

Jun 24, 2016, 9:57 am

RECEIVED ELECTRONICALLY

Supreme Court No.93192-5
COA No. 32708-6-III
(consolidated with No. 32760-4-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent

v.

THOMAS WEATHERWAX, Defendant/Petitioner.

STATE OF WASHINGTON, Plaintiff/Respondent

v.

JAYME LEE RODGERS, Defendant/Petitioner.

ANSWER TO DEFENDANTS' PETITIONS FOR REVIEW

LAWRENCE H. HASKELL
Spokane County Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

 ORIGINAL

INDEX

I. IDENTITY OF PARTY 1

II. STATEMENT OF RELIEF SOUGHT..... 1

III. ISSUE PRESENTED..... 2

IV. STATEMENT OF THE CASE 2

V. ARGUMENT 5

 A. A BASIS EXISTS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW UNDER RAP 13.4(B)(2), REGARDING THE CONFLICT BETWEEN DIVISION ONE AND DIVISION THREE OF THE COURT OF APPEALS AS TO WHETHER RCW 9.94A.515 AND RCW 9.94A.589(1)(B) ARE AMBIGUOUS AS TO HOW AN OFFENDER SCORE IS CALCULATED WHEN THE OFFENSES INCLUDE A SERIOUS VIOLENT ANTICIPATORY OFFENSE AND A COMPLETED SERIOUS VIOLENT OFFENSE. 5

 B. THE APPELLANT WEATHERWAX HAS NOT MET THE CRITERIA UNDER RAP 13.4(b)(3) FOR REVIEW OF THE SUFFICIENCY OF EVIDENCE REGARDING HIS CONVICTIONS FOR FIRST DEGREE ASSAULT. 7

VI. CONCLUSION 9

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Breaux, 167 Wn. App. 166, 273 P.3d 447 (2012)..... 5, 6

State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015) 8

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 9

State v. Weatherwax, No. 32708-6-III, 2016 WL 1755462
(Wash. Ct. App. May 3, 2016)..... 3, 7, 9

STATUTES

RCW 9.94A.589..... 5

RULES

RAP 13.4..... 7, 8

I. IDENTITY OF PARTY

Respondent, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Defendants Weatherwax and Rodgers have filed petitions for review of the opinion issued by the Court of Appeals on May 3, 2016, concerning whether RCW 9.94A.515 and RCW 9.94A.589(1)(b) are ambiguous as to how an offender score is calculated when the offenses include a serious violent anticipatory offense (i.e., attempt, conspiracy, or solicitation) and a completed serious violent offense. Defendant Weatherwax also seeks review of whether sufficient evidence supports his convictions for first degree assault.

The offender score calculation of attempted serious violent felonies and completed serious violent felonies meets the criteria under RAP 13.4(b)(2) for review.

However, Respondent seeks denial of the Defendant Weatherwax's petition for review concerning whether sufficient evidence supports the Defendant's convictions for first degree assault.

III. ISSUE PRESENTED

1. Should this Court grant discretionary review under RAP 13.4(b)(2), regarding the conflict between Division One and Division Three of the Court of Appeals as to whether RCW 9.94A.515 and RCW 9.94A.589(1)(b) are ambiguous as to how an offender score is calculated when the offenses include a serious violent anticipatory offense (i.e., attempt, conspiracy, or solicitation) and a completed serious violent offense?

2. Has petitioner Weatherwax met the criteria for review under RAP 13.4(b)(3), for review regarding the sufficiency of the evidence regarding his convictions for first degree assault?

IV. STATEMENT OF THE CASE

Following a jury trial, the appellants/defendants, Thomas Weatherwax and Jayme Rodgers, were convicted of three counts of first degree assault,¹ one count of conspiracy to commit first degree assault; and two counts of drive-by shooting from a shooting incident in northeast Spokane. In addition to the above charges, defendant Weatherwax was convicted of one count of first degree unlawful possession of a firearm.²

¹ All three first degree assault convictions involved separate victims.

² The defendant did not assign error to his unlawful possession of a firearm conviction in the appellate court.

See State v. Weatherwax, No. 32708-6-III, 2016 WL 1755462 (Wash. Ct. App. May 3, 2016).

The facts of this case are set forth in Division Three of the Court of Appeals decision. The salient facts below, are taken from the opinion, unless the report of proceedings is specifically referenced.

In the late evening hours in September 2013, Leroy Bercier was at a convenience store in the Hillyard neighborhood of Spokane when he was confronted by Jayme Lee Rodgers, a member of the Norteño Red Boyz gang, which claims Hillyard as its territory. Mr. Bercier's shoes, belt, and shirt were all blue, a color favored by the Sureños, the rival gang of the Norteño Red Boyz. Mr. Rodgers confronted Mr. Bercier about his blue clothing and called him a "scrap" — a derogatory term for a Sureños gang member. The confrontation was broken up, and Mr. Rogers left the store.

Mr. Rogers joined up with his co-defendant, Thomas Weatherwax. They were unsuccessful in their attempt to have Mr. Bercier exit the store and fight them. Mr. Bercier advised several customers that he was afraid of Mr. Rogers and Mr. Weatherwax.

Mr. Bercier ultimately exited the store, and shortly thereafter, ran back to the store. Mr. Bercier told a store employee he was being shot at. RP 265. Mr. Bercier looked as if he was "running for his life." RP 233.

Approximately 30 yards away, Mr. Stromberg observed two individuals start shooting in the direction of his car at the gas pump. Mr. Stromberg had witnessed the earlier confrontation in the store involving Mr. Bercier and the defendants. Mr. Stromberg and his passenger, Ms. Smith, ran into the store for cover.

Mr. Stromberg's car was struck in three different areas by bullets.³ RP 235. He heard between six and ten gunshots. RP 235. He also heard gunshots skipping off the ground. RP 234. The gunshots were coming from two different locations and from the area of the two males. RP 235. An officer estimated Mr. Stromberg's car was ten to fifteen yards in front of the store when the suspects were shooting. RP 345-46.

Division Three of the Court of Appeals affirmed the first degree assault convictions, but reversed the drive-by shooting convictions for insufficiency of the evidence.

³ The bullets hit the left car window, the door, and they went through a tire which ultimately struck the car engine, disabling it. RP 237.

V. ARGUMENT

A. A BASIS EXISTS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW UNDER RAP 13.4(B)(2), REGARDING THE CONFLICT BETWEEN DIVISION ONE AND DIVISION THREE OF THE COURT OF APPEALS AS TO WHETHER RCW 9.94A.515 AND RCW 9.94A.589(1)(B) ARE AMBIGUOUS AS TO HOW AN OFFENDER SCORE IS CALCULATED WHEN THE OFFENSES INCLUDE A SERIOUS VIOLENT ANTICIPATORY OFFENSE AND A COMPLETED SERIOUS VIOLENT OFFENSE.

In *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012), the trial court imposed a sentence under RCW 9.94A.589(1)(b)⁴ where the defendant was convicted of two serious violent offenses with the same seriousness level, first degree rape and attempted first degree rape. *Breaux*, 167 Wn. App. at 168. The trial court calculated the offender score using the completed crime of first degree rape, and scored the attempted first

⁴ RCW 9.94A.589(1)(b) provides:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

degree rape as “0.” *Id.* Division One of the Court of Appeals reversed the trial court, holding:

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 0 scoring rule applies to his first degree rape conviction as this will yield a shorter sentence.

Id. at 168.

In the present case, Division Three, in the published portion of their opinion, reached a contrary conclusion. In so ruling, the court stated:

Here, as in *Breaux*, one of the serious violent offenses being sentenced is an anticipatory offense—in this case, it is the charge of conspiracy to commit first degree assault; in *Breaux* the charge was attempted first degree rape. RCW 9.94A.515, which identifies crimes included within each seriousness level, does not include anticipatory crimes within *any* seriousness level. A different statute, RCW 9.94A.595 provides that 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 percent.

Mr. Weatherwax and Mr. Rodgers argue that if we treat the anticipatory crime of conspiracy to commit first degree assault *as if* it has a seriousness level of 12 under RCW 9.94A.515—the seriousness level for first degree assault—then neither it nor the first degree assault count will have the “highest” seriousness level under that statute because their seriousness levels will be the same. Since the standard sentence range for conspiracy is reduced by multiplying it by 75 percent, however, the offender derives a substantial benefit if the offense sentenced using the full

offender score is the anticipatory offense. Mr. Weatherwax and Mr. Rodgers argue the rule of lenity requires us to construe the statute to give them that benefit. If we do, then we will have created the only situation in which RCW 9.94A.589(1)(b) does not require the full offender score to be used where it will maximize the sentence. No reason is offered as to why the legislature would have intended such a result.

Weatherwax, at *3 (internal citation omitted).

Ultimately, the court held:

... [l]imiting the choice of “the offense with the highest seriousness level under RCW 9.94A.515[] to those that actually *have* a seriousness level under that statute, ensures that the full offender score is used where it will maximize the sentence. It avoids an anomalous exception for anticipatory offenses.

For these reasons, we respectfully disagree with the result in *Breaux* and affirm the trial court's application of RCW 9.94A.589(1)(b).

Weatherwax, at *4.

Because “the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals,” a basis exists for this Court to grant discretionary review. RAP 13.4(b)(2).

B. THE APPELLANT WEATHERWAX HAS NOT MET THE CRITERIA UNDER RAP 13.4(b)(3) FOR REVIEW OF THE SUFFICIENCY OF EVIDENCE REGARDING HIS CONVICTIONS FOR FIRST DEGREE ASSAULT.

Appellant Weatherwax seeks discretionary review regarding his first degree assault convictions pursuant to RAP 13.4(b)(3). Pet. for Rev. at 10-12. Mr. Weatherwax does not specifically identify which first degree

assault conviction he seeks review on. However, he does reference the assault regarding Mr. Bercier and the sufficiency of the evidence regarding that conviction.⁵

In ruling on a motion for discretionary review, this Court applies the considerations set forth in RAP 13.4(b). Review will be accepted by this Court only if a petition meets at least one of the four considerations, including a significant question of law under the Constitution of the State of Washington or of the United States, or involving an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3).

Mr. Weatherwax urges this Court to accept review pursuant to RAP 13.4(b)(3) because “[n]o reasonable juror could have found that there was an intent to assault Mr. Bercier under the facts and circumstances of this case.” Pet. for Rev. at 12.

The law on the standard of review and legal principles associated with a challenge to the sufficiency of the evidence are well-settled. When considering a challenge to the sufficiency of the State's evidence, this court determines, 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. *See, State v. Condon*,

⁵ Accordingly, Mr. Weatherwax's two additional first degree assault convictions will not be addressed.

182 Wn.2d 307, 314, 343 P.3d 357 (2015); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

On direct review, the defendant challenged the sufficiency of the evidence regarding the conviction involving victim Leroy Bercier, arguing that Mr. Bercier was not near the shots fired. Division Three rejected this argument finding:

Some evidence suggests Mr. Weatherwax could not have been attempting to inflict injury upon Mr. Bercier, because he likely saw that Mr. Bercier had taken cover in the store, and he did not shoot into the store. Given all that occurred, a reasonable fact finder could still conclude Mr. Weatherwax intended to put Mr. Bercier in apprehension of harm, however.

Weatherwax, at *10.

The defendant has not provided any authority or argument as to why this Court should grant review under RAP 13.4(b)(3) regarding his sufficiency of the evidence claim. He sets forth the same argument previously provided to the jury, and again to court of appeals. This Court should deny review on this issue.

VI. CONCLUSION

There is a basis under RAP 13.4(b)(2) for this Court to grant review regarding the conflict between Division One and Division Three regarding the sentencing issue. With respect to the sufficiency of the evidence argument regarding the first degree assault convictions, Respondent

requests this Court deny review as the appellant Weatherwax's argument does not meet the criteria under RAP 13.4(b)(3) for review.

Respectfully submitted this 24 day of June 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE WEATHERWAX,

Appellant,

NO. 93192-5

COA 32708-6 (consolidated with 32760-4)

CERTIFICATE OF MAILING

STATE OF WASHINGTON,

Respondent,

v.

JAYME LEE RODGERS,

Appellant,

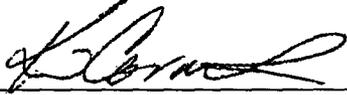
I certify under penalty of perjury under the laws of the State of Washington, that on June 24, 2016, I e-mailed a copy of the Answer to Defendants' Petitions for Review in this matter, pursuant to the parties' agreement, to:

Dennis W. Morgan
nodb1spk@rcabletv.com

Susan Marie Gasch
gaschlaw@msn.com

6/24/2016
(Date)

Spokane, WA
(Place)


(Signature)

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, June 24, 2016 9:58 AM
To: 'Cornelius, Kimberly A.'
Cc: Gasch Law Office; Dennis Morgan
Subject: RE: S.Ct No. 931925 - State v. Weatherwax (consolidated with State v. Rodgers)

Received 6/24/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:
http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:
http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:
<http://dw.courts.wa.gov/>

-----Original Message-----

From: Cornelius, Kimberly A. [mailto:KCORNELIUS@spokanecounty.org]
Sent: Friday, June 24, 2016 9:37 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Gasch Law Office <gaschlaw@msn.com>; Dennis Morgan <nodblspk@rcabletv.com>
Subject: S.Ct No. 931925 - State v. Weatherwax (consolidated with State v. Rodgers)

Attached for filing, please find the State's Answer to Defendants' Petitions for Review in the above consolidated case.

Kim Cornelius
Spokane County Prosecutor's Office
scpaappeals@spokanecounty.org
(509) 477-2873

Confidential & Privileged Legal/Personnel Materials - PLEASE NOTE: This e-mail, its contents and attachments are confidential and privileged. If you are not an intended recipient, promptly notify sender that you received this e-mail in error and destroy all copies. You are not to print, copy, forward or use this e-mail or its contents