant's understanding of all aspects of jury trial right in order for waiver to be valid).

Common sense also compels the conclusion that explanation of the specific right to have a jury determine sentencing enhancements is not required for a jury trial waiver to be valid. The waiver form signed by Adams stated that he understood his right to have a jury determine whether “the elements of the crime(s) with which I have been charged” had been proved beyond a reasonable doubt. It would likely never occur to the average defendant that a firearm enhancement is not technically an element of the crimes with which he was charged. Furthermore, it belies common sense to suggest that a defendant who, after consulting with counsel, was willing to waive his right to a jury trial on the charges, would nevertheless have demanded a jury trial on the firearm enhancement had he been specifically advised of his right to do so. This is particularly true in a case like Adams’, where the use of a firearm was already an element of one of the charges.

Because Adams executed a written waiver, consulted extensively with counsel, and engaged in a colloquy with the court indicating his understanding of his right to a jury trial and the consequences of waiving it, the record contains more than enough evidence to establish that Adams’ waiver of his right to a jury trial

was made knowingly, voluntarily, and intelligently, and was therefore valid. His convictions should be affirmed.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING OF INTENT TO INFLICT GREAT BODILY HARM.

Adams contends that the evidence in this case was insufficient to prove that Adams intended to inflict great bodily harm. This claim should be rejected. Substantial evidence supports the trial court's finding that the defendant intended to inflict great bodily harm.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When an appellant claims that there was insufficient evidence to support his conviction, the reviewing court views the evidence and all inferences that can reasonably be drawn from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Viewing the evidence in that light, if any rational trier of fact could have found each element of the crime proven beyond a reasonable doubt, then the evidence is

sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

Adams was charged with assault in the first degree under RCW 9A.36.011, which states:

- (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
 - (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
 - ...
 - (c) Assaults another and inflicts great bodily harm.

In finding Adams guilty, the trial court explicitly found that the State had proved beyond a reasonable doubt that “[t]he defendant acted with intent to inflict great bodily harm” when he assaulted Pitterson. CP 58.

Although the specific intent to cause great bodily harm cannot be *presumed* from the act of shooting at someone, it can be inferred 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); State v. Salamanca, 69 Wn. App. 817, 826, 851 P.2d 1242 (1993). Evidence of intent is gathered from all the circumstances of a case, including the manner of inflicting the

wound, the nature of the prior relationship, and any prior threats.

Woo Won Choi, 55 Wn. App. at 906.

Here, the facts testified to by witnesses and found by the trial court supported a very strong inference that Adams intended to not just shoot at or near Everett Pitterson, but to actually strike him with a bullet and inflict great bodily harm. When Adams emerged from his apartment with a gun in his hand, he appeared angry at Pitterson, and asked Pitterson why Pitterson was there and what he wanted. CP 53; 2/7/13 RP 88-90. Witnesses heard loud male voices in what sounded like an argument. CP 53; 2/6/13 RP 100-02. Carolyn Smith stepped in between Adams and Pitterson and tried to calm Adams down. CP 53; 2/7/13 RP 97. Adams said something to Pitterson about Pitterson disrespecting him. 2/27/13 RP 5; 2/19/13 RP 34. Adams then pointed the gun at Pitterson and fired multiple shots at him. CP 53; 2/7/13 RP 100-02; 2/19/13 RP 23-24. One shot struck Pitterson in the groin or abdomen area. CP 53; 2/7/13 RP 101. Pitterson fell to the ground, and Adams then stood over him and fired multiple shots at him. CP 53-54;

2/6/13 RP 102-03; 2/19/13 RP 26-27. Adams then ran away.

CP 53-54; 2/6/13 RP 108; 2/7/13 RP 102; 2/19/13 RP 23.

These facts were testified to by multiple witnesses, all of whom the trial court found credible, and are contained in Findings of Fact that Adams has not challenged.¹ CP 53-57. Under these facts, it is “a logical probability” that Adams intended to shoot Pitterson and inflict great bodily harm, and thus the trial court was permitted to infer that Adams intended to inflict great bodily harm. Salamanca, 69 Wn. App. 817 (finding sufficient evidence of intent to inflict great bodily harm on passengers of victim vehicle where defendant drove vehicle from which shots were fired and kept his vehicle close in pursuit of victim vehicle at high speeds while shooter fired multiple shots at vehicle, took time to reload, and fired more shots); Woo Won Choi, 55 Wn. App. 895 (finding sufficient evidence of intent to kill where defendant shot at victim without provocation at close range after a prior disagreement, and bullet would have hit victim’s head had he not ducked).

¹ Unchallenged findings of fact are verities on appeal. State v. Rodgers, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

Adams offers absolutely no authority for his contention that the evidence in this case is insufficient to support the trial court's finding of intent to inflict great bodily harm. His argument seems to be that because it is *possible* for a person to shoot at someone else without possessing intent to inflict great bodily harm, a trial court may never infer such intent from the act of shooting and the surrounding circumstances. This argument is without support and directly contrary to established authority. E.g., Salamanca, 69 Wn. App. 817; Woo Won Choj, 55 Wn. App. 895. Indeed, when a defendant is armed with a gun, expresses anger at the victim, points the gun directly at the victim, fires multiple shots at the victim, hitting him once, and the defendant then continues shooting at the victim as the victim lies on the ground, it strains credulity to argue that intent to shoot the victim is not "plainly indicated as a matter of logical probability." Delmarter, 94 Wn.2d at 638.

Adams also seems to argue that because one circumstance in this case (the fact that most of the shots missed Pitterson) is consistent with a lack of intent to inflict great bodily harm, the surrounding circumstances are necessarily insufficient to prove the

presence of such intent beyond a reasonable doubt. This proposition is again without authority and contrary to common sense. While a reasonable trier of fact *could* have decided that the failure to hit Pitterson each time Adams shot at him raised a reasonable doubt as to Adams' intent, such a result is in no way required. If it were, only perfect marksmen could ever be convicted of assault in the first degree. Instead, a reasonable trier of fact might easily have found that the evidence proved beyond a reasonable doubt that Adams did intend to shoot Pitterson, but was a poor marksman.

The evidence in this case was sufficient to prove intent to inflict great bodily harm because the trial court was permitted to infer Adams' intent from his actions and the surrounding circumstances. The trial court's finding that Adams intended to inflict great bodily harm is supported by substantial evidence and must be sustained. Because the trial court's conclusion that the State had proved all the elements of the charge beyond a reasonable doubt was supported by the court's factual findings, Adams' conviction for assault in the first degree should be affirmed.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Adams' convictions.

DATED this 3rd day of February, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory C. Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. WENDELL ADAMS, JR., Cause No. 70045-6-I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 4th day of February, 2014

W Brame

Name

Done in Seattle, Washington