IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEVON ANTHONY BENTON, Appellant.	No. 41661-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Based on an altercation with police following an argument with his ex-girlfriend, the Thurston County Prosecuting Attorney charged Devon Anthony Benton with two counts of second degree assault while armed with a deadly weapon. RCW 9A.36.021(1)(c), RCW 9.94A.825, .533(4), and .535(3)(v). A jury found Benton guilty of one count of second degree assault with a deadly weapon for assaulting Olympia Police Officer Bryan Houser while he was performing official duties, but it acquitted Benton of assaulting Houser's partner, Officer Ryan Hirotaka. On appeal, Benton contends that the evidence was insufficient to prove he intended to cause Houser apprehension or fear of bodily injury because he took the knife out of his pocket only intending to cut himself. Because the evidence, when viewed in the light most favorable to the jury's verdict, permits any rational trier of fact to find that Benton created the apprehension that he would cause the officers bodily injury before he turned the knife on himself,

the evidence is sufficient to support the jury's verdict and we affirm.

FACTS

On October 23, 2010, Kyra Allen called 911 to report that her former boyfriend, Benton, was at her Olympia apartment and that he was intoxicated, violent, and refusing to leave her home. Uniformed Officers Houser and Hirotaka were dispatched to respond to the call. The dispatcher informed them that Benton had two outstanding arrest warrants for failure to register as a sex offender and burglary, and had left the apartment on foot. Houser radioed Hirotaka that he had located Benton pounding on the sliding door at the back of Allen's apartment. The only light was coming from inside Allen's apartment. The light illuminated Benton's back and the front of Hirotaka and Houser. When Hirotaka responded to Houser's location, he saw Benton putting his hands into the pockets of his (Benton's) jacket.

Officer Hirotaka told Benton several times to remove his hands from his pockets. Benton initially complied but then, with his back to Hirotaka, he put his right hand inside his jacket pocket and turned toward Houser. The officers continued to demand that Benton show his hands. When Benton finally took his right hand out of his pocket, he put it into the air, flicking his wrist to open a folding knife. Houser shouted, "Knife," to alert Hirotaka, who could not see the knife from his vantage point. Report of Proceedings (Jan. 5, 2011) at 60. Houser then attempted to deploy his stun gun on Benton. Houser testified that if he had his firearm in his hand instead of his stun gun, he would have shot Benton because he thought Benton was endangering his and Hirotaka's lives.

When the stun gun probe hit Benton, he hunched over and then began cutting his left arm with the knife. Officer Houser's stun gun did not immobilize Benton and he continued to refuse to show his hands, instead rolling onto his stomach. When back-up officers arrived, Houser and

Hirotaka eventually succeeded in pinning a still-struggling Benton to the ground. They wrestled Benton's arms from beneath his body and placed him in handcuffs. When the struggle ended, the officers recovered the knife from where Benton had been lying.

On October 27, 2010, the State charged Benton by information with two counts of second degree assault with a deadly weapon, one for assault against Officer Houser and another for assault against Officer Hirotaka. RCW 9A.36.021(1)(c), RCW 9.94A.825, .533(4), .535(3)(v). Following a jury trial which began on January 5, 2011, the jury found Benton guilty of second degree assault with a deadly weapon for his assault on Houser. The jury found Benton not guilty of second degree assault regarding Hirotaka. On January 11, the trial court sentenced Benton, with an offender score of 10, to a standard range sentence of 84 months confinement plus a deadly weapon enhancement of 12 months confinement. The trial court also imposed an exceptional sentence of 24 months confinement for an aggravating circumstance; specifically, the assault was against a law enforcement officer performing official duties. The trial court entered written findings of fact and conclusions of law for the exceptional sentence.[1] The total sentence imposed was 120 months of confinement and 18 months of community custody. Benton timely appeals, arguing that his intention was to cut himself, not the officers, and challenging only the sufficiency of the evidence supporting the jury finding that he assaulted Houser.

ANALYSIS

Benton challenges the sufficiency of the evidence proving that he intended to cause apprehension and fear of bodily injury in Officer Houser because he intended to cut only himself with the knife. Benton contends that the State did not show that he had the specific intent to

[1] Benton does not challenge the trial court's imposition of an exceptional sentence.

cause apprehension of bodily injury in Houser, but only showed that he had the specific intent to injure himself. The State contends that the evidence was sufficient to prove Benton intended to cause apprehension of bodily harm in Houser because Benton pulled his knife out quickly and held the blade exposed above his head before Houser used his stun gun. We agree with the State and affirm.

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. Kintz*, 169 Wn.2d 537, 551, 238 P.2d 470 (2010); *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. *Kintz*, 169 Wn.2d at 551 (quoting *Salinas*, 119 Wn.2d at 201). Circumstantial evidence and direct evidence are equally reliable. *Kintz*, 169 Wn.2d at 551; *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *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 evidence. *Thomas*, 150 Wn.2d at 874-75; *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). The trier of fact may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A person is guilty of second degree assault when he or she assaults another with a deadly weapon. RCW 9A.36.021(1)(c). The statute does not define "assault"; thus Washington law applies the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995).

The trial court's jury instruction number 10 defined assault. It included: "An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." Clerk's Papers at 23; *see Byrd*, 125 Wn.2d at 712. As defined, specific intent to create apprehension of bodily harm is an essential element of second degree assault that the State must prove beyond a reasonable doubt. *Byrd*, 125 Wn.2d at 713.

Here, the evidence showed that Benton refused to comply with Officer Hirotaka's repeated commands. Benton was standing just a few feet from Officer Houser when Hirotaka commanded him to remove his hand from his pocket. Benton quickly removed his hand, which was holding a knife. With his hand held high and away from his body, he flicked his wrist and opened the blade. Houser saw Benton quickly remove his hand from his pocket and flick open the knife. Benton did not immediately start cutting his own wrist; he only began to cut himself after Houser activated his stun gun. The evidence clearly showed that Houser apprehended that Benton posed a threat of bodily injury to him and Hirotaka.

On this evidence, any rational trier of fact could find that Benton's actions were intended to cause in Officer Houser an apprehension or fear of bodily harm. *See Goodman*, 150 Wn.2d at 781; *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996) (noting that a jury may infer specific intent to create fear from the defendant's act of pointing a gun at the victim); *State v. Smith*, 124 Wn. App. 417, 427-28, 102 P.3d 158 (2004) (holding that jury could reasonably infer that defendant intended to create fear or apprehension of bodily injury), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007). Any rational juror could have inferred from Benton's quickly removing his

hand from his pocket and raising it high with the knife blade exposed for Houser to see, that Benton intended to cause fear of bodily harm in Houser. The evidence also showed that Benton refused to comply with Officer Hirotaka's repeated commands, even after the stun gun hit him three times and that he was not controllable. Although the jury acquitted Benton of second degree assault of Hirotaka, the evidence established that, to Houser, Benton posed an immediate threat of bodily injury to Hirotaka and himself (Houser). On the evidence presented, any rational trier of fact could find that Benton assaulted Houser with a deadly weapon while he was performing his lawful duties. Accordingly, we affirm.

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.

VAN DEREN, J.