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COA NO. 67816-7-I

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

CITY OF SEATTLE,

Respondent,

v.

WAYNE EVANS,

Appellant.

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

The Honorable Patrick Oishi, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE SEATTLE ORDINANCE PROHIBITING CITIZENS FROM CARRYING KNIVES FOR THE PURPOSE OF SELF-DEFENSE VIOLATES THE CONSTITUTIONAL RIGHT TO BEAR ARMS.

a. The Right To Bear Arms Includes The Right To Bear Knives In Self-Defense Under The Federal And State Constitutions.

The City does not challenge Evans's argument that fixed blade knives, including the knife carried by Evans, qualify as "arms" under the Second Amendment and article I, section 24. Evans presents no further argument on this issue because the City has conceded it. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (on appeal, State conceded legal argument by failing to respond to it); see also Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984) ("It is not the function of . . . appellate courts to do counsel's thinking and briefing.").

b. The Seattle Ordinance Criminalizing The Carrying Of Fixed-Blade Knives Violated Evans's Second Amendment Right To Bear Arms.

The City contends SMC 12A.14.080(B) is constitutional under the Second Amendment because it survives intermediate scrutiny. Brief of Respondent (BOR) at 11-15. As set forth in his opening brief, Evans maintains the appropriate test requires assessment of the burden imposed on those seeking to exercise the right to bear arms in light of the original

and traditional meaning of the right. See Amended Brief of Appellant (BOA) at 21-25 (citing State v. Sieyes, 168 Wn.2d 276, 295, 225 P.3d 995 (2010)).

The Washington Supreme Court in State v. Jorgenson signaled such an analysis is avoided where a "presumptively constitutional" regulation identified by Heller[1] lacks affirmative historical support. State v. Jorgenson, __Wn.2d__, __P.3d__, 2013 WL 6115026 at *6 (slip op. filed Nov. 21, 2013). Evans's case, however, does not involve "presumptively constitutional" legislation.

The Heller Court identified "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms" as examples of "presumptively lawful regulatory measures" controlling ownership of firearms. District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

There is nothing presumptively constitutional about the Seattle knife ordinance at issue here. SMC 12A.14.080(B) is not limited to felons

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[1] District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

or those that have otherwise shown themselves to be untrustworthy of safely handling weapons through criminal action. SMC 12A.14.080(B) is not limited to the mentally ill. SMC 12A.14.080(B) is not limited to "sensitive" areas such as a school or government building. Evans, for his part, is not a felon. Nothing in the record shows he has any criminal history involving unlawful use of weapons. And he did not carry his knife into a "sensitive" area, such as a park. See Warden v. Nickels, 697 F.Supp.2d 1221, 1229 (W.D. Wash. 2010) (upholding ban on firearms in public park because it is a "sensitive area" where children and youth recreate). Evans had the knife on his person while he drove his car. 1RP 128-31, 136-37. He carried his knife for the purpose of self-protection. 1RP 147; see Heller, 554 U.S. at 630, 635 (the Second Amendment protects an individual right to keep and bear arms "for the core lawful purpose of self-defense," at least as to "law-abiding, responsible citizens.").

Because the knife ordinance at issue here cannot be considered presumptively constitutional, it is necessary to look to the nature and extent of the burden imposed on the right to bear arms by the ordinance. The City does not address the constitutionality of the Seattle ordinance on those terms. Evans's opening brief does. BOA at 21-25.

If a level of scrutiny is to be applied, strict scrutiny is the appropriate standard because the fundamental constitutional right to bear arms in self-defense is at stake. See BOA at 25-31.

Jorgenson is instructive in this respect as well. Jorgenson addressed an as applied challenge to the constitutionality of RCW 9.41.040(2)(a)(iv), which proscribes the ownership, possession, or control of any firearm by a person who is "free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010." Jorgenson, 2013 WL 6115026 at *1. The State charged Jorgensen with first degree assault. Id. The trial judge released Jorgenson on bond after finding probable cause to believe the State's allegation that he shot someone. Id. While released on bond, Jorgenson was found with two guns in his car by police officers investigating the discharge of a firearm. Id. Jorgenson was subsequently convicted of violating RCW 9.41.040(2)(a)(iv). Id.

The Court in Jorgenson decided intermediate scrutiny was appropriate to evaluate the constitutionality of RCW 9.41.040(2)(a)(iv) because, unlike the handgun prohibition in Heller, which applied to everyone in the jurisdiction, the statute bans only persons who have been charged with any of an enumerated list of "serious offenses." Id. at *7. Further, the statute is limited in duration, "affecting a person only while on

bond or personal recognizance." Id. The ban is also narrow because it "applies to persons charged with only a subset of serious crimes." Id.

Unlike the firearm restriction at issue in Jorgenson, the Seattle ordinance applies to everyone in the jurisdiction, i.e., the Seattle city limits. SMC 12A.14.080(B). Further, the Seattle ordinance is not temporary. In light of Jorgenson, these factors counsel in favor of strict rather than intermediate scrutiny.

A number of courts have used intermediate scrutiny for laws that involve persons who have already demonstrated themselves to be more likely than most to misuse a firearm or have a criminal history. See, e.g., United States v. Chovan, __F.3d__, 2013 WL 6050914 at *1, 12 (9th Cir. 2013) (upholding federal statute prohibiting persons convicted of domestic violence misdemeanors from possessing firearms under intermediate scrutiny); Schrader v. Holder, 704 F.3d 980, 989-91 (D.C. Cir. 2013) (upholding ban on firearm possession for those convicted of misdemeanors under intermediate scrutiny), cert. denied, 134 S. Ct. 512 (2013).

The Seattle ordinance, on the other hand, applies to everyone, including those with no history of handling a weapon unsafely. This is a reason why intermediate scrutiny should not apply to Evans's case.

But assuming intermediate scrutiny is appropriate, the Seattle ordinance is still unconstitutional. A law survives intermediate scrutiny only "if it is substantially related to an important government purpose." Jorgenson, 2013 WL 6115026 at *8. The state's objective must be legitimate and important, and a direct, substantial relationship between objective and means must be present. Heckler v. Mathews, 465 U.S. 728, 744-45, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984).

Again, Jorgenson is instructive. In that case, the Court recognized RCW 9.41.040(2)(a)(iv) substantially relates to the state's important interest in restricting potentially dangerous persons from using firearm "because it forbids only persons charged with specific serious offenses from possessing firearms, and only while released on bond or personal recognizance." Jorgenson, 2013 WL 6115026 at *8. The legislature's attempt to keep guns from potentially dangerous persons while released on bail was justified as applied to Jorgenson because, while released on bond after a judge had found probable cause to believe Jorgensen had shot someone, Jorgenson was found with two guns in his car by police officers investigating the discharge of a firearm. Id.

The Court acknowledged RCW 9.41.040(2)(a)(iv) "substantially impedes a person from exercising the right to self-defense," but deemed some categorical disqualifications to be permissible when applied to

persons who have been shown to be untrustworthy with weapons. Id. The Court thus held "as applied here, the temporary restriction on Jorgenson's right to bear arms after a trial court judge found probable cause to believe he had shot someone does not violate the Second Amendment." Id.

The holding in Jorgenson is carefully limited, but the factors considered by the Court in upholding the constitutionality of RCW 9.41.040(2)(a)(iv) lead to a different result when applied to the Seattle ordinance at issue in Evans's case.

First, Seattle's ban on the carrying of fixed blade knives for the purpose of self-defense is not temporary. It is permanent. There is no temporal limitation in SMC 12A.14.080(B).

Second, unlike Evans's case, Jorgenson did not involve a self-defense issue as applied to the facts of the case. See Jorgenson, 2013 WL 6115026 at *1 ("Jorgenson was not at home at the time, nor is there any evidence that he was defending himself."). Evans brings an as applied challenge to SMC 12A.14.080(B). The unrebutted evidence in this record is that Evans carried the knife for the purpose of self-protection after being attacked — the purpose for bearing an arm that lies at the heart of the Second Amendment. 1RP 147.

Third, there is no indication in this record that Evans has shown himself to be untrustworthy with knives or any other weapon. There is a

lack of substantial nexus between the City's interest in the knife ban as applied to Evans's conduct. See City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) ("An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional.").

In opposition, the City points to cases rejecting the notion that there is a constitutional right to carry concealed arms in public and contends Evans simply argues that he has a constitutional right to carry a concealed fixed-blade knife in public. BOR at 4, 19.

Evans's argument, however, does not rise or fall solely on whether there is a constitutional right to carry a concealed knife or other weapon in public because it is not established in this case that Evans was convicted of carrying a concealed "dangerous knife" or other deadly weapon.

Seattle makes it unlawful for a person to carry "dangerous knives," whether concealed or unconcealed, and to carry a concealed "deadly weapon" other than a firearm. SMC 12A.14.080B. The City charged Evans with violating SMC 12A.14.080(B) through alternative means, one of which is based on carrying an unconcealed knife. CP 88. The jury was instructed on both the concealed and unconcealed means of committing the crime but did not return a special verdict specifying under which

means it convicted. CP 71, 81. It was a question of fact for the jury to decide whether Evans's carrying of a knife while driving in his car and then stepping out of his car with the knife in his pocket when confronted by police amounts to concealment.

To the extent concealment is relevant to the constitutional analysis, it cannot be used to defeat Evans's as applied challenge because the jury may have convicted Evans of carrying an unconcealed knife. See Stromberg v. California, 283 U.S. 359, 367-68, 51 S. Ct. 532, 75 L. Ed. 1117 (1931) (if the jury has been instructed to consider more than one ground for conviction, one of which proves to be unconstitutional, and returns a general verdict, the verdict must be set aside because it is impossible to determine the jury rested its verdict on the constitutional ground); accord Griffin v. United States, 502 U.S. 46, 53-55, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991).

The City cites People v. Mitchell, which rejected a constitutional challenge to a California statute that prohibited the carrying of a concealed dirk or dagger. People v. Mitchell, 209 Cal. App. 4th 1364, 1368-69, 148 Cal. Rptr. 3d 33 (Cal. Ct. App. 2012), review denied (Jan 23, 2013). The outcome in Mitchell primarily turned on the idea that the state has an important interest in preventing surprise attacks against citizens in public

when a concealed weapon is involved. Mitchell, 209 Cal. App. 4th at 1371, 1375-76, 1378.

Evans's constitutional challenge cannot be turned away on that ground because, as explained above, it is impossible to determine if the jury convicted him of carrying a concealed knife as opposed to an unconcealed one.

Even Mitchell recognized the statute at issue there only banned concealed daggers or dirks while allowing their unconcealed counterparts to be used for the purpose of self-defense. Mitchell, 209 Cal. App. 4th at 1375. The Seattle ordinance, however, criminalizes the unconcealed carrying of a dangerous knife when carried for the purpose of self-defense, there being no exception for it. SMC 12A.14.080(B); SMC 12A.14.100.

Evans stands by the argument made in his opening brief that the right to bear arms includes the right to carry a weapon outside the home for the purpose of self-defense. BOA at 15-19. The reasoning of Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) is sound.

c. The Seattle Ordinance Criminalizing The Carrying Of Fixed-Blade Knives Violated Evans's Right To Bear Arms Under The Washington Constitution.

The Washington Supreme Court in Jorgenson determined the state and federal rights to bear arms have different contours and mandate separate interpretation. Jorgenson, 2013 WL 6115026 at *2, 4. According

to Jorgenson, the firearm rights guaranteed by the Washington Constitution are subject to reasonable regulation pursuant to the State's police power and Heller and McDonald[2] left this police power "largely intact." Jorgenson, 2013 WL 6115026 at *4. The Court in Jorgenson retained the balancing of interest approach, under which the public benefit from the regulation is balanced against the degree to which it frustrates the purpose of the constitutional provision. Jorgenson, 2013 WL 6115026 at *4-5.

Evans does not understand how an interest balancing approach can legitimately be retained when the United States Supreme Court has rejected that approach as incompatible with the Second Amendment because it devalues the right to bear arms. Heller, 554 U.S. at 634-36. It is well recognized that the federal constitution sets a minimum floor of protection, below which state law may not go. Orion Corp. v. State, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987). Evans understands the Court of Appeals is powerless to disagree with the Washington Supreme Court's decision in Jorgenson on this point, but takes this opportunity to make it clear that he does not agree with it.

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[2] McDonald v. City of Chicago, __U.S. __, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

In any event, the City contends City of Seattle v. Montana, 129 Wn.2d 583, 919 P.2d 1218 (1996) controls the question of whether the ordinance is unconstitutional. BOR at 19. It does not. Montana is a plurality decision. Only four justices agreed that the Seattle ordinance is a reasonable regulation on the right to bear arms. Montana, 129 Wn.2d at 596 (Talmadge, J., lead opinion). Five justices in two separate opinions concurred in the result on the basis that the knives in question were not "arms" for the purposes of article I, section 24 without reaching the issue of whether the ordinance would be a reasonable regulation if the knives did qualify as "arms." Id. at 599-601 (Alexander, J. concurring, Durham, C.J., concurring).

"A plurality opinion has limited precedential value and is not binding on the courts." In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). The lead opinion in Montana is not binding precedent. The City, meanwhile, does not challenge Evans's argument that, in light of Heller, knives qualify as "arms" for the purpose of the Second Amendment and that article I, section 24 cannot provide lesser protection that the federal constitution in this regard. See Sieyes, 168 Wn.2d at 292 ("Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights."). Aside from the Second Amendment argument,

it is still an open question whether the Seattle knife ordinance passes constitutional muster under article I, section 24 as a reasonable regulation.

Although not explicitly spelled out, the lead opinion in Montana treated the challenge to the Seattle ordinance as a facial challenge in proclaiming "[i]t is presumed that the legislation was passed *with respect to any state of facts* which could be reasonably conceived to warrant the legislation." Montana, 129 Wn.2d at 592 (emphasis added). The lead opinion could thus conceive of knife wielding individuals disposed to brawls and quarrels as the proper subject of the Seattle ordinance. Id.

Under an as applied challenge, however, the reviewing court determines whether the challenged legislation is unconstitutional as applied to the facts of the case. State v. Carver, 113 Wn.2d 591, 599, 781 P.2d 1308, 789 P.2d 306 (1989). The facts of this case do not show Evans is disposed to brawls or quarrels. Nothing in the record shows Evans has a history of improperly using weapons or that he is not a law-abiding individual.

In applying its "reasonable regulation" standard, the Court in Jorgenson deferred to the legislature's finding that certain crimes justify "limited restriction" of firearms under RCW 9.41.040(2)(a)(iv). That restriction was reasonably necessary and did not violate article I, section

24 as applied to Jorgenson because the trial court found probable cause to believe Jorgenson had shot someone. Jorgenson, 2013 WL 6115026 at *5.

Unlike in Jorgenson, Evans has not shown himself to use weapons for a criminal purpose. The Seattle ordinance might be constitutional if it were limited to such offenders. But it is not. It applies to everyone, including the law abiding.

The Court noted Jorgenson possessed the firearms while driving, rather than in the home, where the need for defense is most acute. Jorgenson, 2013 WL 6115026 at *5. The Court did not, however, hold that every law restricting arms will be a reasonable regulation if it restricts the carrying of arms for the purpose of self-defense outside the home. The question did not present itself in Jorgenson. It presents itself here.

The City notes "[p]eople have a strong interest in being able to use public areas without fearing for their lives." BOR at 13 (quoting State v. Spencer, 75 Wn. App. 118, 876 P.2d 939 (1994), review denied, 125 Wn.2d 1015, 890 P.2d 20 (1995)). People also have a strong interest in being able to arm themselves for self-protection in the event of attack while in a public area.

The lead opinion in Montana concluded "[t]he exemptions to the ordinance are adequate to narrow its application to situations where it is reasonable to presume that a person with a dangerous knife in public is

carrying such a knife for a mischievous purpose." Montana, 129 Wn.2d at 599. That conclusion is untenable in light of the express right to bear arms for the purpose of self-defense under article I, section 24. The need for self-defense arises outside of the home as well as inside the home. Carrying a dangerous knife for the purpose of protecting one's self from being attacked in public is not a mischievous purpose. It is a purpose enshrined in the constitution as worthy of protection.

B. CONCLUSION

For the reasons set forth, Evans requests reversal of the conviction and dismissal of the charge with prejudice.

DATED this 10th day of December 2013

Respectfully Submitted,

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

CITY OF SEATTLE,	)	
Respondent,	)	
v.	)	COA NO. 67816-7-I
WAYNE EVANS,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WAYNE EVANS
17010 12TH AVE CTE E
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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF DECEMBER, 2013.

X Patrick Mayovsky