

63327-9

63327-9

NO. 63327-9-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAROEUN PHAI,

Appellant.

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

APPELLANT'S OPENING BRIEF

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DIVISION ONE
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A. SUMMARY OF ARGUMENT.

The prosecution charged Saroeun Phai with two counts of aggravated first degree murder, mandating a sentence of life without the possibility of parole, based on two aggravating circumstances: that the killing occurred during a robbery in the second degree; and that there was more than one victim and the killings were either a common scheme or plan or a single act causing multiple deaths.

Despite alleging the “robbery” aggravator, there was no evidence Phai took property during the incident which is an essential element of robbery. Even though the prosecution sought a “common scheme or single act” aggravator, there was insufficient evidence of a single act and the jury was not instructed that it must be unanimous in agreeing that the common scheme applied. Additionally, the court failed to explain the essential elements of this aggravating factor to the jury.

Furthermore, while the court acknowledged it could not impose sentences on Phai for the alternatively charged offenses of first degree felony murder based on the same incident, the court listed all four offenses in the Judgment and Sentence and warrant

of commitment rather than vacating the offenses as required by principles of double jeopardy.

B. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove the alleged aggravating circumstance that a killing occurred in the course of a robbery, which is an essential element of aggravated first degree murder as charged and required by the state and federal constitutional requirements of due process of law.

2. The prosecution did not prove all alleged means of the aggravating circumstance of multiple victims and either a common scheme or a single act caused the deaths as required by the constitutional guarantee of due process.

3. The jury did not unanimously find the “common scheme” aggravating circumstance applied in violation of the right to a unanimous jury verdict for all essential elements.

4. The court did not properly instruct the jury on the legal definition of the aggravating circumstance of either a common scheme or a single act causing multiple deaths in violation of the right to a fair trial by jury.

5. The entry of a judgment and sentence that states Phai was convicted of four offenses when two of those offenses are the

same in law and fact violates the state and federal constitutional prohibitions on placing someone in double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The prosecution must prove all essential elements of an aggravating circumstance that substantially increases the mandatory punishment imposed upon conviction. Here, the prosecution alleged Phai committed a murder in the course of, or flight from a robbery in the second degree, but the State did not offer evidence that Phai stole any property and thus he did not commit a robbery. Where the State did not prove an essential element of the aggravating circumstance, must this aggravating factor be vacated and dismissed?

2. The prosecution must obtain a unanimous verdict for all essential elements of an offense, including aggravating circumstances. Where the prosecution alleges the aggravating circumstances of either a "common scheme or plan," or a "single act" causing multiple murders, and there is no evidence supporting one of the alternatives of this aggravator, does the failure to inform the jury that its verdict must be unanimous undermine the validity of the verdict?

3. The jury is entitled to instructions explaining the legal requirements of all essential elements of a crime. The “common scheme or plan” and “single act” aggravators have specific legal definitions but the court provided no definition or guidance to the jury. Did the court’s failure to accurately explain this aggravating circumstance leave the jury to deliberate without a complete understanding of the law?

4. The state and federal constitutions prohibit placing a person twice in jeopardy for the same offense. Here, the court agreed that Phai’s four first degree murder convictions involved only two killings and thus, two of the four convictions violated double jeopardy, yet the court neglected to vacate any of the convictions. Did the court improperly fail to vacate two convictions despite the obvious double jeopardy violation?

D. STATEMENT OF THE CASE.

Ngoc Nguyen rented two houses in Everett that she used to grow marijuana. 3/11/09RP 219-20.¹ Somehow, Areewa Saray learned about one home, at 617 Dexter Avenue, and he and

¹ The verbatim report of proceedings (RP) is referred to herein by the date of proceeding followed by the page number.

Saroeun Phai decided to go to the house and steal money or possibly marijuana. 3/13/09RP 534.

As the men entered the home, they encountered Linda Nguyen, who worked for Ngoc harvesting marijuana.² 3/11/09RP 224-25; 3/13/09RP 546. The men shot Linda. 3/13/09RP 546. Saray looked for money inside the home but encountered Linda's boyfriend, Kevin Meas, who also worked processing the marijuana. 3/11/09RP 225; 3/12/09RP 547. As they shot Meas, Vo Tran arrived at the house with his family. 3/12/09RP 401. Tran owned the home and rented it to Ngoc but claimed he had no involvement in her marijuana-growing operation. Id. at 389, 413.

Tran heard shots being fired as he arrived but he thought it was a nail gun. 3/12/09RP 396. As Tran entered the home, he saw Linda lying on the floor and then saw two men with guns. Id. at 402. He fled and the men fled too. Id. at 406. Tran saw the men speed past him in a car as they left the house. Both Linda Nguyen and Kevin Meas died from gunshot wounds, and the State charged Phai with two counts of aggravated first degree murder

² Because several participants share the last name Nguyen, they are referred to by their first name for purposes of clarity. Ngoc and Linda were not related and no disrespect is intended.

two counts of first degree felony murder.³ 3/11/09RP 196, 207; CP 164-65.

The police connected Phai to the shootings by identifying the car used to flee the scene, which was found near the Dexter Avenue home having been intentionally burned. 3/11/09RP 268; 3/12/09RP 358. The car belonged to Phai Chum, a person well known to the Tacoma Police and who had several convictions for crimes of theft. 3/12/09RP 367; 3/13/09RP 525, 550. Chum told the police that Phai borrowed his car for the incident and he disavowed his own personal involvement. Chum testified as a witness for the prosecution against Phai, claiming that Phai solicited his help in a robbery but Chum declined to participate, although Chum said he obtained a gun for Phai to use and lent him his car. Id. at 527, 539, 546. Phai conceded his involvement to the police, saying he agreed to help Saray in the robbery because he was “broke” but providing few additional details other than admitting to shooting both people and saying it was “a big mistake.” Id. at 465, 467-68, 518.

³ Saray was tried separately and he is not part of this appeal.

After a jury trial before Judge Larry McKeeman, Phai was convicted of the four charged offenses, including firearm sentencing enhancements and two aggravating circumstances. CP 40-51. The court imposed a sentence of life without the possibility of parole. CP 10. Phai timely appeals.

Pertinent facts are included in further detail in the relevant argument sections below.

E. ARGUMENT.

1. ABSENT ANY EVIDENCE THAT PHAI STOLE PROPERTY, THE STATE DID NOT PROVE THAT PHAI COMMITTED A ROBBERY

The State “aggravated” Phai’s sentence by imposing a mandatory sentence of life without the possibility of parole predicated on an aggravating factor that the offense occurred during a robbery. Yet the prosecution did not prove that Phai committed a robbery. Consequently, this aggravating factor must be stricken.

a. The State must prove all essential elements of charged offenses, including aggravating factors. The State is required to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612,

615, 683 P.2d 1069 (1984); U.S. Const. amends. 5; 14; Wash. Const. art. I, § 3, 22. This burden of proof extends to aggravating factors because they are also elements of the offense. State v. Allen, 159 Wn.2d 1, 9, 147 P.3d 581 (2006); see Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 738 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Without the jury finding at least one aggravating circumstance, Phai's offenses would have been punishable as first degree murder *with* the possibility of parole. RCW 9A.20.021(1); RCW 9A.32.030(2). However, with the jury finding at least one of the aggravating factors, the offenses became aggravated first degree murder, which is punishable only by life imprisonment *without* the possibility of parole or death. RCW 10.95.030(1), (2). Thus, the aggravating factors acted to elevate the punishment and were functional equivalents of elements of aggravated first degree murder. Ring, 536 U.S. at 609; see State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004) (first degree murder with aggravating factor creates different offense than first degree murder due to enhanced maximum penalty).

There is insufficient evidence when, after viewing the evidence in the light most favorable to the State, a rational trier of fact could not have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

b. Committing a robbery requires taking something of value that belonged to someone else and Phai did not take anything. An elemental requirement of a robbery is that something is stolen. RCW 9A.56.190. A person commits a robbery only when he “takes property belonging to another.” Id. Here, the prosecution claimed Phai committed the murders during the course of a second degree robbery, and sought a sentence of life without the possibility of parole based on this allegation. CP 80 (Instruction 25); CP 164 (Amended Information); RCW 10.95.020(11)(a) (aggravating factor of robbery). But the State did not offer any evidence that Phai took any property either during or immediately after the shootings.

There was some evidence that Phai wanted money and that was his motive in going to the house where the incident occurred. Phai told police he went to the house because, “I was broke,” and

two friends of Phai said he planned to commit a robbery.

3/13/09RP 532; 576.

But Linda Nguyen was shot at her front doorstep and that is where she was laying when Vo Tran discovered her. 3/12/09RP 399. According to Phai Chum's testimony for the prosecution, the men shot Nguyen as they entered the home and Saray searched the house for money after shooting Nguyen. 3/13/09RP 547. Then they encountered Kevin Meas and shot him. Upon shooting Meas, Vo Tran unexpectedly arrived at the house, accompanied by his wife and son. Id.

Tran heard a noise as he drove up to the house that he thought was a nail gun shooting nails inside the house. 3/12/09RP 396. Upon seeing Tran at the front door, Phai and Saray "ran out," fleeing in their car, and the Tran family watched them drive away. 3/12/09RP 402, 406. No one claimed they took anything with them from the house or that they were holding anything other than guns. Id. at 402.

As charged in the case at bar, under RCW 10.95.020(11), the prosecution was required to prove the murder was committed "in the course of, in furtherance of, or in immediate flight from" a robbery in the second degree in order to satisfy the elements of this

aggravating factor. CP 43 (special verdict); CP 80 (Instruction 25). The aggravating factor for first degree aggravated murder must apply to the individual defendant's behavior. State v. Roberts, 142 Wn.2d 471, 501-02, 14 P.3d 713 (2000) (noting that statutory authority for aggravated first degree murder does not mention and thus implicitly excludes, accomplice liability). Here there was no evidence either Phai or his separately tried co-defendant Saray stole any property from the home.

Unlike felony murder, which may be proven by committing "or attempting to commit" second degree robbery, the aggravated circumstance requires a completed robbery to mandate a sentence of life without the possibility of parole. RCW 9A.32.030(1)(c); CP 69, 70 (felony murder instructions). The felony murder statute defines the offense as when a person "commits or attempts to commit" a specified offense, but the aggravating circumstance statute, RCW 10.95.020(11), requires the commission and completion of a specified offense. This distinction makes sense, as there is a significant difference in the seriousness level and penalty imposed for a first degree felony murder as opposed to an aggravated first degree murder. RCW 9A.20.021(1); RCW 9A.32.030(2); RCW 10.95.030(1), (2).

Because the record reveals that Phai did not steal property from the house, he did not commit a murder in the course of a completed robbery in the second degree. Consequently, this unproven aggravating factor cannot stand. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. THE JURY VERDICT FINDING “COMMON SCHEME” OR “SINGLE ACT” UNDERLYING THE TWO KILLINGS IS FUNDAMENTALLY FLAWED WITHOUT CLEARLY UNANIMOUS FINDINGS FOR THE ALTERNATIVE MEANS OR SUFFICIENT JURY INSTRUCTIONS.

a. The prosecution must prove an aggravating factor to an unanimous jury. The automatic, discretionless imposition of the most serious sentence permissible short of the death penalty based on an aggravating factor requires rigorous application and narrow construction of the statutory aggravating factors that mandate such a sentence. See State v. Cross, 156 Wn.2d 580, 594, 132 P.3d 80 (2006); Thomas, 150 Wn.2d at 828 (refusing to apply harmless error to erroneous jury instruction pertaining to aggravating circumstance for first degree murder).

RCW 10.95.020(10) mandates a sentence of life without the possibility of parole upon a conviction for first degree murder if the jury finds, “[t]here was more than one victim and the murders were

part of a common scheme or plan or the result of a single act of the person.” An aggravating factor is an element of an aggravated offense and must be proven beyond a reasonable doubt to a unanimous jury. Ring, 536 U.S. at 609.

b. The jury was not directed to unanimously agree on the means of the common scheme or single act aggravating circumstance and there was not sufficient evidence of both. The jury’s verdict must be based on its unanimous agreement as to all essential elements of an offense, including aggravating circumstances. When a statute includes more than one means of committing an offense, there must be substantial evidence to support each alternative. State v. Rivas, 97 Wn.App. 349, 351-52, 984 P.2d 432 (1999); see In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988).

In the case at bar, the court instructed the jury to determine whether,

There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

CP 43. This aggravating circumstance includes two alternatives: either the existence of a common scheme or plan; or the occurrence of a single act that results in two murders. RCW

10.95.020(10). The court provided no further instructions on the scope or meaning of either alternative, an additional error which is further discussed *infra*, section (c). The court did not tell the jury that its verdict must reflect a unanimous determination of either portion of this aggravating circumstance.

In Jeffries, the court found that the disjunctive aggravating circumstance of more than one killing with either a “common scheme” or “single act” are not alternative means per se, but “means within a means” that need not be separately instructed in a jury verdict. 110 Wn.2d at 349. But the court also found there was sufficient evidence to support each aggravating circumstance, which is not true of the case at bar. Id. at 347.

The differentiation between the “common scheme” aggravator and the “single act” aggravator as distinct means justifying an aggravating circumstance was recognized in In re Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007), cert. denied, 128 S.Ct. 2871 (2008). In Benn, the jury voted in favor of a “common scheme” aggravator but left a separate line blank for a “single act” aggravator under RCW 10.95.020(10). Id. at 259-60. Benn argued that he had been implicitly acquitted of the “single act” alternative by the blank verdict form but the Supreme Court disagreed and

allowed the prosecution to re-try Benn based on this alternative aggravator upon which no verdict had been rendered. Id. at 261. The analysis in Benn acknowledges and treats the “common scheme” and “single act” aggravators as independent alternative grounds for establishing an aggravating circumstance as required for a conviction of aggravated first degree murder. Id. at 261-64. The court similarly treated the “common scheme” aggravator as an “additional aggravating factor” separate from the factor of “multiple victims,” both set forth in RCW 10.95.020(10), in State v. Woods, 143 Wn.2d 561, 574, 23 P.3d 1046 (2001); see also Id. at 622 (Sanders, J., dissenting).

Here, there was not substantial evidence supporting the “single act” alternative but there is no explanation as to whether some jurors rested their verdict on this portion of the aggravating circumstance and the court did not instruct them that their verdict should be unanimous in regard to either part of this aggravating circumstance.

There was no clear evidence about what happened inside the 617 Dexter Avenue home other than that two people were shot. The only evidence regarding the sequence of events came from Phal Chum, a less than credible witness given his criminal history

for crimes of dishonesty and his own escape from criminal liability only by virtue of his agreement to testify for the prosecution. Indeed, the court instructed the jury that an accomplice's testimony given on behalf of the State must be evaluated with "great caution." CP 61 (Instruction 7). Chum said that the men entered the home and shot a woman at the door; then Saray searched for money in the home; and at some point he encountered Meas; whereupon the men shot Meas. 3/13/09RP 546-48.

While the only testimony available about what happened inside the home indicated that the shootings occurred at separate times, no timeline was established. One juror could have speculated or surmised that they were "close enough" to be considered a single act and no court instruction required the jury to find that a single act must be strictly and literally construed.

Based on the evidence presented, a juror could have believed the "single act" aggravator applied even though the single act aggravator is not supported by substantial evidence as there was no evidence that a single act caused the two killings. Because of the insufficient evidence of this factor and the lack of a clearly unanimous verdict underlying the "common scheme" factor, this

portion of the verdict violates due process and the right to a unanimous jury verdict.

c. The court did not properly explain this legal criterion to the jury. A “common scheme or plan” requires proof of “an overarching plan that connects [the] murders.” State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). The State must “prove an ‘overarching’ plan with a criminal purpose that connects the murders.” Cross, 156 Wn.2d at 628. There must be a nexus between the killing and the plan in which the killing occurred. State v. Yates, 161 Wn.2d 714, 749, 168 P.3d 359 (2007).

In Yates, the court noted that a common scheme need not be separately defined for jurors because it is understood by commonsense terms, yet the decision went on to explain the nuances of a “common scheme or plan.” It noted that there are different kinds of common schemes, one type requiring that individual offenses are constituent parts of a larger plan and another involving similar offenses repeatedly perpetrated under a plan devised by an individual. Id. at 750 (citing State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)).

As Yates illustrates, courts have repeatedly explained what a “common scheme or plan” requires, and it is illogical to withhold this information from the jury. Jurors are lay people who are not expected to construe statutes and so the instructions themselves must adequately convey the law. State v. Kyllö, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Due process compels accurate and complete jury instructions.

This Court acknowledged this very principle in State v. Gordon, __ Wn.App. __, 2009 WL 4756146, COA No. 63815-7-I (Dec. 14, 2009). The Gordon Court found that the failure to define the aggravating factors of deliberate cruelty and victim vulnerability used to impose an exceptional sentence requires reversal even when the error was not complained of below and is raised for the first time on appeal. Slip op. at 18-19. The “practicable and identifiable consequences” of permitting the jury “to deliberate with a misleading and incomplete statement of the law” occurs when aggravating factors are not defined for the jury. Id. at 19. The statement of law was “misleading and incomplete” because the court did not explain the legal parameters of the aggravating factors, instead leaving them undefined. Because a body of caselaw defines the specific legal parameters of these aggravating

factors, and a juror might not know these specifics without a court instruction, the court found the jury must be given proper instruction so that they may deliberate with a clear understanding of the law.

Similarly to Gordon, in the case at bar, the court did not define what the jury must consider when evaluating this aggravating circumstance. It did not tell them that the jurors must unanimously agree that there was an overarching plan and a nexus between the killings and the plan. The only evidence of a specific plan to rob the house while armed and ready to shoot came from Chum, who clearly faced significant criminal liability by virtue of his admitted assistance in providing a car and a gun to Phai, and he had great incentive to minimize or deny his actual culpability. Phai himself disavowed any role in planning the incident, said he did not know why he did what he did, explained that he simply followed Saray and it was a “big mistake.” 3/12/09RP 464, 466, 471.

As this Court said in Gordon, the jury has a right to be properly instructed on the legal elements of an aggravating factor. By failing to provide that instruction here, the jury was left to deliberate without accurate and complete instructions, thus undermining the validity of the verdict on the aggravating circumstance.

3. THE COURT'S ENTRY OF ORDERS THAT REPEATEDLY CLAIM PHAI WAS CONVICTED OF FOUR MURDERS, WHEN DOUBLE JEOPARDY BARS THE IMPOSITION OF ANY PUNISHMENT FOR TWO OF THOSE OFFENSES, REQUIRES REMAND FOR A NEW JUDGMENT AND SENTENCE.

As the Supreme Court recently reaffirmed, when two offenses merge because they are the same offense for purposes of double jeopardy, simply imposing a sentence on one offense is an inadequate remedy. State v. League, __ Wn.2d __, Supreme Ct. No. 82991-8 (Dec. 10, 2009). Instead, when convictions for two offenses violate double jeopardy, "the proper remedy is to vacate the lesser conviction." Id.

In the case at bar, the prosecution properly acknowledged that Phai's convictions for first degree felony murder were the same in fact and in law as his two convictions for aggravated first degree murder of the same two individuals. 4/10/09RP 771. But the court made no ruling on the matter and its Judgment and Sentence does not vacate the two lesser convictions. Instead, it lists all four offenses as those for which Phai was found guilty. CP 5. It lists sentencing data for all four offenses. CP 6. It notes that counts II and IV are dismissed, without explaining why, and does not impose sentence on the lesser convictions. CP 8, 10.

Furthermore, the Order of Commitment signed by the Clerk of the Superior Court and witnessed by the trial judge states that Phai “has been duly convicted of” all four offenses “and judgment has been imposed against him.” CP 17. It lists all four offenses. Id. Thus Phai faces the real potential that he will be punished for legally duplicative offenses that should be treated as a nullity, because the court directed the Department of Corrections to treat Phai as if he were convicted of all four offenses.

While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005); North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); U.S. Const. amend. 5; Const. art. 1, § 9. “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007))

In Womac, the Supreme Court rejected the prosecution’s contention that when the court imposes only a single sentence, there is no double jeopardy violation. 160 Wn.2d at 656-57. The

court explained, “[t]hat Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions.” Likewise, Phai still suffers the consequences of four convictions even though the court did not impose sentence on two offenses. This Court must order the two counts of first degree felony murder vacated and stricken from the judgment and sentence so they have no remaining punitive consequences as required by principles barring placing someone in double jeopardy for the same offense.

F. CONCLUSION.

For the foregoing reasons, Mr. Phai respectfully requests this Court reverse the aggravating factors that are unsupported by the evidence and imposed in violation of due process, and strike the convictions that violate double jeopardy.

DATED this 21st day of December 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)
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 Respondent,)

NO. 63327-9-I

SAROEUN PHAI,)
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 Appellant.)

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