

NO. 36407-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TREMAYNE REED,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF PREMEDITATION.

In his opening brief, Tremayne Reed argued that the State failed to prove premeditated intent – an essential element of first-degree attempted murder – because the evidence showed that Reed did not know the victim, did not threaten him, did not plan his murder, did not engage him in a struggle, did not attack him from behind, did not employ multiple methods of injury, and did not make statements indicating premeditation. Instead, the evidence showed that Reed “freaked out” and shot the victim, Gary Shilley, when Shilley unexpectedly came upon him while Reed was trying to fix his car. This constitutes, at most, second-degree attempted murder. Appellant’s Brief at 16-24 (citing, inter alia, State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987); State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986)).

Reed noted that all of the cases in which this Court or the supreme court found the State proved premeditation involved facts substantially different from Reed’s. Appellant’s Brief at 18-23. In response, the State first cites a case that involved a completely different issue: whether the State presented sufficient evidence to

establish the corpus delicti of attempted first degree murder. Respondent's Brief at 13-14 (citing State v. Vangerpen, 71 Wn. App. 94, 100-101, 856 P.2d 1106 (1999)). The standard for establishing corpus delicti is much lower than that for proving guilt: "The independent evidence need not have been sufficient to support a conviction or even send the case to the jury." Vangerpen, 71 Wn. App. at 98, affirmed, State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Because more evidence is required to support a conviction than to establish corpus delicti, Vangerpen is inapposite.

The second and final case the State cites supports Reed's argument, not the State's. Respondent's Brief at 14 (citing State v. Barajas, 143 Wn. App. 24, 177 P.3d 106 (2007)). The events in Barajas took place over a long period of time and across different locations, in contrast to Reed's "freakout" in response to Shilley's sudden appearance. In Barajas, the officer stopped the defendant for driving without a license. Id. at 28. A long conversation between the two ensued, after which the officer attempted to place the defendant under arrest. Id. at 29. The defendant wanted to avoid arrest because it meant he would be deported from the country. Id. The defendant swung at the officer with his fist, then

raced back to his car and drove away. Id. He drove to his house, went inside, retrieved his gun, and loaded it. Id. He then ran out of the house and hid, and ambushed the officer and his partner when they ordered him out of hiding. Id. at 30. Barajas shot one officer twice, then turned and shot the other officer after the officer fell to the ground while retreating. Id.

Thus, Barajas is an example in which sufficient evidence of premeditation was presented. The defendant and his victims struggled for a long time in two different locations. The defendant went to the second location with the express purpose of retrieving and loading a weapon to use against the victims. Id. at 36. He had a motive of avoiding the severe consequence of deportation. Id. The defendant hid from the victims before attacking them. Id. at 36-37. He shot twice, then turned and shot again while the victim was retreating. Id. at 30.

In contrast, the incident in this case occurred quickly in one location. There was no struggle. Reed did not retrieve and load a weapon to use against Shilley; he had previously procured it to protect himself and his family, and he happened to have it with him. He did not face deportation, but merely arrest for DWLS or possession of a firearm. He was working on his car, not hiding in

the bushes waiting to ambush a police officer. The officer's sudden appearance surprised him, and he "freaked out" and shot him.

The State erroneously argues that it presented evidence that this was not a spontaneous reaction. Respondent's Brief at 15-16. But contrary to the State's representation of events, the officer did not "circle around the jeep" in the parking lot before stopping behind it. The officer drove by the parking lot on the road, along with many other cars, then entered the parking lot from behind the jeep. Ex. 60. There is no indication that Reed noticed Shilley when he first entered the parking lot.

There is also no support for the State's proposition that Reed "tried not to look suspicious in order to avoid contact with the police." Respondent's Brief at 16. And its implication that Reed was behind the hood of his car not for the purposes of fixing it but in order to attack a police officer on the off-chance one would appear is preposterous. See id.

Reed's case is nothing like the cases in which sufficient evidence of premeditation was presented. See, e.g., Barajas, 143 Wn. App. 24; Ollens, 107 Wn.2d at 853; State v. Hoffman, 116 Wn.2d 51, 83-84, 804 P.2d 577 (1991); State v. Pirtle, 127 Wn.2d 628, 645-46, 904 P.2d 245 (1995); State v. Allen, 159 Wn.2d 1, 8,

147 P.3d 581 (2006); State v. Bushey, 46 Wn. App. 579, 585, 731 P.2d 553 (1987); State v. Rehak, 67 Wn. App. 157, 160, 164, 834 P.2d 651 (1992); State v. Townsend, 97 Wn. App. 25, 26, 979 P.2d 453 (1999); State v. Neslund, 50 Wn. App. 531, 749 P.2d 725 (1988). If his conviction is allowed to stand, the distinction between first-degree attempted murder and second-degree attempted murder will be completely obliterated. The conviction on count 1 should be reversed and the case remanded for entry of a conviction on the lesser-included offense of attempted murder in the second degree.

2. THE "TO CONVICT" INSTRUCTION FOR ATTEMPTED FIRST-DEGREE MURDER OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

The problem discussed above was exacerbated by the trial court's refusal to include the element of premeditated intent in the "to convict" instruction. The court instructed the jury as follows:

To convict the defendant of the crime of Attempted Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

That on or about the 25th day of March, 2006, the defendant did an act which was a substantial step toward the commission of Murder in the First Degree;

That the act was done with the intent to commit Murder in the First Degree; and

That the acts occurred in the State of Washington.

CP 97 (Instruction 13).

As explained in Reed's opening brief, this instruction violated his right to due process because it used the word "intent" instead of "premeditated intent," thus conflating first-degree attempted murder and second-degree attempted murder. Although other instructions explained that premeditation was an element of the completed crime of first-degree murder, this does not make up for its absence from the "to convict" instruction for first-degree attempted murder, because the omission relieved the State of the burden of proving the proper *mens rea*. Appellant's Brief at 25-32 (citing, inter alia, State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995)).

The "intent" referred to in the "to convict" instruction given by the court is the intent "to accomplish a result which constitutes a crime." State v. Dunbar, 117 Wn.2d 587, 591, 817 P.2d 1360 (1991) (citing RCW 9A.08.010(1)(a)) (emphasis in original). Premeditation is not a result; death is the result contemplated in a case of attempted murder. Id. at 590 (citing W. LaFave & A. Scott, Criminal Law § 6.2(c) at 500-01 (2d ed. 1986)). Thus, the jury was

instructed to find Reed guilty if he had the intent to accomplish the death of the officer and took a substantial step toward causing his death. This is second-degree attempted murder.

In its response brief, the State fails to address the unique nature of the crime of first-degree attempted murder. It cites DeRyke for the proposition that the “to convict” instruction for an attempt need not include the elements of the crime allegedly attempted, so long as they include the elements of “intent” and “substantial step.” Respondent’s Brief at 18 (citing State v. DeRyke, 149 Wn.2d 906, 910-11, 73 P.3d 1000 (2003)). But as explained in Reed’s opening brief, this rule makes no sense in the context of first-degree attempted murder, because it is the one crime for which the *mens rea* is higher than intent.

DeRyke is inapposite because it involved a base crime (first-degree rape) for which there is no mens rea element. DeRyke, 149 Wn.2d at 913. Thus, the *mens rea* for attempted first-degree rape is intent. Id. The general attempt instruction is therefore appropriate for attempted rape. But it is not appropriate for first-degree attempted murder, which is *sui generis*. This Court should address the unique due process issue inherent in a charge of first-

degree attempted murder by holding that the “to convict” instruction must include the element of premeditated intent.

The failure to include the element of premeditation in the “to convict” instruction was not harmless beyond a reasonable doubt, and the conviction on count 1 should be reversed and the case remanded for a new trial. See Smith, 131 Wn.2d at 266.

3. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR AND REMAND FOR RESENTENCING.

In his opening brief, Reed argued that the sentencing court violated the SRA and his Sixth Amendment rights when it imposed an exceptional sentence based on three aggravating factors not included in the SRA's exclusive list and not submitted to a jury or proved beyond a reasonable doubt. Appellant's Brief at 39-42. The court also violated Reed's Fifth Amendment rights by inferring lack of remorse from his invocation of the constitutional privilege against self-incrimination, and giving great weight to that inference in imposing a sentence above the standard range. Appellant's Brief at 42-48. The case must be remanded for resentencing because three of four bases for imposing the exceptional sentence were improper, and it is not clear the same sentence would have been imposed absent the inappropriate considerations.

The State agrees that resentencing is required.

Respondent's Brief at 33-35. The prosecutor at sentencing did not propose the improper factors, and the State continues to urge the court to sentence Mr. Reed using only the factor properly submitted to the jury and found beyond a reasonable doubt. Reed and the State both respectfully request that this Court remand for resentencing. Respondent's Brief at 35-36.

B. CONCLUSION

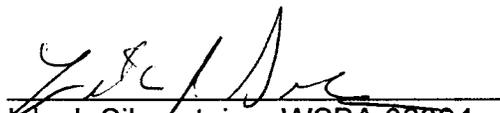
Because the State failed to prove that Reed acted with premeditated intent, his conviction on count 1 should be reversed and his case remanded for entry of a conviction on the lesser-included offense of second-degree attempted murder.

Alternatively, his conviction should be reversed and his case remanded for retrial because the court omitted the element of premeditated intent from the "to convict" instruction.

Even if this Court affirms the conviction, the State and Reed agree that this case should be remanded for resentencing because the court relied on improper factors in imposing the exceptional sentence.

DATED this 2nd day of September, 2008.

Respectfully submitted,


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