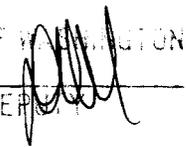


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPARTMENT

No. 41432-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

Vs.

JASON TIMOTHY WEISS

Appellant,

On Appeal from the Pierce County Superior Court
Cause No. 10-1-00362-4
The Honorable Vicki Hogan, Judge

STATEMENT OF ADDITIONAL GROUNDS OF APPELLANT

JASON TIMOTHY WEISS
Appellant

Coyote Ridge Corrections Center (#329072 / BB15)
P.O. Box 769
Connell, Wa 99326

The purpose and scope of this document is to outline mistakes of law presented in the trial of State v. Jason Timothy Weiss, cause number 10-1-00362-4, and appeal number 41432-5-II. This document has been prepared by the appellant, Jason T. Weiss.

The Jason Weiss was arrested on January 23, 2010, in Pierce County, Tacoma, Washington. Weiss was charged with assault in the first degree with a deadly weapon (RCW 9A.36.011); assault in the third degree (RCW 9A.36.031); attempt to elude a pursuing police vehicle (RCW 46.61.024); reckless endangerment (RCW 9A.36.050), and driving while license suspended in the second degree. (CP 9-11) The state also proposed two sentence aggravators; one to the charge of assault in the first degree stating that the assault was committed against a law enforcement officer performing his official duties (RCW 9.94A.535 (3) (v)); the second aggravator was added to the remaining charges stating that the alleged crimes were committed shortly after being released from incarceration (RCW 9.94A.535 (3) (t)). (CP 9-11)

Weiss requested to represent himself at trial and was granted permission. (RP 11-19, 29-31) The jury found Weiss guilty of Assault in the second degree rather than assault in the first degree and that the assault was committed against a law enforcement officer performing his official duties (RP 566-567), assault in the third degree, attempted elude, reckless endangerment. Prior to the jury hearing state's evidence in support of "rapid recidivism" aggravator, Weiss moved the court to dismiss the aggravator and the trial court agreed that the aggravator did not apply under the circumstances of this case. (RP 573, 582, 587-88) The trial court sentenced Weiss to 60 months total confinement which was above the standard range, due to the law enforcement aggravator. (RP 609)

ASSIGNMENTS OF ERROR

1. The state failed to prove the absence of self-defense and failed to provide self-defense instruction to the jury.
2. The state failed to dismiss the cause due to destruction of evidence and prosecutorial misconduct.
3. The state failed to prove every element of the crime of assault in the second degree.
 - a. The state failed to prove the vehicle was used as a deadly weapon.
 - b. The state failed to prove beyond a reasonable doubt, Weiss possessed the intent to assault either officer in this case.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Weiss provided the court with a motion to assert self-defense in this case due to the actions of the arresting officers in this case and was denied by the court. During trial, stand-by counsel reiterated this request and Weiss was again denied. (RP 465-466)

State v. Takacs, 35 Wn. App. 914, 671 P.2d 163 (1983), once the issue of self-defense is properly raised in a second degree assault prosecution; the state has the burden of proving the absence of self-defense beyond a reasonable doubt.

2. Weiss brought forth a motion to dismiss pursuant to CrR 8.3 (b/c). The motion was for destruction of evidence and outlined the defendant's need for the availability of the vehicle to allow the defense to prove its case. (RP 64) Weiss made it be known to the court that he was unaware of the destruction of the vehicle, aka the "deadly weapon" until he received discovery on June 10, 2010. (RP 73) The vehicle was destroyed on January 23, 2010 and was therefore unavailable for the defendant's private investigator to take measurements and photographs to prove the vehicles admissibility as materially exculpatory evidence. The judge denied the defendant's motion to dismiss. (RP 70-71)

3. The state failed to prove the vehicle used in the case was to be considered a deadly weapon. The vehicle was used to flee the scene of the initial traffic stop and was never proven to be used as a "deadly weapon" in this case State v. Shilling, 77 Wn. App. 166, 889 P.2d 948 (1995), this case requires case-specific proof of the object's inherent capacity and the circumstances in which it is used. The officer's testimony stated that his only injury was on his right elbow and was, "like a rug-burn, or something from the interior from the seat itself, and that's where my elbow was riding." (RP 207) The officer admitted he was not drug by the defendant's vehicle. He was asked if he was ever drug by the vehicle and he stated, "No, because I was running next to the car." (RP 232) In fact he admitted that his only injury which was sustained on his right elbow was, "Due to my elbow being placed on the seat, the driver's seat." (RP 236)

In fact the state in closing arguments stated, "But he is dead set on getting away, no matter how unsafe or what the situation is. He is going to do whatever it takes, and that is his intent." (RP 484) If Weiss' intent was to flee the scene it is quite obvious that his intent was not to assault to officers. The officers admitted to attempting to drag the defendant out his driver's side window using force. (RP 147, 168, 200) The prosecution is outlining the defendant's intent in this statement. Prosecution does not state that the defendant's intent was to create fear in either officer, does not state that his intent was to assault either officer, nor does it state that the defendant's intent was to do anything but to flee the scene. State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995), specific intent either to create apprehension of bodily injury or to cause bodily harm is an essential element of assault in the second degree. The state again in closing arguments states, "basically what the state submits here is that the defendant assaulted Officer Barry by putting his hands on him, going for his neck, going for his uniform, repeatedly trying to either get control of Officer Barry or get Officer Barry out of the vehicle so he can presumably flee." (RP 481) The state is again reiterating the presumptive intent of the defendant could be to flee. The state failed to prove the actual intent to commit assault, the state failed to prove every element of assault in the second degree and therefore the charge of assault in the second degree and its corresponding sentence aggravator should be reversed and dismissed.

STATE OF WASHINGTON
DEPARTMENT OF JUSTICE

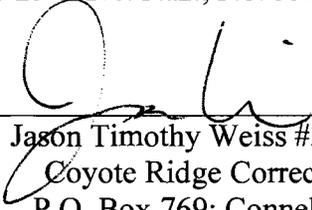
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CERTIFICATE OF MAILING

I certify that on 05/12/2011, I caused to be placed in the mails of the United States, postage pre-paid, a copy of this document, addressed to: (1) David C. Ponzoha Court of Appeals, Division II; 950 Broadway, Suite 300; Tacoma, WA 98402; and (2) Stephanie C. Cunningham 4616 25th Ave. N.E.; No. 552; Seattle, Wa 98105

STATE OF WASHINGTON

BY _____
DEPUTY



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