IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MOSES BELIZ, JR., Appellant.	No. 38763-8-II UNPUBLISHED OPINION

Armstrong, J. — Bruce Bratton encountered a masked, armed intruder on his property. The intruder shot Bratton in the leg during a scuffle over the intruder's gun. The State charged Moses Beliz Jr. with first degree burglary, attempted first degree robbery, attempted second degree murder, and second degree unlawful possession of a firearm and a jury found him guilty of all the charges. On appeal, Beliz argues (1) the trial court violated his Sixth Amendment right to confrontation when it refused to admit impeachment evidence of Bratton's prior drug convictions, (2) the evidence is insufficient to support an attempted murder conviction, (3) the State committed a *Brady*[1] violation by failing to disclose that a State's witness was a former confidential informant, and (4) the trial court improperly imposed a firearm enhancement. Finding no reversible error, we affirm.

FACTS

Bratton returned to his home in Quilcene, Washington on December 19, 2007 and discovered that an intruder had been inside his trailer and workshop. The oven in the trailer was on, someone had baked and consumed several frozen pies, and the tools in his shop were gathered

[1] *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

into piles by the door. Bratton decided to set up a surveillance camera and went to the hardware store to purchase wiring.

It was dusk when Bratton returned. While setting up the camera, he noticed a shadow behind his shop and realized it was a man wearing a ski mask and holding a gun. The man told Bratton to get on his knees, held a gun to Bratton's head, and demanded his wallet and cell phone. When Bratton threw his phone at the intruder, the man shot Bratton in the leg. Bratton jumped up and tried to wrestle the gun away. The intruder repeatedly hit Bratton in the head with his gun and Bratton stabbed him in the eye with his thumb. Bratton managed to pull the ski mask off before the man ran away.

The next day, Bratton's neighbor reported his red Jeep had been stolen. The car was later recovered with a pair of blood-stained jeans inside. A forensic scientist analyzed the jeans, ski mask, and a fork used by the intruder, and found deoxyribonucleic acid (DNA) matching Beliz on all of the items.

The State charged Beliz with first degree burglary, attempted first degree robbery, attempted second degree murder, and second degree unlawful possession of a firearm. Before trial, Beliz moved to admit as impeachment evidence Bratton's four pending felony drug charges. The trial court ruled that Beliz could question Bratton about the charges without revealing their specific nature. Bratton also had three prior drug convictions from 1976, 1998, and 2000. The trial court granted the State's motion to exclude evidence of the prior convictions under ER 609, ruling they were not probative of witness credibility.

At trial, Joseph Martinez testified that he, Beliz, and another man drove to Quilcene from

Omak, Washington. The driver left them in Quilcene. Because it was cold and raining, they let themselves into Bratton's trailer and ate some of his food. Martinez went to the store to get beer and was arrested for shoplifting. He testified that Beliz was wearing a black ski hat and carrying a gun.

Beliz testified that he, Martinez, and a man named Joe from Idaho drove to Seattle to buy methamphetamine. Joe's contact in Seattle was not home, so they drove to Quilcene to buy drugs from Bratton. Beliz asked to be dropped off with a friend, Tammy Owen, while the others went to Bratton's. Owen testified that Beliz showed up at her house on December 18, 2007. She fed him breakfast, he slept most of the day, and a friend picked him up the next night. Beliz testified that Joe picked him up in a red Jeep and drove him to his friend Joseph Morris's house. Joe then drove back to Idaho and Beliz has not seen him since.

Morris testified that Beliz showed up at his house in a red Jeep. Beliz told Morris that he had "encounter[ed] the guy . . . had the guy down on his knees pointing the gun at him," and then the gun jammed.[2] III Verbatim Report of Proceedings at 477-79. Susan Bishop testified that Beliz showed up at her house a few days after the shooting and asked to use her phone. Beliz looked scared and told her that he had been on the run for three days. Bishop noticed that Beliz had a black eye. Rebecca Presler testified that Beliz called and asked her to tell the police that her former boyfriend, Michael, was involved in the Quilcene shooting.

The jury convicted Beliz of all the charges. Beliz moved for a new trial, arguing the State

[2] At trial, Morris initially claimed that he could not remember what Beliz said to him. The prosecutor read portions of a transcript of an interview between Morris and a detective, and Morris admitted that he previously made those statements. The testimony was admitted without objection.

committed a *Brady* violation by failing to disclose that Presler had worked as a confidential informant. At a hearing on the motion, Detective Apeland testified that Presler's contract was not related to the charges against Beliz and ended three months before Beliz's trial began. Beliz also moved to arrest judgment for the attempted murder charge, arguing that the State failed to prove intent to kill. The trial court denied both motions and sentenced Beliz to 320 months, which included a 60-month firearm enhancement.

ANALYSIS

I. Sufficiency of the Evidence

A. Standard of Review

Beliz first assigns error to the trial court's denial of his motion to arrest judgment, arguing the State failed to prove that he intended to kill Bratton. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In analyzing the challenge, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

B. Attempted Murder

A person attempts to commit second degree murder by taking a substantial step toward causing the death of another "[w]ith intent to cause the death of another person but without premeditation." RCW 9A.32.050(1)(a); RCW 9A.28.020(1). The jury may infer intent to kill from the circumstances surrounding the event. *State v. Elmi*, 138 Wn. App. 306, 313, 156 P.3d

281 (2007) (citing *State v. Gallo*, 20 Wn. App. 717, 729, 582 P.2d 558 (1978)). "Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill." *State v. Hoffman*, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991).

Beliz argues that firing a weapon is not sufficient to find intent to kill in this case. He argues that the evidence shows he accidentally shot Bratton in the leg because he was startled when Bratton threw the cell phone at him. Viewed in the light most favorable to the State, the evidence shows that Beliz told Bratton to get on his knees and *pointed the gun at Bratton*'s *head*. After shooting Bratton in the leg, Beliz attempted to chamber another round, but the gun jammed. While struggling with Bratton for control of the gun, Beliz repeatedly hit Bratton in the head with the gun with enough force to cause him to almost lose consciousness. A rational trier of fact could reasonably infer intent to kill from these facts. *See Hoffman*, 116 Wn.2d at 84-85; *Elmi*, 138 Wn. App. at 313.

II. Admissibility of Prior Convictions

A. Standard of Review

Beliz next assigns error to the trial court's ruling that Bratton's prior drug convictions were not admissible as impeachment evidence. He argues that the trial court improperly analyzed the admissibility of the prior convictions under ER 609. We review a trial court's ruling under ER 609 for abuse of discretion. *State v. Bankston*, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000). Beliz also argues that excluding the prior convictions violated his Sixth Amendment right to confrontation, a constitutional issue that we review de novo. *See State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

B. Admissibility under ER 609

Evidence of a prior conviction may be admissible under ER 609 for the purpose of attacking witness credibility if the prior conviction has some relevance to the witness' ability to tell the truth. *See State v. Jones*, 101 Wn.2d 113, 118-19, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988). But a trial court must be cautious when admitting prior drug convictions to impeach a witness because there is "nothing inherent in ordinary drug convictions to suggest the person convicted is untruthful." *State v. Hardy*, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997). Accordingly, the party seeking to admit such evidence must show "that the specific nature of the crime of possession of a controlled substance [is] probative of the [witness'] ability to tell the truth on the witness stand." *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997).

Beliz argues that the trial court incorrectly interpreted *Hardy* and *Calegar* as holding that prior drug convictions are per se inadmissible for impeachment purposes. Even if that is so, Beliz did not argue that the specific nature of Bratton's prior drug convictions was probative of his ability to tell the truth. *Calegar*, 133 Wn.2d at 727. Thus, Beliz did not overcome the presumption that generally drug convictions are not probative of witness credibility, and the trial court did not abuse its discretion by ruling that Bratton's prior drug convictions were inadmissible under ER 609. *See Hardy*, 133 Wn.2d at 709-10; *Bankston*, 99 Wn. App. at 268.

C. Sixth Amendment Right to Confrontation

Both the federal and state constitutions guarantee a criminal defendant the right to confront adverse witnesses and conduct a meaningful cross-examination. *State v. Darden*, 145

Wn.2d 612, 620, 41 P.3d 1189 (2002). The purpose of cross-examination is to test the witness's perception, memory, and credibility. *Darden*, 145 Wn.2d at 620. But the right to cross-examination is not absolute. *Darden*, 145 Wn.2d at 620. The right is limited by general considerations of relevance under ER 401 standards. *Darden*, 145 Wn.2d at 621; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Beliz argues that Bratton's prior drug convictions were relevant for establishing his defense—that he, Martinez, and "Joe from Idaho" drove to Quilcene to buy drugs from Bratton, Joe later broke into Bratton's house to steal drugs, and then assaulted Bratton. Even if drug convictions from 1976, 1998, and 2000 had any tendency to show that Bratton possessed drugs in 2007, the evidence does not make it more or less likely that "Joe from Idaho" was the assailant, not Beliz.

Beliz also argues the prior convictions were relevant for impeaching Bratton's credibility, because the State portrayed Bratton as a respectable military veteran and construction worker. As we previously discussed, prior drug convictions are generally not probative of a witness's credibility, absent a showing that the specific nature of the crime is probative of the witness's ability to tell the truth. *Hardy*, 133 Wn.2d at 709-10; *Calegar*, 133 Wn.2d at 727.

Finally, even if the trial court somehow violated Beliz's right to confrontation by excluding the prior drug convictions, the error was harmless beyond a reasonable doubt. *See State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). The prior convictions were not necessary to establish that Bratton possessed drugs—Beliz testified that they drove to Bratton's house to buy drugs and Martinez testified that he found methamphetamine in Bratton's trailer and

used it to get high. And the prior convictions were not necessary to impeach Bratton's credibility—Beliz was able to use Bratton's pending felony charges to impeach him.

III. Alleged *Brady* Violation

A. Standard of Review

Beliz next assigns error to the trial court's denial of his motion for a new trial, arguing that the State violated *Brady* by failing to disclose Presler's status as a confidential informant. We review an alleged *Brady* violation de novo. *U.S. v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993).

B. Failure to Disclose Impeachment Evidence

Under *Brady*, the State is required to disclose exculpatory and impeachment evidence that is favorable to the accused and material to guilt or punishment. *See U.S. v. Bagley*, 473 U.S. 667, 674, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993). Evidence is material if "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Bagley*, 473 U.S. at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *Benn*, 120 Wn.2d at 649. A reasonable probability is "'a probability sufficient to undermine confidence in the outcome [of the trial].'" *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694); *see also Benn*, 120 Wn.2d at 649.

The State's failure to disclose Presler's status as a former confidential informant in an unrelated matter does not warrant reversal because its value as impeachment evidence was minimal. Presler's contract ended three months before Beliz's trial and did not involve the charges against Beliz. Also, Presler's credibility had already been impeached with evidence of five prior theft convictions and one conviction for giving a false statement to a police officer. Finally, her testimony was not material in light of the overwhelming evidence supporting the

convictions—particularly the DNA evidence and testimony from Martinez, Morris, and Bishop. Thus we find no "reasonable probability" that the result of Beliz's trial would have been different if the State had disclosed Presler's status as a former confidential informant. *See Bagley*, 473 U.S. at 682; *Benn*, 120 Wn.2d at 649.

IV. Firearm Enhancement

A. Standard of Review

Finally, Beliz argues that the trial court erroneously imposed a firearm enhancement when the amended information cited the statute for a deadly weapons enhancement. This argument is without merit. Any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The State specifically charged Beliz with attempted second degree murder while "armed with a firearm," although the information cited the wrong statute. Clerk's Papers (CP) at 20. The jury expressly found by special verdict that Beliz was "armed with a firearm at the time of the commission of the crime of Attempted Second Degree Murder." CP at 137. Thus, the trial court had authority to impose a firearm enhancement because the jury found beyond a reasonable doubt that Beliz committed the crime while armed with a firearm. *Cf. State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008) (trial court did not have the authority to impose a firearm enhancement where the State charged assault with a deadly weapon and the jury found by special verdict that the defendant was armed with a deadly weapon).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.