SUPREME COURT NO. 96785-7
C.O.A. No. 49933-9-II
Cowlitz Co. Cause No. 16-1-01107-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEX QUINTANA,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

THOMAS LADOUCEUR/WSBA# 19963
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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Tom Ladouceur, Chief Criminal Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter. Specifically, the Court held that there was sufficient evidence to support the guilty verdict. The Respondent respectfully requests this Court deny review of the December 27, 2018, Court of Appeals' opinion affirming the convictions in State of Washington v. Alex Quintana Jr., Court of Appeals No. 49933-9-II

III. ISSUE PRESENTED FOR REVIEW

Should the Supreme Court accept review of Quintana's petition when the Court of Appeals' decision does not conflict with a prior decision of the Supreme Court or the Court of Appeals, and he raises no other grounds for review under RAP 13.4(b)?

IV. STATEMENT OF THE CASE

Quintana was convicted of two counts of second-degree assault, drive-by shooting, and first degree unlawful possession of a firearm. In his petition for review, Quintana claims the evidence was insufficient as to count 1, second-degree assault. The victim in this count was Christopher Jones.

The State supplements Quintana's statement of the case as follows. Ms. Osorio-Heaton (the victim in Count 2) was certain the person who called her the morning of August 23, 2016 was the defendant. RP 157. She did not take the message as being friendly, because they weren't friends. RP 161. Later that day she and Christopher were driving in Christopher's car when she heard someone shout "showoo", and when she looked she saw a gun coming out of the window of a vehicle. She recognized the vehicle as belonging to William Johnson, who used to hang out with her boyfriend Christopher Jones. RP 150. She recognized the defendant's voice as the person who shouted the "showoo" call RP 148, 149, 164. She had heard that particular shout from defendant as well as Christopher Jones in their group of friends. RP 149. She saw the defendant in the back seat behind the driver with a gun in his hand. He was wearing a black T-shirt. RP 154. She heard three shots. RP 151. She was scared that a bullet could have hit her or her son who was outside shortly before the shots were fired. RP 154. She immediately called 911. RP 156.

The 911 call was played for the jury. In addition to the 911 call excerpts included in appellant's brief, Ms. Osorio also stated "the person who shot was Alex Quintana," and "I saw him in the vehicle." RPA 14, 15. (Proceedings on 12/8/16).

Quintana asserts "Ms. Osorio-Heaton *was equivocal* regarding the identity of the person who yelled showoo." (Petitioner's brief, page 5) Although that may be Quintana's interpretation of the actual testimony, whether she was equivocal or not was for the jury to determine. When asked on cross examination "is Alex Quintana the person you saw in this car," she answered, "yes." RP 169.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Quintana's motion fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Quintana argues the State presented insufficient evidence of count 1, assault in the second degree. Quintana claims this court should accept review of the Court of Appeals' decision because it conflicts with decisions of the Supreme Court and the Court of Appeals. He does not raise grounds under RAP 13.4(b) (3) or (4). Quintana does not identify any particular

decision of either the Court of Appeals or the State Supreme Court which is in conflict with the decision by the Court of Appeals in this case. Quintana also does not provide any argument as to how any decision he cites in his brief is in conflict with the Court of Appeals decision in this case.

Quintana argues "there was no evidence that Jones actually suffered a reasonable apprehension and fear of bodily injury due to the shooting." (Page 11). The Court of Appeals rejected this argument, explaining,

> "Quintana correctly points out that the record lacks direct testimonial evidence of Jones's fear or apprehension. However, such proof was not required under the facts and circumstances of this case. Circumstantial evidence proves Jones's apprehension. Jones heard the "showoo" call and the gunshots. He knew that members of the Nortenos did not like him. He also testified that he was "[k]ind of shocked" by the gunshots. B VRP (Dec. 7, 2016) at 203. Additionally, any reasonable person would understand that gunshots can kill you. Taken in a light most favorable to the State, circumstantial evidence showed Jones's fear or apprehension.

The court went on to explain that to find Quintana guilty of assault, the jury did not necessarily have to find that Jones was apprehensive and fearful of bodily injury. Instead, under an alternate definition of assault, the jury could have found an assault occurred when there was an act of unlawful force done with the intent to inflict bodily injury accompanied by the present ability to inflict such bodily injury. In support of its decision that there was sufficient evidence of this alternative manner of committing an assault, the court observed that there was ill will between the Nortenos, of

which Quintana was a member, and Jones after Jones was kicked out of the group, and that Quintana shot toward Osorio-Heaton and Jones three times, not just once. This evidence, the court correctly concluded, taken in a light most favorable to the prosecution, would allow a reasonable jury to find Quintana guilty of second degree assault against Jones.

Quintana next argues there was insufficient evidence to prove that he was the shooter. In support of his argument Quintana contends that Osorio Heaton made a false statement to the police and there was an utter lack of physical evidence supporting her claims. This he argues, casts considerable doubt on the veracity of her testimony that she saw Quintana with the gun hanging out of the window of the Mercedes. The Court of Appeals disagreed with this argument, noting the well-settled law that courts defer to the jury to make determinations on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. With these principles in mind, Quintana's arguments regarding the identity of the shooter go to the jury's determinations regarding credibility and the weight of the evidence. Again, Quintana does not cite to any appellate court decision which conflicts with the appellate court's decision.

Quintana cites to *State v. Baeza*, 100 Wash. 2d 487, 490–91, 670 P.2d 646, 648 (1983). This case is not in conflict with the Court of Appeals decision in Quintana. *Baeza* simply applied the well-settled law that in

evaluating a sufficiency of the evidence claim, the reviewing court must not attempt to determine whether it believes the State has met the burden of proof. Rather, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Baeza* at 490. Applying these principles to the facts of that case the court held there was not sufficient evidence, noting the fact that petitioner may have owned the green and white Dodge pickup does not establish guilt beyond a reasonable doubt. No one identified petitioner as having been on Dodson Road when the theft apparently occurred, at the shop building when the calf was delivered, or later, when the calf was discovered. Further, the State offered no proof that petitioner had masterminded or even aided the theft in some way.

The facts in *Baeza* are completely different than the facts in the case at bar. Simply pointing to a case which applies well-settled principles of sufficiency of the evidence but which is factually distinguishable from the present case does not mean that there is a conflict between the Court of Appeals decision and *Baeza*.

Quintana also cites *State v. Bencivenga,* 137 Wash. 2d 703, 705, 974 P.2d 832, 833 (1999) and *State v. Weaver*, 60 Wash. 2d 87, 87–88, 371 P.2d 1006, 1007–08 (1962). These cases also do not conflict with the Court of

Appeals decision in this case. Quintana does not even attempt to explain how they conflict with the decision.

Citing to *State v. Weaver* and *State v. Bencivenga* Quintana writes, "in cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilty beyond a reasonable doubt." (Petitioner's brief page 13). Quintana misrepresents the holdings of these cases. The *Bencivenga* court stated, "our decision in *Weaver* was predicated on our application of the *former rule* which required that if a conviction rests solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence.[1] We have since *rejected this rule* in favor of the rule that whether the evidence be direct, circumstantial, or a combination of the two, the jury need be instructed that it need only be convinced of the defendant's guilt beyond a reasonable doubt. (Emphasis added). See also *State v. Locke*, 175 Wash. App. 779, 789, 307 P.3d 771, 776 (2013) (Our Supreme Court, however,

[1] *Weaver* involved a situation where the only proof of the defendants' connection with the count charged was the discovery of a tool that may or may not have been used in the commission of a burglary in a spot where the defendants had been.

subsequently rejected the rule in *Weaver,* citing with approval the statement that "[i]f the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on pyramiding inferences.")

Quintana argues that the Court of Appeals' affirmance of his conviction was based "on a cursory assessment of the facts." The Court of Appeals' review of the facts was hardly *cursory*. The court examined all of the testimony, as well as a number of photographs admitted as exhibits. The undisputed evidence was that someone fired three shots from a moving vehicle in the direction of the two victims in this case, Osorio Heaton and Christopher Jones, who were standing in front of their house. One bullet actually hit their house. Quintana and two others were in that moving vehicle. The issue at trial was who fired the gun. There was hostility between the gang Quintana was a member of and Jones, a former gang member ousted for violating gang rules. The 911 call from Osorio Heaton was played for the jury, in which she identified Quintana as the shooter. She also identified Quintana as the shooter at trial. A rational person could conclude that Quintana was the shooter, that firing a gun 3 times towards two people is an act done with the intent to inflict bodily injury even though there was no injury. A rational person could also conclude that the

circumstantial evidence, as noted by the Court of Appeals, was sufficient to show that Mr. Jones was placed in fear and apprehension of bodily injury.

Quintana does not identify any particular decision of the Court of Appeals which is in conflict with the decision by the Court of Appeals in this case. Quintana also does not provide any argument as to how any decision he cites in his brief is contrary to general case law regarding sufficiency of the evidence.

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 28 day of Feb., 2019.

Tom Ladouceur, WSBA # 19963
Chief Criminal Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via the Supreme Court Portal to the following:

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and,

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 1, 2019.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

March 01, 2019 - 10:58 AM

Transmittal Information

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