

FILED

SEP 14, 2015

Court of Appeals
Division III
State of Washington

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.

.REPLY BRIEF OF APPELLANT,

Dennis W. Morgan WSBA #5286
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ARGUMENT

The State has appropriately conceded Thomas Lee Weatherwax's Assignments of Error 2(a), (b) and (c).

The State's argument concerning Assignment of Error 1 misstates the evidence. The State in its brief, at p. 7, alleges: "They drove the vehicle to the center of the adjoining street. RP 267."

There is nothing in the transcript at RP 267 to support that claim. Mr. Weatherwax has been unable to locate any testimony in the transcripts concerning the vehicle being driven to the center of an adjoining street.

Rather, the candid admission in closing argument by the prosecuting attorney controls. It is essentially a concession that the State failed to prove each and every element of the offense of drive-by shooting. The prosecuting attorney stated that the car was parked "somewhere off in the dark streets." (RP 706, ll. 7-8)

Mr. Weatherwax reasserts that *State v. Rodgers*, 146 Wn.2d 55, 61-62, 43 P.3d 1 (2002) controls the outcome of this issue.

The State's argument is without merit and should be disregarded entirely.

The State misinterprets the facts concerning the offense of first degree assault set forth in Count I of the Second Amended Information.

Count I involves Leroy Bercier.

The State, at p. 4 of its brief, asserts: “Mr. Bercier testified he was then shot at inside the store. (RP 220). The gunshots were fired from outside the store. (RP 225).”

A careful reading of the testimony reflects that Mr. Bercier was inside the store when he heard shots fired. He had no idea where anyone was when the shots were fired. He only assumed the shots were being fired at him. (RP 220, l. 25 to RP 221, l. 6)

The fact that Mr. Bercier was inside the store before any shots were fired is confirmed by Mr. Stromberg. (RP 232, l. 12 to RP 233, l. 7)

Insofar as Count I is concerned Mr. Weatherwax otherwise relies upon the argument and facts set out in his original brief.

Finally, the State identifies Mr. Bercier as a gang member. The State is wrong.

In *fn.* 1 on p. 4 of its brief the State references RP 552. The transcript identifies Mr. Bercier’s cousin as a gang member. (RP 552, ll. 1-6)

Mr. Weatherwax respectfully requests that the Court recognize that the State is taking testimony out of context and whenever it occurs in the State’s brief it should be ignored.

Misstatements in an appeal brief must be stricken and are not to be considered by the appellate court. *See: Dependency of K.S.C.*, 137 Wn.2d 918, 933, 976 P.2d 113 (1999).

DATED this 14th day of September, 2015.

Respectfully submitted,

s/Dennis W. Morgan

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