IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, | ) | No. 66058-6-I |
| Respondent, | ) | DIVISION ONE |
| v. | ) | |
| | ) | UNPUBLISHED |
| ANTOINE DAVIS, | ) | |
| | ) | FILED: August 13, 2012 |
| Appellant. | ) | |

Spearman, A.C.J. — Davis was convicted, on a theory of accomplice liability, of one count of first degree murder of the driver of a car and three counts of attempted second degree murder of three passengers in the car. He argues the evidence was insufficient to demonstrate the mens rea of attempted second degree murder or that he knowingly aided the principal on grounds that he did not know the car had passengers. We reject Davis's argument because there was sufficient evidence to show that Davis was aware of the passengers at the time the crime was committed. Additionally, the trial court was not required to hold a formal hearing on continued impartiality before seating an alternate juror, and as such, we reject Davis's argument that he did not receive a fair trial. Affirmed.

## FACTS

Dominick Reed, Jontae "Little Man" Chatman, Nestor Ovidio-Mejia, and Antoine Davis believed that Mario Spearman had ordered the shooting of their friend, Ronald "Ron Ron" Preston. They decided to go find Mario Spearman to "avenge" the shooting, packing several guns in the car before leaving. Reed testified, "we wanted to get him, get revenge." Verbatim Report of Proceedings (VRP) at 70. Reed drove the car.

The four found Spearman in his car near the intersection of 188th Avenue South and Pacific Highway. Although Spearman's car had tinted windows, photographs showed the tint was light enough to see inside the car. There was also testimony that at least one of the car windows was open. Spearman's car stopped at a red light. Chatman, Ovidio-Mejia, and Davis got out of the car driven by Reed, and ran to Spearman's car. Reed testified that Chatman was armed with an AK-47 and Davis and Ovidio-Mejia were armed with handguns. One eyewitness recalled seeing Chatman fire at Spearman's car, and another eyewitness recalled seeing both Chatman and Ovidio-Mejia fire at the car. Spearman's car had approximately 30 bullet holes in it, most of them were the same size, although two or three were smaller. Chatman, Ovidio-Mejia, and Davis all ran back to the car being driven by Reed, and the four fled the scene.

Spearman was killed in the shooting, and the front seat passenger, David Route, was hit by multiple bullets and required several operations. There were also two passengers in the back seat: Paige Sauer and her child, N.S. Sauer lay on top of N.S. when the shooting started. Sauer was grazed by a bullet on her arm, and N.S. was not wounded. The police arrested Chatman, Ovidio-Mejia, Davis, and Reed. While in jail,

“Ron Ron” Preston visited Davis. Davis told Preston that Chatman “did all the shooting” because Davis’s gun had jammed. 7/21/12 VRP at 24.

The State charged all four with one count of first degree murder for the death of Mario Spearman, and three counts of attempted first degree murder for the three passengers. Reed pled guilty to lesser crimes and testified against the other three. During closing argument, the State argued that Ovidio-Mejia and Davis were guilty as accomplices to Chatman and made a brief reference to “transferred intent.”[1] See, e.g., 7/26 VRP at 34-35.

After the jury had been deliberating for a day, the court and the parties discovered that one juror had talked to somebody outside the jury about possible penalty issues. The court directed the jury to stop deliberations, and questioned the juror on the issue. The juror, a legal secretary at a law firm, admitted she had asked a co-worker attorney about possible penalties for the crimes charged in the case. The court dismissed the juror. All parties agreed with the decision to dismiss the juror and replace her with an alternate. The court seated the alternate and instructed the jury to begin deliberations anew, but did not voir dire the juror regarding the juror’s continued

[1] The prosecutor stated:

> But one thing I want to point out with murder in the first degree is the very last four words or five. ‘Or of a third person.’ What this is, ladies and gentlemen, is what we call a transferred intent. And what that means is that, if someone intends to commit the crime of murder against a specific person, say Mario Spearman, and instead kills someone else, is he any less culpable for killing that other person? Of course not. That’s where the third person comes in, and it applies just the same to attempted murder.

Significantly, the jury was not instructed on the issue of transferred intent and there was no objection to this argument. Thus, the issue was not considered by the trial court and is not properly preserved for our review. RAP 2.5(a). Moreover, in light of our resolution of the case, it is not necessary to address the issue.

impartiality. The jury convicted Davis, Chatman, and Ovidio-Mejia of the first degree murder of Spearman. The jury acquitted on the attempted first degree murder counts for the three passengers, but convicted Davis, Chatman, and Ovidio-Mejia of the lesser included offenses of attempted second degree murder for each of the three passengers. Davis does not appeal his first degree murder conviction, but appeals his three convictions for attempted second degree murder.

## DISCUSSION

Relying on two separate theories, Davis argues the State failed to prove that he acted as an accomplice to the attempted murder of the three passengers. He first contends that while the State's evidence proved Chatman intended to murder Spearman, the driver of the vehicle, it is insufficient to show that he intended to also murder the passengers. Thus, Davis argues his accomplice liability extends only to Spearman's murder. Second, Davis contends that even if Chatman intended to murder the passengers, the evidence was insufficient to show Davis knew that any person, other than the driver, was in the car at the time of the shooting. Thus, according to Davis, the State failed to prove that Davis knew his conduct would aid in the commission of the crime of second degree murder against the passengers or that he had the requisite intent to commit those crimes. For the reasons set forth below we reject Davis's arguments and affirm.

A person commits the murder in the first degree "when, with a premeditated intent to cause the death of another person, he or she causes the death of such person

or of a third person." Clerk's Papers (CP) at 182; see also RCW 9A.32.030(1)(a). A person is an accomplice to a crime if "with knowledge that it will promote or facilitate the commission of the crime, he or she . . . encourages . . . another person to commit the crime . . . or . . . aids or agrees to aid another person in planning or committing the crime." CP at 179; see also RCW 9A.08.020(3). Davis does not dispute that the evidence well establishes that he was Chatman's accomplice in killing Spearman or that both he and Chatman acted with premeditated intent.

A person commits murder in the second degree "when with intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person." CP at 204; see also RCW 9A.32.050. A person commits the crime of attempted second degree murder when "with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime." CP at 208; see also RCW 9A.28.020(1).

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

Davis argues that Chatman did not know there were passengers in Spearman's car because the windows were tinted too dark to see inside. Because he was unaware

of their presence, Davis argues that Chatman could not have intended to kill them. Therefore, he contends the State failed to prove Chatman guilty of attempted murder of the passengers, from which it follows that the State also failed to prove Davis acted as an accomplice. The argument is without merit. Photographs of Spearman's car, admitted into evidence at trial, showed that the tint on the car windows was not so dark as to have prevented viewing the passengers inside.[2] There was also evidence that at least one of the car windows was open during the attack.[3] Viewed in the light most favorable to the State, this evidence supports a reasonable inference that the passengers were visible to Chatman as he opened fire on the vehicle. Given the nature and scope of the attack, a rational trier of fact could reasonably conclude that Chatman intended to kill the passengers as well as Spearman

In State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993), Salamanca drove a car in pursuit of another car with a driver and four passengers, after having words with one of the occupants. Five or six shots were fired from Salamanca's car at the fleeing vehicle and then after a pause, more shots were fired. Three shots struck the vehicle, injuring the driver. The defendant was convicted of five counts of first degree assault, one for each occupant in the victim's car. On appeal, the defendant argued that the evidence only supported a conclusion that he intended to harm the occupant with whom he had had words and that there was no evidence he intended to harm any of the other occupants. We disagreed, stating

[2] See State's Exhibit 1, Attachments T-W.

[3] See 7/7/10 VRP at 170 and State's Exhibit 14, Attachments V and Y.

> there is evidence from which a jury could infer Mr. Salamanca (and the shooter) intended to inflict great bodily harm on all of the Mustang occupants. Mr. Salamanca did not just drive his companion to a location where a shot or shots could be fired at Mr. Tatum. He pursued the Mustang over considerable distance, at high speeds, for a considerable length of time. Mr. Salamanca kept the Mustang in close range while the shooter fired a series of shots at the vehicle, apparently took time to reload, then fired another series of shots.

Id. at 826.

We concluded that while "specific intent cannot be presumed . . . it can be inferred as a logical probability from the evidence." Id. (Citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

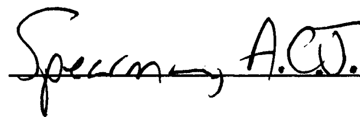
Likewise in this case, the evidence that Chatman intended to kill the passengers is a logical inference given his knowledge of their presence and the fact that he fired nearly 30 rounds into the vehicle they occupied.

For the same reasons, we reject Davis's claim that because he was unaware of the passengers, he did not knowingly aid Chatman or form the intent to murder the passengers. As with Chatman, there is evidence to support a reasonable inference that Davis was aware of the passengers in the car. The nature of the attack and Davis's participation in it warrants a logical inference that he formed the intent to commit the crimes and knowingly aided Chatman in doing so. The evidence is sufficient to support Davis's convictions of three counts of attempted murder in the second degree.

Davis next argues his conviction must be reversed because the trial court erroneously seated an alternate juror without determining that juror's continued impartiality. We reject this argument, because as Davis admits in his reply brief, the

matter has already been resolved against him by this court in State v. Chirinos, 161 Wn. App. 844, 255 P.3d 809, rev. denied, 172 Wn.2d 1021, 268 P.3d 224 (2011). Davis urges us to "reconsider" Chirinos, noting that CrR 6.5 contemplates the possibility of a brief voir dire to ensure that an alternate juror who has been temporarily excused has remained impartial. But as we held in Chirinos, the rule's "permissive language indicates that the trial court is not required to conduct a hearing prior to replacing a deliberating juror with an alternate juror. Rather the trial court has the discretion to do so where the court deems it necessary to ensure that the alternate juror has remained impartial." Chirinos, 161 Wn. App. at 848-49. We adhere to Chirinos and reject Davis's arguments on this issue.

Affirmed.



WE CONCUR: