

NO. 39769-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA ELIAS BOYD,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
10 SEP -7 AM 8:47  
STATE OF WASHINGTON  
BY [Signature]

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James R. Orlando

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REPLY BRIEF OF APPELLANT

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P.M. 9-3-2010

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT BOYD OF ATTEMPTED MURDER IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT.

The State argues that credibility determinations are for the trier of fact and cannot be reviewed upon appeal, citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Brief of Respondent at 9. The State appears to confuse sufficiency of the evidence with witness credibility because clearly the sufficiency of the State's evidence can be reviewed on appeal which does not entail a determination of credibility. The State additionally cites State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985), arguing that great deference is to be given to the trial court's factual findings where it has the opportunity to view the witness' demeanor and judge his veracity. Brief of Respondent at 10. However, Cord has no application here because Boyd's case involved a jury trial and therefore the trial court did not make any factual findings.

The State argues more to the point that the jury could infer and conclude that Boyd intended to commit murder because he had a motive and procured a weapon. Brief of Respondent at 12-14. The State claims that a problem arose when Tasha's family went to bed and Boyd was told it was time to leave. Brief of Respondent at 12. To the contrary, Tasha

testified that the kids usually went to bed around 8 or 9 p.m. so that was the reason why it was time for Boyd to go. Tasha's mother and Billy went to sleep around 9 p.m. and Boyd left about 10 or 15 minutes later when the kids had gone to bed. When Tasha told Boyd it was time to leave, he left without any argument. RP 153-54. Although Tasha had called her mother into her room, it is evident that her mother would not have just gone back to bed if there was any indication of a problem with Boyd. RP 102, 167. Earlier that day, "everything seemed normal." RP 208. Despite the restraining order, Tasha allowed Boyd to visit the children and he came over two or three times between January and March 2009. RP 132-33. Boyd brought diapers, a booster seat, clothes, and shoes, and played with the kids. RP 149. Tasha acknowledged that she still had feelings for Boyd, explaining that "[h]e's my kids' dad." RP 148. Tasha's testimony reflects that she understood and supported Boyd's relationship with his children, and importantly, she never stated or implied that she placed limitations on his visitations. Consequently, the record belies the State's argument that the jury could infer that because Tasha controlled when Boyd could see his children, he had a motive to kill Tasha.

The State argues additionally that the jury could infer premeditation because Boyd procured a knife "during the hours between leaving Tasha's apartment and returning after midnight to kill her" and he

knew that her family would be asleep “so Tasha would be alone and he could murder her.” Brief of Respondent at 12-13. Fatal to the State’s farfetched argument is the fact that Tasha recognized Boyd’s knife:

Q. Do you know where he got the knife from that night?

A. Out of his pocket.

Q. Do you know which pocket it was in?

A. No, I don’t remember that.

Q. Was it after he put his coat on?

A. Yeah, he put his coat on.

Q. What kind of coat was he wearing?

A. A black -- black jacket. Wasn’t really puffy, just a black nylon jacket.

Q. **Had you ever seen that knife before?**

A. **Yeah.**

Q. **How many times had you seen it?**

A. **Oh, how many times -- I don’t know how many times. But I know he’s had that knife for a while.**

Q. I am going to show you what we have marked as Exhibit 34A. Just want you to look at this to yourself at this point. Do you recognize that --

A. Yes.

Q. -- that exhibit? Can you tell me what that is?

A. **That’s Josh’s knife.**

RP 140. (Emphasis added.)

Contrary to the State's assertion, the record substantiates that Boyd did not acquire the knife that night and it was not unusual that he was carrying his knife in his pocket.

Furthermore, Tasha was not "alone" because her mother, Billy, and the children were close by in the two-bedroom apartment. According to Tasha, Boyd returned to the apartment intoxicated and was "beating" and "pounding" on the door and window, being "[l]oud and boisterous." RP 136-37, 155-57. If Boyd had planned to murder Tasha as the State asserts, he would not have risked waking up everyone in the household as well as the neighbors by loudly beating and pounding on the door. Obviously, he was not acting surreptitiously by drawing attention to himself which dispels any inference of a plot to murder Tasha.

A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. State v. Defries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). It is evident from the record that when viewing the evidence and all reasonable inferences therefrom in the light most favorable to the State, the evidence was insufficient to prove that Boyd acted with the intent to murder Tasha where there was no evidence of motive, procurement of a weapon, or stealth. State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). At the very most, the record

reveals that Boyd was drunk and provoked when Tasha yelled at him “to get the fuck out of here,” and he stabbed her in the heat of the moment, which fails to establish attempted murder in the first degree. RP 138-39, 145.

Unjustifiably, the State originally charged Boyd with assault in the first degree then added the charge of attempted murder in the first degree based on the same alleged facts. CP 1-2, 10-11, 13-15. Reversal and dismissal is required because no rational trier of fact could have found all the elements of murder in the first degree beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. REMAND FOR RESENTENCING IS REQUIRED  
PURSUANT TO THE STATE SUPREME  
COURT’S RECENT DECISION IN STATE v.  
TURNER.

The Washington Supreme Court recently concluded in State v. Turner, WL 3259876 (Wash. Aug. 19, 2010), that a trial court “may violate double jeopardy *either* by reducing to judgment both the greater and the lesser of two convictions for the same offense *or* by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid.” Turner at 8. The Supreme Court held that although the lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant’s conviction

for a more serious offense based on the same act is subsequently overturned on appeal, “the lesser conviction, once vacated, and prior to reinstatement, is not a valid conviction.” Turner at 9.

In Guy Daniel Turner’s case, the trial court sentenced Turner on his first degree robbery conviction and issued a written order conditionally vacating his assault conviction. In Faulolua Faagata Jr.’s case, consolidated with Turner on appeal, the trial court sentenced Faagata on his first degree murder conviction and issued an oral ruling conditionally dismissing his felony murder conviction. This Court affirmed both trial courts. Turner at 1-2.

The Supreme Court reversed and remanded to the trial courts with directions to (i) enter a corrected judgment removing the conditional vacation order in Turner’s case and (ii) redact all references to any validity or import attributable to the vacated lesser conviction in Faagata’s case. The Court emphasized that “[i]n the future, the better practice will be for trial courts to refrain from any reference to the possible reinstatement of a vacated lesser conviction.” Turner at 9.

At sentencing here, the prosecutor presented an order conditionally vacating Boyd’s assault in the first degree conviction, stating that “[b]ecause the assault and the attempted murder counts are the same course of conduct, he would not be sentenced on both of those counts;

however, they are still both valid convictions.” RP 562. The trial court responded that it was “not sure” if the language in the order was appropriate, referring to the State Supreme Court’s decision in State v. Womac.<sup>1</sup> RP 563. The prosecutor was unfamiliar with Womac, so the court directed him to research the issue and “perhaps you can modify this order or present it at a later time.” RP 563-65, 572. The court did not sentence Boyd on the assault conviction and it did not vacate the conviction. CP 115-30. The record contains no subsequent order.

In accordance with the Supreme Court’s holding in Turner, remand is required for the trial court to enter an order vacating the assault in the first degree conviction and for a redaction of all references to the conviction, which as the Supreme Court concluded, is not a valid conviction once vacated and prior to reinstatement. To ensure that double jeopardy proscriptions are understood and carefully observed, it is important that the trial court is informed of, and complies with, the Supreme Court’s decision.

3. REMAND FOR RESENTENCING IS REQUIRED BECAUSE BOYD’S SENTENCE EXCEEDS THE STATUTORY MAXIMUM IN VIOLATION OF RCW 9.94A.701(8) RECODIFIED AS RCW 9.94A.701(9).<sup>2</sup>

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<sup>1</sup> State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

<sup>2</sup> Effective June 10, 2010, RCW 9.94A.701(8) is recodified as RCW 9.94A.701(9). Laws of 2010, ch. 224, section 5.

The State contends that remand is required to “add the appropriate language” to the judgment and sentence that “the total term of incarceration and community custody cannot exceed the maximum,” citing In re Brooks, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009). Brief of Respondent at 17-18. However, the judgment and sentence already contains the provision that “under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.” CP 125.

In any event, the State misapprehends the State Supreme Court’s holding in Brooks. Citing RCW 9.94A.715, the Court in Brooks observed that while a sentencing court is required to impose a determinate sentence that does not exceed the statutory maximum, the community custody provisions of the SRA make it impossible to determine with any certainty how much community custody a defendant will actually be required to serve until well after the court imposes the sentence. 166 Wn.2d at 671-72. The Court noted that under RCW 9.94A.715(4), the Department of Corrections determines when an offender will be discharged from community custody and where the term of community custody is imposed as a statutory range, the DOC will release the offender on a date it establishes that is within that range or at the end of the period of earned early release. Id. However, the Court pointed out that the legislature has

repealed RCW 9.94A.715, effective August 1, 2009, and amended RCW 9.94A.701(8) as follows:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

116 Wn.2d at 672 (emphasis added).

Recognizing the “upcoming changes,” the Court concluded that while the trial courts await the amendment to take effect, it must direct the DOC to ensure that whatever release dates it sets, under no circumstances may the offender serve more than the statutory maximum. Id. at 672-73. As anticipated by the Court in Brooks, since the amendment has taken effect, the trial court must reduce Boyd's term of community custody because the term of his confinement in combination with his term of community custody exceeds the statutory maximum. In light of the legislative amendment, it is no longer sufficient for the trial court to simply state in the judgment and sentence that “the total term of confinement and community custody shall not exceed the statutory maximum.”

Generally, statutes are presumed to apply prospectively, unless there is some legislative indication to the contrary. Macumber v. Shafer,

96 Wn.2d 568, 570, 637 P.2d 645 (1981). Here, the legislature explicitly stated that the statute applies retroactively as well as prospectively:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

LAWS of 2009, ch. 375, section 20.

The statute therefore applies to Boyd because he is currently incarcerated with a term of community custody.

Accordingly, Boyd's sentence must be amended to reduce the term of community custody so as to ensure that he does not serve a sentence beyond the statutory maximum.

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse and dismiss Mr. Boyd's first degree attempted murder conviction and remand for resentencing.

DATED this 3<sup>rd</sup> day of September, 2010.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Joshua Elias Boyd

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3<sup>rd</sup> day of September, 2010 in Kent, Washington.

  
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