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STATE OF WASHINGTON
BY _____

COURT OF APPEALS, DIVISION II

JERRY

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STATE OF WASHINGTON,

Respondent

vs.

ANCIL G. JONES, III,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Richard D. Hicks, Judge

Cause No. 06-1-02265-7

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Jones's convictions for assault in the second degree and conspiracy to commit robbery in the first degree? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

1. Procedure

Ancil G. Jones, III, (Jones) was charged by first amended information filed in Thurston County Superior Court with one count of assault in the second degree (Count I) and one count of conspiracy to commit robbery in the first degree (Count II). [CP 51]. Both charges included a sentence enhancement allegation that the crimes were committed while armed with a firearm. [CP 51]. The State also filed similar charges against Louis Fazio (Fazio) and Mary Yeldon (Yeldon), with the three being tried together as co-defendants at a joint trial.

No pretrial motions regarding CrR 3.5 and CrR 3.6 were made or heard. Prior to trial, the State notified the court that it would not be eliciting any statements in violation of Bruton and its progeny—any such statements had been properly redacted. [CP 11-50; 3-19-07 RP 9-11]. Jones, along with his co-defendants, was tried by a jury, the Honorable

Richard D. Hicks presiding. During trial near the close of the State's case, Yeldon, one of Jones's co-defendants, pleaded guilty. [3-22-07 RP 411-421]. Thereafter, Jones moved the court to exercise its discretion by excluding Yeldon as a witness given the fact that she had sat through the trial, which the court properly denied and granted a mid-trial continuance to allow Jones and his remaining co-defendant, Fazio, to interview Yeldon in anticipation of her testifying. [CP 52-63; 3-22-07 RP 422-423; 3-26-07 RP 4-17]. Jones had no objections and took no exceptions to the court's instructions. [CP 74-109; 3-27-07 RP 4-5]. The jury found Jones guilty as charged on both counts and entered special verdicts finding the sentence enhancement allegation. [CP 112, 113, 114, 115; 3-28-07 RP 9-13].

The court sentenced Jones to a standard range sentence of 84-months plus 36-months for the sentence enhancement (for a total of 120-months—the statutory maximum) on Count I, and to a concurrent standard range sentence of 57-months plus 36-months (for a total of 93-months) on Count II based on a stipulated offender score of seven for a total sentence of 120-months. [CP 121, 122, 123, 124, 125, 126-136; 4-6-07 RP 3-13].

A notice of appeal was timely filed on April 6, 2007. [CP 118].

This appeal follows.

2. Facts

On November 25, 2006 at approximately 5:14 AM, Thurston County Sheriff Deputy Lester Klene (Klene) was dispatched to the scene of a single car accident possibly involving a gun. [3-19-07 RP 35-36]. Upon arriving at the scene, Klene saw that the vehicle had been involved in a roll-over accident and the driver, Dean Hamlin (Hamlin), was wandering back and forth near the car scared and confused. [3—19-07 RP 36-37]. Hamlin had blood on his head and had been shot in the leg and was taken to St. Peter's Hospital. [3-19-07 RP 36-37]. Thurston County Detective Rodney Gray (Gray) processed the car for evidence and found a suitcase inside the car containing drugs. [3-19-07 RP 47, 65-66, 73-37; 3-20-07 RP 89-90].

Thurston County Detective Steve Hamilton (Hamilton) investigated the incident and first went to St. Peter's Hospital where he interviewed Hamlin. [3-20-07 RP 103-106]. Hamlin told Hamilton that he was in the car with two people (a woman named "Mary" and a man he described as muscular, short in stature with a shaved head). [3-20-07 RP 107-108]. When he was told to stop the car and didn't, he was slapped about the head with a firearm then shot and that he had deliberately crashed the car to stop the attack. [3-20-07 RP 107-108, 115].

Mary Yeldon (Yeldon) eventually contacted Hamilton regarding the incident telling him that Hamlin had been pressuring her for an intimate relationship and had offended her the night before the incident. [3-20-07 RP 117-123]. She got the help of some “associates” for protection, obtained a gun, and planned to rob Hamlin. [3-20-07 RP 117-124]. In telling Hamlin what transpired during the incident she said that Hamlin was only supposed to be robbed not hurt, but her protection freaked out. [3-20-07 RP 117-124].

Hamilton showed Hamlin a photo montage in an attempt to identify who had shot him. [3-20-07 RP 126-132, 181-183]. Hamlin picked photo number four, the photo of an initial suspect for the shooter. [3-20-07 RP 126-132]. After eliminating the initial suspect as the shooter, Hamlin was shown a second photo montage and again picked photo number four—Jones’s photo—as the person who had shot him. [3-20-07 RP 126-132].

Hamilton contacted Eric Skau (Skau) and obtained a .45 caliber gun from him that was suspected as the gun that shot Hamlin. [3-20-07 RP 136-137, 148-153]. Ballistics tests confirmed that the gun obtained from Skau could have been the gun that shot Hamlin—an exact match could not be made as only a bullet fragment had been recovered from Hamlin’s shooting. [3-20-07 RP 136-137, 148-153; 3-21-07 RP 299-312].

Hamilton also contacted Louis Fazio (Fazio), who told him that he had given some people a ride and had dropped the two of them off near the scene of Hamlin's shooting on the day in question. [3-20-07 RP 157-160, 164-165].

Hamlin, an admitted drug dealer testifying after being granted immunity for the drugs found in his car after the incident [3-20-07 RP 258-260; 3-21-07 RP 394-395], testified that he received a phone call from Yeldon on November 25, 2006, and set up a meeting where she could buy methamphetamine from him. [3-20-07 RP 235-238]. Hamlin drove to the meeting place and saw Yeldon get out of another car, approach his car, and get into the front passenger seat at the same time a stocky man with a shaved head got into the back seat of Hamlin's car. [3-20-07 RP 239-245]. Hamlin drove off and attempted to conduct the drug deal, but the man in the back hit him on the head with something metallic and told him to pull over. Hamlin kept driving, "I floored it," and gunshots started going off. [3-20-07 RP 239-245]. Hamlin and the man behind him began wrestling with the steering wheel when Hamlin felt a sharp pain in his leg. To stop the attack, Hamlin rolled the car crashing it. [3-20-07 RP 239-245]. After the crash, Yeldon and the man fled. [3-20-07 RP 239-245]. Hamlin recalled that after he was hit in the head someone demanded all his money. [3-20-07 RP 247]. Hamlin identified Yeldon in court and

identified Jones in court as the man who had attacked him. [3-20-07 RP 252-253].

Skau testified that on November 25, 2006, Yeldon, Jones, and Fazio came to his home. [3-21-07 RP 315-318]. Yeldon and Jones came into the house while Fazio waited outside. [3-21-07 RP 315-318]. Yeldon and Jones wanted to borrow his .45 caliber gun and at first he refused but eventually he let them borrow the gun, which was loaded, in exchange for some promised drugs. [3-21-07 RP 318-328]. He decided to go with the group. [3-21-07 RP 318-328]. Fazio, Yeldon, Jones, and Skau went to a gas station where Yeldon, Jones, and Fazio planned to meet and rob Yeldon's drug dealer of his drugs. [3-21-07 RP 318-328]. Eventually, someone arrived in an SUV and Yeldon and Jones (Jones had the gun) got into the car and drove off with Skau driving Fazio's car and Fazio following. [3-21-07 RP 328-334]. The SUV suddenly sped up, swerved and crashed. [3-21-07 RP 328-334]. Yeldon and Jones got out of the SUV, got into Fazio's car and Skau drove off. [3-21-07 RP 328-334]. After driving some distance away from the scene, Skau stopped Fazio's car, got his gun back from Jones—which was now empty, and left. [3-21-07 RP 328-334]. Skau admitted that he had pleaded guilty to the reduced charges of rendering criminal assistance and providing a firearm to an

ineligible person for his involvement in the incident. [3-21-07 RP 338-339].

Yeldon testified that she and Fazio had seen Hamlin on November 24, 2006, and that Hamlin had yelled at her over his belief that she had taken some of his drugs. [3-26-07 RP 33-35]. Yeldon was mad. [3-26-07 RP 34]. She and Fazio left. [3-26-07 RP 35]. Yeldon and Fazio went to a drug house in Roy where they met up with Jones. [3-26-07 RP 36-37]. Yeldon, because she was upset with Hamlin, decided to “go and take an ounce of dope from him [Hamlin],” but she needed help. [3-26-07 RP 37-39]. Yeldon’s plan involved her calling Hamlin to set up a drug deal, meet him for an ounce of dope, take the ounce of dope without paying and if Hamlin got “rowdy” Jones could have “roughed him up.” [3-26-07 RP 37-40]. The next day before executing the plan, Yeldon, Jones, and Fazio went to Skau’s home to get a gun; they obtained the gun from Skau who went with the three to meet Hamlin after being promised some drugs. [3-26-07 RP 40-47]. Hamlin arrived at the meeting place, Yeldon and Jones got into Hamlin’s car, Hamlin produced an ounce of dope then Jones pulled the gun out telling Hamlin to pull over and when Hamlin didn’t Jones attacked Hamlin including firing the gun. [3-26-07 RP 48-51]. The car crashed, Yeldon and Jones got out of Hamlin’s car and into Fazio’s car which Skau was driving and fled. [3-26-07 RP 51-52].

Angelique Pierce (Pierce), Jones's girlfriend and mother of his child, and Deana McClain (McClain), Pierce's roommate and friend, both testified that on November 25, 2006, Jones was at their home watching his and Pierce's child and that the couple had shared a bed that night. [3-26-07 RP 93-104, 107-111, 167-185]. Both women testified that they specifically recalled the date because Pierce had been gone on that night between 1 AM and 4 AM to get a friend's car that had been impounded after his arrest. [3-26-07 RP 93-104, 107-111, 167-185]. McClain testified that Jones did not leave the house while Pierce was gone and that Jones got up the next morning about 6:30 when his and Pierce's child woke up. [3-26-07 RP 93-104, 107-111, 167-185]. Pierce also provided a number of pictures taken just days after the incident where Hamlin was shot in which Jones does not have a shaved head. [3-26-07 RP 93-104, 107-111, 167-185].

Neither Jones nor his co-defendant, Fazio, testified.

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JONES WAS GUILTY OF ASSAULT IN THE SECOND DEGREE AND CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Jones was convicted of assault in the second degree (Count I) and conspiracy to commit robbery in the first degree (Count II). The State bore the burden of proving beyond a reasonable doubt that it was in fact Jones who committed these crimes. This is a burden the State cannot sustain as to either count.

The sum of the State’s evidence against Jones on both counts essentially turns on Hamlin’s identification of Jones, and Skau’s and Yeldon’s testimony regarding Jones’s involvement in the incident.

However, Hamlin is an admitted drug dealer who was given immunity in return for his testimony and initially picked someone other than Jones from a photo montage as the person involved, and both Skau and Yeldon were allowed to plead guilty to lesser charges in exchange for their testimony against Jones. Given the self interest evident with these favorable agreements, the testimony of the State's key witnesses against Jones cannot be deemed credible. Absent the testimony of these three witnesses, all that remains in evidence is a vague plan to rob Hamlin of his drugs and that Hamlin was attacked and shot, but not exactly who was involved in the plan or attack other than Yeldon (by her own admissions to Hamilton) and that her accomplice/co-conspirator was described as short and stocky with a shaved head. Based on photos provided by Pierce taken shortly after the incident where Hamlin was shot, the person described as Yeldon's accomplice/co-conspirator could not be Jones.

Moreover, the evidence elicited at trial establishes that Jones had an alibi for the night that Hamlin was shot. Jones was at the home of Pierce, his girlfriend and mother of his child, and McClain, Pierce's roommate and friend, watching his and Pierce's child on November 25, 2006, did not leave the home that night, and did not get up until the next morning well after the incident where Hamlin was shot. Given the totality of the evidence, the State failed to produce sufficient evidence proving

beyond a reasonable doubt that Jones was guilty of assault in the second degree (Count I) and conspiracy to commit robbery in the first degree (Count II). This court should reverse and dismiss these convictions.

E. CONCLUSION

Based on the above, Jones respectfully requests this court to reverse and dismiss his convictions.

DATED this 13th day of November 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of November 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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COURT OF APPEALS
DIVISION II

Signed at Tacoma, Washington this 13th day of November 2007.

Patricia A. Pethick
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