NO. 32708-6-III
(Consolidated with 32760-4-III)

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

THOMAS LEE WEATHERWAX,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, that a firearm was discharged from the immediate area of a motor vehicle as set forth in Counts V, VI and VII (drive-by shooting) of the Second Amended Information. (CP 51)

2. The trial court committed multiple sentencing errors including:

(a) Imposing mandatory minimum terms on the first degree assault convictions;

(b) Using Count I (first degree assault) as the predicate offense for calculating the offender score;

(c) Miscalculating the offender score;

(d) Imposing conditions of community custody which are improper.

3. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of first degree assault under Count I of the Second Amended Information.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Should Thomas Lee Weatherwax's convictions for drive-by shooting be reversed and dismissed due to the fact that the State was unable to establish, beyond a reasonable doubt, the location of any motor vehicle that may have been involved in the offenses?

2. Does *Personal Restraint of Tran*, 154 Wn.2d 323, 111 P.3d 1168 (2005) and RCW 9.94A.540(1)(b) preclude application of mandatory minimum terms of five (5) years each on Mr. Weatherwax's first degree assault convictions?

3. Does *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012) and RCW 9.94A.595 require the use of an anticipatory offense (conspiracy to commit first degree assault) as the predicate offense for calculation of Mr. Weatherwax's offender score?

4. Did the trial court miscalculate Mr. Weatherwax's offender score?

5. Are the following conditions imposed by the trial court improper:

(a) A finding that use of a motor vehicle was involved in commission of the offenses of first degree assault, drive-by shooting and conspiracy to commit first degree assault; and

(b) Gang-related prohibitions contained in the terms of community custody.

6. Did the State establish, beyond a reasonable doubt, the offense of first degree assault pertaining to Leroy Bercier?

STATEMENT OF CASE

Seventeen (17) year-old Leroy Bercier was inside a convenience store at 5803 North Market Street on September 24, 2013. He was dressed in varying shades of blue including his shirt, jeans, shoes and belt. (RP 154, ll. 23-24; RP 155, l. 1; ll. 15-17; ll. 21-22; RP 156, ll. 16-22; RP 318, ll. 1-7; RP 374, l. 24 to RP 375, l. 9)

Mr. Bercier denies gang membership. Cpl. Rose was unable to determine if Mr. Bercier was a member of a gang. Mr. Bercier admitted that he had family members who belonged to a gang. (RP 156, ll. 8-13; RP 414, ll. 21-22; RP 415, ll. 12-15; RP 554, l. 3 to RP 555, l. 7)

Mr. Weatherwax and Jayme Rodgers are both recognized members of the Norteno Red Boyz. Mr. Weatherwax has been arrested in the past with regard to gang graffiti. Both he and Mr. Rodgers display gang tattoos. (RP 493, ll. 12-15; RP 502, l. 9 to RP 503, l. 8; RP 504, ll. 15-18; RP 505, ll. 3-10; ll. 16-20; RP 538, ll. 1-12; RP 539, ll. 6-11)

Mr. Rodgers confronted Mr. Bercier inside the store. Mr. Weatherwax never entered the store. Mr. Singh, one of the store owners, asked Mr. Rodgers to leave when he confronted Mr. Bercier about his blue shoes. Mr. Rodgers left. (RP 218, ll. 8-9; ll. 18-19; RP 257, ll. 17-20; RP 258, ll. 6-16; RP 271, l. 24 to RP 272, l. 1; RP 326, ll. 4-18)

John Liberty and his son were customers at the store. Mr. Liberty called 9-1-1 when the confrontation occurred. He heard the word "banging." He identified both Mr. Rodgers and Mr. Weatherwax as the persons involved. (RP 274, l. 24 to RP 275, l. 5; RP 275, ll. 8-22; RP 276, ll. 4-11; RP 278, ll. 3-6; ll. 14-21; RP 278, l. 25 to RP 275, l. 9; RP 290, ll. 3-10)

Louie Stromberg and Amanda Smith were also customers at the store when the confrontation occurred between Mr. Rodgers and Mr. Bercier. Mr. Stromberg observed that Mr. Bercier was "scared shitless." Mr. Bercier told him he was afraid of being jumped. After Mr. Bercier left the store Mr. Stromberg kept an eye on him. Mr. Bercier came running back into the store as Mr. Stromberg and Ms. Smith went to their car. (RP 227, ll. 17-24; RP 228, ll. 1-7; RP 229, ll. 2-3; ll. 17-18; RP 232, ll. 12-21)

Mr. Bercier claims he was intoxicated on September 24. He remembers running back into the store. He heard the shots afterwards. (RP

160, l. 3; RP 219, l. 11 to RP 220, l. 6; RP 220, l. 24 to RP 221, l. 6; RP 225, ll. 9-21)

Mr. Stromberg saw two (2) individuals walk around from behind parked semis. He asked them what was going on. He then heard something and his car window exploded. He observed muzzle flashes as six (6) to ten (10) shots occurred. (RP 232, l. 21 to RP 233, l. 7; RP 234, ll. 18-20; RP 235, ll. 2-6)

Mr. Stromberg has poor eyesight. He could not identify either individual. He could not tell what color clothes they were wearing. He did not hear them say anything to Mr. Bercier. Mr. Bercier was already inside the store when the shots were fired. (RP 234, ll. 1-2; RP 243, ll. 7-11; RP 247, ll. 9-12; RP 249, ll. 22-25; RP 255, ll. 1-6)

Mr. Singh heard the gunshots. No damage was ever found on the front of the store. (RP 228, ll. 22-23; RP 557, ll. 821)

Mr. Weatherwax, Mr. Rodgers and one of their friends was at a convenience store earlier in the evening of September 24, 2013. Mr. Weatherwax was wearing a red stocking cap and red t-shirt with a Huelga bird. Mr. Rodgers was wearing a red hoodie. The hoodie was later found in the backseat of Mr. Rodgers' car at 5611 North Perry. In the trunk of the car was a .380 Browning handgun. (RP 417, ll. 7-18; RP 419, ll. 5-12;

RP 422, ll. 4-6; RP 425, ll. 9-17; RP 513, ll. 9-17; RP 523, ll. 9-15; RP 524, ll. 1-18)

Mr. Rodgers and Mr. Weatherwax were later arrested at 5611 North Perry. In addition to the .380 Browning found in the trunk of Mr. Rodgers' car, officers recovered a Makarov 9 mm inside of a holster that had been placed in the dryer at the residence property. Natalie Lemery advised the officers that she had put the Makarov in the dryer. (RP 176, ll. 22-25; RP 182, ll. 5-14; RP 193, ll. 10-21; RP 342, ll. 1-11; RP 371, ll. 14-23; RP 376, ll. 1-3; ll. 22-24; RP 426, l. 22 to RP 427, l. 4; RP 427, l. 24 to RP 428, l. 1)

Natalie Lemery is Mr. Weatherwax's friend. She had asked him to have an unwanted guest removed from her home on September 24. (RP 177, ll. 20-25; RP 178, ll. 4-24)

The magazine of the .380 was empty. There were six (6) bullets in the Makarov. Five (5) in the magazine and one (1) in the chamber. (RP 425, ll. 9-17; RP 429, ll. 17-21; RP 430, ll. 5-8)

The two (2) firearms were sent to the Washington State Patrol Crime Lab (WSPCL). Glenn Davis, a forensic scientist at WSPCL, determined that both guns were operable. The Browning has a capacity of seven (7) bullets with one (1) in the chamber and the Makarov has the same capacity. Mr. Davis determined that a bullet fragment recovered

from Mr. Stromberg's car matched the .380. No 9 mm bullets were recovered. (RP 337, ll. 15-18; RP 440, ll. 8-10; RP 449, ll. 8-21; RP 450, ll. 4-14; RP 452, ll. 10-15; RP 454, ll. 4-6; RP 455, l. 1-5; RP 570, ll. 15-20)

Kristi Barr is a former forensic scientist at WSPCL. She conducted DNA testing on a number of items. The Makarov holster had two (2) contributors. Mr. Weatherwax was the major contributor. Testing on the Makarov was inclusive. Testing on the Browning was inconclusive. (RP 464, ll. 14-21; RP 471, ll. 18-24; RP 472, ll. 9-16; RP 474, ll. 1-14)

An Information was filed on September 27, 2013 charging Mr. Weatherwax and Mr. Rodgers with one (1) count of first degree assault and one (1) count of drive-by shooting. Firearm enhancements were included. (CP 9)

An Amended Information was filed on November 21, 2013. It added two (2) additional counts of first degree assault and two (2) additional counts of drive-by shooting. All of them contained the firearm enhancement. (CP 34)

A Second Amended Information was filed on April 3, 2014. Gang enhancements were added; firearm enhancements were removed from the drive-by shooting counts; a count of conspiracy to commit first degree assault with enhancements was added; and Mr. Weatherwax was separately charged with unlawful possession of a firearm first degree (UPF1°).

A number of agreed scheduling orders were entered. Trial finally commenced on May 5, 2014. (CP 17; CP 36; CP 37; CP 44)

Mr. Weatherwax stipulated that he had a prior serious felony conviction for purposes of the UPF1°. (CP 207; RP 489, ll. 16-18)

A jury found Mr. Weatherwax guilty of all eight (8) counts. The jury also answered yes to each of the special verdict forms concerning firearm and gang enhancements. (CP 269; CP 270; CP 271; CP 272; CP 273; CP 274; CP 275; CP 276; CP 277; CP 278; CP 279; CP 280; CP 281; CP 282; CP 283)

The trial court denied Mr. Weatherwax's motion to arrest judgment on July 21, 2014. (CP 284; RP 808, l. 3 to RP 813, l. 2)

Mr. Weatherwax filed a Notice of Appeal on July 31, 2014 even though Judgment and Sentence was not entered until August 18, 2014. (CP 326; CP 330)

In calculating the offender score the trial court and the State used Count I as the predicate offense (first degree assault involving Mr. Bercier). Mr. Weatherwax was assigned an offender score of eight (8). He received consecutive sentences on Counts I, II, III and IV. Counts I, III and IV were assessed five (5) year mandatory minimum terms. Firearm enhancements on those counts were doubled due to a prior conviction where a firearm was involved. This added three hundred and sixty (360)

months to Mr. Weatherwax's sentence. (CP 335)

SUMMARY OF ARGUMENT

The State did not establish the location of the car in connection with Counts V, VI and VII (drive-by shooting). The convictions must be reversed and dismissed.

Imposing statutory five (5) year minimum sentences on Counts I, III and IV violates RCW 9.94A.540(1)(b) and *Personal Restraint of Tran, supra.* They must be reversed and removed from the Judgment and Sentence.

Using Count I as the predicate offense for calculating Mr. Weatherwax's offender score violates RCW 9.94A.595. Applying the rule of lenity as the Court did in *State v. Breaux* requires resentencing due to miscalculation of the offender score.

The determination that the motor vehicle was used in the commission of the offenses is unsupported by the record. The Judgment and Sentence needs to be corrected.

The gang-related conditions of community custody violate Mr. Weatherwax's First Amendment rights.

The State failed to prove, beyond a reasonable doubt, that Leroy

Bercier was the victim of first degree assault.

ARGUMENT

I. DRIVE-BY SHOOTING

The jury determined that Mr. Weatherwax was guilty of three (3) counts of drive-by shooting. RCW 9A.36.045(1) defines drive-by shooting as follows:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person **and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.**

(Emphasis supplied.)

The prosecuting attorney candidly admitted in closing argument that the location of the car was unknown. He stated that the car was parked "somewhere off in the dark streets." (RP 706, ll. 7-8)

Defense counsel, in closing argument, also told the jury that there was no proof of the car's location. (RP 736, ll. 15-19)

Mr. Weatherwax asserts that under the facts and circumstances of

his case that the controlling authority is *State v. Rodgers*, 146 Wn.2d 55, 43 P.3d 1 (2002).

In the *Rodgers* case the shooting occurred after a car had been parked two (2) blocks from the house where the shooting occurred. The individuals involved walked the two (2) blocks from the car to the house. The *Rodgers* Court stated at 61-62:

> The drive-by shooting statute is … narrowly drawn and requires the State to produce evidence that the firearm was discharged by the defendant from the "immediate area" of the vehicle which transported the shooter. It seems obvious that one is not in the immediate area of a vehicle that is parked two blocks away from the place where that person discharges a firearm. That is the case we have here and, thus, we have no difficulty saying the evidence is insufficient to support the trial court's conclusion of law ….
>
> … A person discharging a firearm two blocks away from a vehicle cannot be said to be in close proximity to that vehicle. To conclude otherwise would be akin to attempting to shove a square peg into a round hole - it does not fit.

When considering the sufficiency of the evidence to establish each and every element of an offense, the test is that set forth in *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980):

> "… [T]he relevant question 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.*" *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

Since the State could not even present a scintilla of evidence as to the location of the car, it did not meet its burden of proof. Mr. Weatherwax's convictions for drive-by shooting under Counts V, VI and VII must be dismissed with prejudice.

II. SENTENCING ERRORS

Mr. Weatherwax contends that multiple sentencing errors require a recalculation of his offender score and dismissal of certain mandatory minimums and conditions of community custody. A miscalculated offender score constitutes the basis for an appeal. *See: State v. Ford,* 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

Mr. Weatherwax did not object at the sentencing hearing. Nevertheless, he asserts that pursuant to RAP 2.5(a)(3) the sentencing errors are manifest.

> "Errors are 'manifest' for purposes of RAP 2.5(a)(3) when they have '"practical and identifiable consequences in the trial of the case."' *Roberts* [*State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000)] at 500 (*quoting State v. WWJ Corp.,* 138 Wn2d 595, 603, 980 P.2d 1257 (1999).

State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

A. Mandatory Minimums

RCW 9.94A.540(1) provides, in part:

> (b) An offender convicted of the crime of assault in the first degree … where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

Mr. Weatherwax was convicted of three (3) counts of first degree assault with a firearm. No individual was hit by any bullet. The State did not establish an intent to kill.

Mr. Weatherwax asserts that this issue is controlled by *Personal Restraint of Tran, supra* 328-30.

The *Tran* case analyzed the structural differences between RCW 9A.36.011(1)(a) and former RCW 9.94A.120(4) [now RCW 9.94A.540(1)].

The Second Amended Information bases the first degree assault counts on violation of RCW 9A.36.011(1)(a). The Court, in *Tran*, at 329, stated:

> As an initial matter, RCW 9A.36.011(1)(a) alone does not *necessarily* satisfy either of these two conditions [referring to the conditions under RCW 9.94A.540(1)(b)]. First, the *actus reus* for first degree assault may be the use of "any force or means likely to produce great bodily harm." RCW 9A.36.011(1)(a). For purposes of the first

> degree assault statute, "great bodily harm" is defined as an "injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c). It follows that great bodily harm and, therefore, first degree assault may occur in at least three ways that are incongruent with former RCW 9.94A.120(4)'s condition that the offender use "force or means likely to result in death." (*i.e.*, significant permanent disfigurement, significant permanent loss or impairment of bodily function). Second, to obtain a first degree assault conviction, the perpetrator's *mens rea* need only be an "intent to inflict great bodily harm." RCW 9A.36.011(1). Accordingly, not every first degree assault conviction includes an "inten[t] to kill the victim" under the second of the two conditions in former RCW 9.94A.120(4). The lack of direct overlap between the assault and mandatory minimum statutes indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent.

The State failed to establish, for sentencing purposes, that Mr. Weatherwax's alleged acts fall within the mandatory minimum statute. As the *Tran* Court recognized in *fn.* 6 at 330:

> Other provisions in the mandatory minimum sentencing scheme strongly indicate that the legislature understands how to attach a mandatory minimum to a specific crime

> without limitation, if it chooses to do so. *See* former RCW 9.94A120(4) ("Offender convicted of the crime of murder in the first degree shall be sentenced to a term … not less than twenty years" and "offender convicted of the crime of rape in the first degree shall be sentenced to a term … not less than five years").

Since the mandatory minimum statute pertaining to first degree assault does not contain the relevant language to bring it within the parameters of the charged offense, the mandatory minimum sentenced attached to each count of first degree assault must be reversed and dismissed.

The *Tran* Court's conclusion, at 332, fully supports Mr. Weather-wax's position:

> If the legislature had intended every violation of the first degree assault statute to result in a five-year mandatory minimum, it would not have limited former RCW 9.94A.120(4) to assaults characterized by "force or means likely to result in death" or an "inten[t] to kill."

B. Predicate Offense

The sentencing court used Count I of the Second Amended Information as the predicate offense for sentencing purposes. The sentencing court is in error. The predicate offense is Count II - conspiracy to commit first degree assault.

RCW 9.94A.595 states:

> For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under Chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75%.

First degree assault is a serious violent offense. It is a Level XII offense. (Appendix "A")

Conspiracy to commit first degree assault is also a Level XII offense.

The trial court determined that Mr. Weatherwax's offender score was eight (8). Using Count I as the predicate offense it imposed a term of two hundred and thirty-four (234) months.

On the other hand, using Count II - conspiracy to commit first degree assault - the standard sentencing range would be one hundred and fifty-six point seven five (156.75) to two hundred and seven point seven five (207.75) months based upon an offender score of eight (8). Mr. Weatherwax will be addressing whether or not eight (8) is the correct offender score in a later portion of this brief.

In *State v. Breaux, supra*, which involved the anticipatory offense of attempted first degree rape, and the completed offense of first degree

rape the Court analyzed the interplay between completed and anticipatory offenses for scoring purposes.

The *Breaux* Court ruled at 176:

> To determine the offense with the highest seriousness level, RCW 9.94A.589(1)(b) provides for "the highest seriousness level under RCW 9.94A.515." Anticipatory offenses are not specifically ranked in the seriousness level table in RCW 9.94A.515. That table contains seriousness levels only for completed offenses. First degree rape has a seriousness level 12. From this, the State argues that in the absence of any seriousness level for attempted first degree rape, the completed crime of first degree rape applies when calculating Breaux's offender score under RCW 9.94A.589(1)(b). This reading ignores RCW 9.94A.595, which governs the procedure to calculate the standard range for anticipatory offenses ….

The *Breaux* Court went on to say at 177-78:

> We are unpersuaded by the State's argument but need not decide whether the seriousness levels assigned to completed offenses apply to anticipatory offenses for purposes of RCW 9.94A.589(1)(b). … [T]he rule of lenity applies in favor of a defendant where legislative intent is lacking. Because RCW 9.94A.589(1)(b) fails to address the circumstance in which two or more serious violent offenses arguably have the same seriousness level, we address whether the rule of lenity applies here.

Even though the *Breaux* Court did not decide that a completed offense and an anticipatory offense carry the same seriousness level, Mr. Weatherwax urges the Court to so rule in his case. There is no difference between a completed offense and an anticipatory offense, both of which are serious violent offenses. In the anticipatory offense a substantial step has been taken toward completion of the anticipated offense. The State elected to include a conspiracy charge (Count II) in addition to Count I. The victim was the same in Counts I and II. The intent was the same as to Counts I and II. The sentencing court found that Counts I and II encompassed the same criminal conduct.

The *Breaux* Court's conclusion at 179 is the same conclusion that should be reached on behalf of Mr. Weatherwax.

> The rule of lenity requires the court to construe a statute strictly against the State in favor of the defendant where two possible constructions are permissible. Because RCW 9.94A.589(1)(b) is ambiguous, it must be construed in Breaux's favor. We conclude that (1) the offender score calculation applies to Breaux's attempted first degree rape and (2) the zero scoring rule applies to his first degree rape conviction as this will yield a shorter sentence. We remand for resentencing consistent with this opinion.

Mr. Weatherwax respectfully request that as to this issue it be remanded to the trial court for resentencing.

C. Offender Score

Based upon the preceding arguments Mr. Weatherwax contends that there was an erroneous calculation of his offender score. Mr. Weatherwax's criminal history consists of the following felonies:

- Second degree malicious mischief;
- Possession of a controlled substance;
- Attempted second degree assault.

The SRA scoring sheet for first degree assault provides that one (1) point be assessed for each non-violent felony. Two (2) points are assessed for violent felonies. Three (3) points are assessed for serious violent felonies.

Second degree malicious mischief and possession of a controlled substance are non-violent felonies. Attempted second degree assault is a violent felony. Therefore, when he was sentenced, Mr. Weatherwax's prior criminal history resulted in an offender score of four (4).

Mr. Weatherwax was being sentenced on not only the assault convictions, but also the drive-by shooting and UPF1° convictions.

Since the State failed to prove, beyond a reasonable doubt, each and every element of the offense of drive-by shooting, those offenses do not count in the offender score. The sentencing court had not counted them in the offender score since it determined that they constituted the

"same criminal conduct" as the first degree assault offenses. However, the UPF1° is included for scoring purposes. Thus, Mr. Weatherwax's correct offender score is five (5).

An offender score of five (5), utilizing conspiracy to commit first degree assault as the predicate offense, results in a reduced sentencing range. The sentence range would be one hundred and three point five (103.5) to one hundred and thirty-eight (138) months. (Appendix "B")

D. Community Custody Conditions

Two (2) conditions of the community custody portion of Mr. Weatherwax's sentence should not have been imposed.

Mr. Weatherwax requests that the condition under Paragraph 2.1 relating to use of a motor vehicle in the commission of a felony has to be removed since it only pertained to the drive-by shooting convictions.

If the drive-by shooting convictions are reversed and dismissed, the condition must also be dismissed.

Furthermore, it is Mr. Weatherwax's position that the State did not establish that the car was used in conjunction with any of the offenses.

In the recent case of *State v. Alcantar-Maldonado,* 184 Wn. App. 215, 229-30 (2014) the Court, relying upon Ohio and Florida cases determined that "Washington decisions … require a more direct

connection between the use of the vehicle and the crime. We find support in this position in several foreign decisions."

The mere transport of a defendant from one place to another, if the motor vehicle itself is not used to commit the crime, precludes imposition of this particular condition.

The other condition that needs to be removed is set forth in Paragraph 4.2(c)(6) and states: "… [T]he defendant shall not wear clothing, insignia, medallions, etc., which are indicative of gang lifestyle. Furthermore, that the defendant shall not obtain any new or additional tattoos indicative of gang lifestyle."

Initially, even though the jury determined that there was a gang enhancement by special verdict, the trial court did not enhance Mr. Weatherwax's sentence based upon the jury determination.

> A condition that constitutes a "[l]imitation [ ] upon fundamental rights" is "permissible, provided [it is] imposed sensitively." *Riley* [*State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)] at 37. In accord with the federal rule, a convict's First Amendment right "'may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.'" *Id.* at 37-38 (quoting *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974)). Thus, conditions may be imposed that restrict free speech rights if reasonably necessary, but they must be sensitively imposed. This meshes with the vagueness doctrine's principle that

> where the challenged law involves First Amendment rights, a greater degree of specificity may be demanded.

State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008).

The prohibition against certain colored clothing impinges on an individual's First Amendment rights. An individual has the right to freedom of expression. The clothing one wears may also be an expression of the constitutional right to free speech. The fact that an individual is a member of a particular group should not dictate the imposition of conditions that abrogate those freedoms.

Tattoos are also expressions of beliefs. They may make a statement that is political, personal or to memorialize some event. They can be artistic, expressive and colorful.

Not every person desires to have a tattoo. However, those individuals who wish to have their body tattooed should not be prohibited from engaging in that activity.

III. COUNT I

Count I of the Second Amended Information states:

> FIRST DEGREE ASSAULT, committed as follows: That the defendants, JAYME L. RODGERS and THOMAS LEE WEATHERWAX, as actors and/or accomplices, in the State of Washington, on or about September 24, 2013, did, with intent to inflict great bodily harm,

> intentionally assault LEROY L. BERCIER, with a firearm or deadly weapon, *to wit:* a handgun, and the defendant and the accomplice were each individually armed at the time of the commission of the crime with a firearm under the provisions of 9.94A.602 and 9.94A.533(3) ….

Multiple shots were fired on September 24, 2013. Three (3) bullets hit Louie Stromberg's car. No individual was wounded by a bullet. No bullets struck the convenience store.

Mr. Bercier was inside the convenience store when the shots were fired.

WPIC 35.50 provides, in part:

> … An assault is … an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, 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. …

Mr. Stromberg testified that Mr. Bercier appeared "scared shit-less." Mr. Bercier's recollection at trial was questionable at best. He could not identify Mr. Weatherwax at trial. (RP 225, ll. 7-18)

Since no injury occurred it is unknown which assault alternative was used by the jury to reach its decision. Was it Mr. Bercier's apprehension of harm? Was it the intent of Mr. Rodgers and Mr. Weatherwax to inflict bodily injury?

The biggest problem is that Mr. Bercier was not injured and was not outside when the handguns were fired. No bullets entered the store where Mr. Bercier had sought safety.

Based upon the facts in the record all of the shots were directed at Mr. Stromberg's car.

"… [T]he apprehension of one assaulted is not a necessary element of first or second-degree assault." *State v. Stationak,* 1 Wn. App. 558, 559, 463 P.2d 260 (1969).

Mr. Weatherwax reads the *Stationak* case as standing for the proposition that the apprehension prong of WPIC 35.50 is applicable only to third and fourth degree assault.

A second problem with the State's case on Count I is that no shots were fired until Mr. Stromberg challenged the two (2) individuals who then fired their guns. Since the guns were discharged in Mr. Stromberg's

direction, it would appear that he was the target of the assault as opposed to Mr. Bercier.

> It is not necessary that the threat of violence be directed against a particular person, if such general threat could properly be found to include within its scope the person assaulted. 4 Am.. Jur. 199, § 153.

State v. Cunningham, 51 Wn.(2d) 502, 506, 319 P.(2d) 847 (1958).

The threat of violence was directed at Mr. Stromberg. Mr. Weatherwax contends that that threat was specific and that there was not a general threat implicating Mr. Bercier who was already inside the store.

CONCLUSION

Counts V, VI and VII must be reversed and dismissed pursuant to *State v. Rodgers, supra.*

The five (5) year minimum mandatory terms imposed on Counts I, III and IV must be vacated under the authority of *Personal Restraint of Tran, supra.*

Mr. Weatherwax's offender score was miscalculated. His case needs to be remanded for resentencing. The predicate offense used by the trial court at sentencing contravenes *State v. Breaux, supra* and the rule of lenity.

The designated conditions of use of a motor vehicle and gang-

related prohibitions cannot be justified. They should be removed upon resentencing.

The State failed to prove, beyond a reasonable doubt, Count I. It should be reversed and dismissed.

DATED this 15th day of April, 2015.

Respectfully submitted,

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APPENDIX “A”

ASSAULT FIRST DEGREE

RCW 9A.36.011
CLASS A – SERIOUS VIOLENT

OFFENDER SCORING RCW 9.94A.525(9)

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Serious Violent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 176.

ADULT HISTORY:
Enter number of serious violent felony convictions _____ x 3 = _____
Enter number of violent felony convictions _____ x 2 = _____
Enter number of nonviolent felony convictions _____ x 1 = _____

JUVENILE HISTORY:
Enter number of serious violent felony dispositions _____ x 3 = _____
Enter number of violent felony dispositions _____ x 2 = _____
Enter number of nonviolent felony dispositions _____ x ½ = _____

OTHER CURRENT OFFENSES:
(Other current offenses that do not encompass the same conduct count as offender score)
Enter number of other violent felony convictions _____ x 2 = _____
Enter number of other nonviolent felony convictions _____ x 1 = _____

STATUS:
Was the offender on community custody on the date the current offense was committed? + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number) _____

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL XII	108m 93 - 123	119m 102 - 136	129m 111 - 147	140m 120 - 160	150m 129 - 171	161m 138 - 184	189m 162 - 216	207m 178 - 236	243m 209 - 277	279m 240 - 318

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 20 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 167 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 170.
- ✓ For sentencing alternatives, see page 160.
- ✓ For community custody eligibility, see page 168.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 165.
- ✓ Multiple current serious violent offenses shall have consecutive sentences imposed per the rules of RCW 9.94A.589(1)(b).
- ✓ Statutory minimum sentence is 60 months (RCW 9.94A.540) if the offender used force or means likely to result in death or intended to kill the victim. The statutory minimum sentence shall not be varied or modified under RCW 9.94A.535.

APPENDIX “B”

SENTENCING GRID D - ANTICIPATORIES

FOR CRIMES COMMITTED AFTER JULY 24, 1999

"CURRENT"

Seriousness Level	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL XVI	LIFE SENTENCE WITHOUT PAROLE/DEATH PENALTY									
LEVEL XV	180 - 240	187.5 - 249.75	195.75 - 260.25	203.25 - 270.75	210.75 - 280.5	218.25 - 291	234 - 312	253.5 - 337.5	277.5 - 369.75	308.25 - 411
LEVEL XIV	92.25 - 165	100.5 - 175.5	108 - 183	115.5 - 190.5	123.75 - 198.75	131.25 - 206.25	146.25 - 221.25	162 - 237	192.75 - 267.75	223.5 - 297.75
LEVEL XIII	92.25 - 123	100.5 - 133.5	108 - 144	115.5 - 153.75	123.75 - 164.25	131.25 - 174.75	146.25 - 195	162 - 216	192.75 - 256.5	223.5 - 297.75
LEVEL XII	69.75 - 92.25	76.5 - 102	83.25 - 110.25	90 - 120	96.75 - 128.25	103.5 - 138	121.5 - 162	133.5 - 177	156.75 - 207.75	180 - 238.5
LEVEL XI	58.5 - 76.5	64.5 - 85.5	71.25 - 93.75	76.5 - 102	83.25 - 110.25	90 - 118.5	109.5 - 145.5	119.25 - 158.25	138.75 - 183.75	157.5 - 210
LEVEL X	38.25 - 51	42.75 - 56.25	46.5 - 61.5	50.25 - 66.75	54 - 72	57.75 - 76.5	73.5 - 97.5	81 - 108	96.75 - 128.25	111.75 - 148.5
LEVEL IX	23.25 - 30.75	27 - 36	30.75 - 40.5	34.5 - 45.75	38.25 - 51	42.75 - 56.25	57.75 - 76.5	65.25 - 87	81 - 108	96.75 - 128.25
LEVEL VIII	15.75 - 20.25	19.5 - 25.5	23.25 - 30.75	27 - 36	30.75 - 40.5	34.5 - 45.75	50.25 - 66.75	57.75 - 76.5	65.25 - 87	81 - 108
LEVEL VII	11.25 - 15	15.75 - 20.25	19.5 - 25.5	23.25 - 30.75	27 - 36	30.75 - 40.5	42.75 - 56.25	50.25 - 66.75	57.75 - 76.5	65.25 - 87
LEVEL VI	9 - 10.5	11.25 - 15	15.75 - 20.25	19.5 - 25.5	23.25 - 30.75	27 - 36	34.5 - 45.75	42.75 - 56.25	50.25 - 66.75	57.75 - 76.5
LEVEL V	4.5 - 9	9 - 10.5	9.75 - 12.75	11.25 - 15	16.5 - 21.75	24.75 - 32.25	30.75 - 40.5	38.25 - 51	46.5 - 61.5	54 - 72
LEVEL IV	2.25 - 6.75	4.5 - 9	9 - 10.5	9.75 - 12.75	11.25 - 15	16.5 - 21.75	24.75 - 32.25	32.25 - 42.75	39.75 - 52.5	47.25 - 63
LEVEL III	0.75 - 2.25	2.25 - 6	3 - 9	6.75 - 9	9 - 12	12.75 - 16.5	16.5 - 21.75	24.75 - 32.25	32.25 - 42.75	38.25 - 51
LEVEL II	0 - 67.5 days	1.5 - 4.5	2.25 - 6.75	3 - 9	9 - 10.5	10.5 - 13.5	12.75 - 16.5	16.5 - 21.75	24.75 - 32.25	32.25 - 42.75
LEVEL I	0 - 45 days	0 - 67.5 days	1.5 - 3.75	1.5 - 4.5	2.25 - 6	3 - 9	9 - 10.5	10.5 - 13.5	12.75 - 16.5	16.5 - 21.75

NO. 32708-6-III
(Consolidated with 32760-4-III)

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. THOMAS LEE WEATHERWAX, Defendant, Appellant.	)	SPOKANE COUNTY NO. 13 1 03446 9 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 15th day of April, 2015, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Yakima, WA 99201

SPOKANE COUNTY PROSECUTOR'S OFFICE — E-FILE (per-agreed)
Attn: Brian O'Brien
SCPAAppeals@spokanecounty.org

E-FILE (per agreed)

SUSAN GASCH, ATTORNEY AT LAW
gaschlaw@msn.com

THOMAS LEE WEATHERWAX #337563 — U.S. MAIL
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CERTIFICATE OF SERVICE