IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA ELIAS BOYD, Appellant.	No. 39769-2-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Joshua Elias Boyd guilty of attempted first degree murder, first degree assault, and violating a domestic violence court order. Boyd appeals his attempted first degree murder conviction, arguing that the State failed to prove his intent was premeditated. Boyd also appeals the trial court's failure to vacate the first degree assault conviction as a double jeopardy violation and argues that his sentence for the domestic violence court order conviction exceeds the statutory maximum. We affirm the convictions and hold that the trial court did not err when it did not vacate the first degree assault conviction or when it imposed Boyd's sentence for the domestic violence court order conviction.

FACTS

Background Facts

On September 29, 2008, the Pierce County Superior Court issued a two-year domestic violence order prohibiting Boyd from having contact with Tasha Mitchell. On the afternoon of March 20, 2009, Boyd visited Mitchell, with whom he has two children, as it appears he had done previously despite the court order. Boyd and Mitchell had two or three beers together before Boyd left at around 8 pm.

Later the same evening after midnight, a loud and intoxicated Boyd reappeared at Mitchell's apartment demanding to see his children. Mitchell let Boyd in and he sat at the end of a couch Mitchell laid down on. Boyd then asked Mitchell for money. Mitchell said no and asked Boyd to leave. He refused.

After several unsuccessful requests for Boyd to leave, Mitchell finally cursed at Boyd and, according to Mitchell, Boyd jumped up, put on his coat, took a knife from his coat pocket, and stabbed her in her neck, finger, wrist, knee, and chest. Mitchell's mother, Cheryl Mitchell,[1] and Cheryl's boyfriend, Billy Bell, were in the apartment at the time. Mitchell's younger brother, Terrence Mitchell, and Terrence's girlfriend, Dominique Nason, were in an upstairs apartment. All heard the commotion and ran down to see what the trouble was.

At trial, Cheryl and Bell testified that they saw Boyd standing over Mitchell and it appeared he was hitting her. Bell testified that when he saw Boyd had a knife in his hand, he went to the kitchen to arm himself with a knife as well. Cheryl testified that she saw Boyd run

[1] Tasha Mitchell's family members are referred to by their first names to avoid confusion.

out of the apartment and she called 911. Terrence left the apartment to find Boyd while Nason used her experience as a nurse's assistant to aid Mitchell until help arrived.

Tacoma Police Officer David W. May arrived at Mitchell's apartment at around 1:51 am. May immediately noticed Mitchell dressed only in underwear, lying on the couch, and holding a white wash cloth against her neck. May also noticed Mitchell bleeding from other areas of her body and a significant amount of blood scattered around the apartment. Mitchell told May "[i]t was Josh Boyd" who had stabbed her. 3 Report of Proceedings (RP) at 274.

Shortly thereafter, other police officers arrived to secure the area and the Tacoma Fire Department took over Mitchell's medical care. The medical team assessed the injury to her neck as "not immediately life threatening" and began treating her other injuries. 3 RP at 280. Mitchell was moved from her apartment to Tacoma General Hospital where Tacoma Police Officer Philip Hoschouer observed she had a two-and-a-half-inch long laceration on the left side of her lower jaw bone, a laceration on the upper right side of her chest, and defensive wounds on her right wrist, right knee, and left middle finger. Hoschouer questioned Mitchell and noted that, although she was not confused, she was upset and related that she was scared. Dr. Paul Inouye, a trauma surgeon at the Tacoma Trauma Center, testified that Mitchell's wounds were "not life threatening" but that her chest wound was "deep" and not superficial. 3 RP at 403, 419.

Meanwhile, Tacoma Police K-9 Officer Wendy Haddow-Brunk tracked Boyd to a house one block away. Haddow-Brunk testified that Boyd had blood on his shirt when she discovered him. After Terrence identified Boyd, Tacoma Police Officer Robin Siebert arrested Boyd and noticed a laceration on his right pinkie finger. Tacoma Police Officer Johnathan Hill, who

arrived with Siebert, testified that Boyd's hand was "bleeding profusely" which caused Hill to call an ambulance to take Boyd to Allenmore Hospital for treatment. 3 RP at 383. Haddow-Brunk testified that she failed to locate the knife after a continued search of the area and Hill confirmed that Boyd did not have a knife on him when he was arrested. Terrence later notified the police he had found the knife and it was taken into evidence.

Procedural Facts

On March 23, 2009, the State charged Boyd with one count of first degree assault with a deadly weapon enhancement and one count of violating a domestic violence court order. The State replaced the first degree assault charge with one count of attempted first degree murder in an amended information on August 4, but added the first degree assault charge in a second amended information filed on September 15.

Trial began on September 21, 2009, and continued through September 28. On September 29, Boyd moved to dismiss the attempted first degree murder charge based on his contention that the State failed to prove the premeditation element and to add a second degree assault charge as a lesser included offense. The trial court denied the motion to dismiss but granted Boyd's motion to give the jury an instruction on the lesser included offense of second degree assault. The jury found Boyd guilty as charged on September 30.

On November 6, 2009, the trial court sentenced Boyd to 312 months for the attempted first degree murder conviction, plus 24 months for the deadly weapon enhancement, and 54 months for the violation of a domestic violence court order conviction, to be served consecutively. The trial court also entered an order prohibiting Boyd from having contact with Mitchell for life. Last, the trial court sentenced Boyd to 36 months of community custody for the

attempted first degree murder conviction and 12 months of community custody for violating the domestic violence court order. The trial court did not enter a judgment on the first degree assault conviction.

Boyd timely appeals.

DISCUSSION

Sufficiency of the Evidence

Boyd contends that there was insufficient evidence to prove his attack on Mitchell was premeditated to support the jury verdict finding him guilty of attempted first degree murder. He also assigns error to the trial court's denial of his motion to dismiss the attempted first degree murder charge on this basis. At trial, Boyd argued that the State failed to prove the element of premeditation because the evidence only showed that he "jumped up" at Mitchell's outburst. 2 RP at 139. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

To convict Boyd of attempted first degree murder as charged, the State had to prove beyond a reasonable doubt that he (1) had the premeditated (2) intent (3) to cause the death of Mitchell, and he (4) took a substantial step toward causing her death. RCW 9A.32.030(1)(a); RCW 9A.28.020(1). Premeditation is "'the deliberate formation of and reflection upon the intent to take a human life.'" *State v. Sherrill*, 145 Wn. App. 473, 484, 186 P.3d 1157 (2008) (quoting *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991)), *review denied*, 165 Wn.2d 1022 (2009). Premeditation may be shown by circumstantial evidence where the jury's inferences are reasonable and substantial evidence supports the jury's verdict. *Sherrill*, 145 Wn. App. at 484 (citing *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999)). Where the sufficiency of the evidence is challenged with respect to the element of premeditation, Washington cases hold that a wide range of factors can support an inference of premeditation. *Sherrill*, 145 Wn. App. at 484. Motive, procurement of a weapon, stealth, and method of killing are "'particularly relevant'" factors in establishing premeditation. *Sherrill*, 145 Wn. App. at 484-85 (quoting *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)).

Here, evidence shows that Boyd brought a knife to Mitchell's apartment. It is reasonable for the jury to have inferred that once Mitchell cursed at Boyd, Boyd deliberated and formed the intent to kill Mitchell, procured a knife, and acted on his intent. *See State v. Ortiz*, 119 Wn.2d 294, 313, 831 P.2d 1060 (1992) ("the jury could have found that the act of obtaining the knife involved deliberation"); *see also State v. Allen*, 159 Wn.2d 1, 8, 147 P.3d 581 (2006) (sufficient evidence of premeditation may be found where the weapon used was not available or where multiple wounds are inflicted). Boyd argues the fact that he was present in the apartment earlier

in the day and that Mitchell had seen the knife before negates an inference of premeditation. But we are not persuaded by an argument which suggests a victim who is murdered by a person she saw earlier that day with a weapon she recognized cannot be a victim of premeditated murder. And, to the extent Boyd attempts to argue the fact that the multiple-blows attack lasted less than 15 seconds proves only that Boyd stabbed Mitchell "in the heat of the moment," his argument is unsupported and lacks merit. Br. of Appellant at 18; *see* RAP 10.3(a)(6). Even if Boyd routinely carried a knife, the evidence showed that he put on his coat before reaching into the pocket to retrieve the knife, open it, and begin stabbing Mitchell in parts of her body, neck, and chest, likely to cause fatal injury. The fact that Cheryl and Bell interceded and stopped the attack and that Mitchell received nearly immediate medical attention to lessen Mitchell's blood loss does nothing to negate Boyd's culpability for the knife attack.

Accordingly, we hold that there was substantial evidence before the jury from which a rational trier of fact could determine, beyond a reasonable doubt, that Boyd premeditated Mitchell's murder but that her family intervened and she survived.

Double Jeopardy

Next, Boyd assigns error to the trial court's failure to unconditionally vacate the first degree assault conviction. Specifically, Boyd asserts that the failure to vacate violated his constitutional protections against double jeopardy. The State argues that Boyd's rights were not violated because the trial court did not enter judgment on the jury verdict finding Boyd guilty of first degree assault. We review a trial court's failure to vacate a conviction, a question of law, de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

The Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence

to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington Constitution mirrors the federal constitution, stating, "No person shall be . . . twice put in jeopardy for the same offense." "'Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause.'" *Womac*, 160 Wn.2d at 650 (quoting *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003)). Both prohibit "'(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.'" *Womac*, 160 Wn.2d at 650-51 (quoting *Percer*, 150 Wn.2d at 48-49). In a case where there would be a double jeopardy violation if a trial court sentenced multiple convictions together, there is no violation when the court enters a judgment and sentence for only one of the relevant convictions. *Womac*, 160 Wn.2d at 658-59 (discussing *State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)). And, if there is no violation, the trial court is not required to vacate the remaining conviction. *Womac*, 160 Wn.2d at 659 (citing *Ward*, 125 Wn. App. at 144).

Here, the jury found Boyd guilty of attempted first degree murder, first degree assault, and violating a domestic violence court order. The trial court entered a judgment on the attempted first degree murder and domestic violence court order violation only and sentenced Boyd accordingly. Assuming without deciding that a judgment for both the attempted first degree murder and first degree assault convictions would violate double jeopardy, the trial court did not err when it did not vacate the jury's first degree assault verdict because it did not enter judgment on it. *Womac*, 160 Wn.2d at 659; *Ward*, 125 Wn. App. at 144. Boyd's argument fails.

Violation of Domestic Violence Court Order—Statutory Maximum for Sentencing

Last, Boyd assigns error to the trial court's imposition of a sentence which he contends

exceeds the statutory maximum. Specifically, Boyd argues that when his 54-month term of confinement for violation of a domestic violence court order conviction is combined with his 12-month term of community custody, the sentence exceeds the statutory maximum of 5 years in violation of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. *See* RCW 9.94A.701(9). The State attempts to concede that the sentence was improper, but because the limiting language in Boyd's judgment and sentence satisfies the requirements of *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), we decline to accept the State's concession.

"[A] court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime." Former RCW 9.94A.505(5) (2008); *see Brooks*, 166 Wn.2d at 673. In *Brooks*, our Supreme Court held that a sentence which potentially exceeds the statutory maximum when the incarceration term is added to the community custody term is nonetheless lawful if the sentencing court includes in the judgment and sentence language explicitly stating that the combination of confinement and community custody shall not exceed the statutory maximum. 166 Wn.2d at 670-74 (reiterating that the SRA applies to the Department of Corrections and that a sentence is not rendered indeterminate by the fact that a defendant may earn early release). Violation of a domestic violence court order is a class C felony if the offender has at least two previous convictions for violating the provisions of an order. Former RCW 26.50.110(5) (2007). A class C felony carries a maximum sentence of five years incarceration or a $10,000 fine. RCW 9A.20.021(1)(c).

Here, Boyd's judgment and sentence explicitly states, "That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the

statutory maximum for each offense." Clerk's Papers at 125; *see Brooks*, 166 Wn.2d at 673. Because the language in Boyd's judgment and sentence is consistent with both former RCW

9.94A.505(5) and *Brooks*, we reject the State's concession that remand is warranted in this case and affirm Boyd's sentence. 166 Wn.2d at 670-73.

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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

JOHANSON, J.