

No. 67413-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARCELIS KING,

Appellant.

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

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF
NANCY P. COLLINS
11/15/15

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A. ARGUMENT.

1. **The failure to require the jury to reach a unanimous verdict on the firearm enhancements is a fundamental flaw that King did not invite**

a. King did not propose the inadequate instructions given by the court.

Concluding Instruction 48 was not “proposed by the defendant,” as the State asserts. Resp. Brf. at 26. The State rests its claim of “invited error” on its contentions that Davis proposed Instruction 48 and this instruction could have -- but did not -- explain the unanimity required to convict him of firearm enhancements. Response Brief at 25-26.

Tellingly, the prosecution does not cite an instruction actually proposed by King. Resp. Brf. at 26. Instead it cites “CP 137-44,” but that citation is for the court’s instruction 48 given to the jury.

It also cites “9RP 76,” but on this page of the transcript, the court said, “I’m using the packet that Ms. Cruz provided to the Court.” 9RP 76. Cruz was not King’s lawyer. Cruz represented a separately charged co-defendant, Kurtis Walker. The prosecution does not explain how King is bound by instructions proposed by the co-defendant’s lawyer, but rather misleadingly acts as if Cruz

represented King. The invited error discussion in the Response Brief has no application to King.

Finally, even if King had proposed Instruction 48, which he did not do, Instruction 48 is simply the concluding instruction. The unanimity instruction for the special verdict could have been put anywhere – including on the special verdict form itself – but it was not included therein. The failure to explain the essential requirement that the special verdict answer of “yes” or “no” rest on a unanimous jury determination is a fatal error that denies the court authority to impose the firearm enhancement, as discussed in King’s Opening Brief and as further explained below.

- b. The court’s failure to explain the requirement of a unanimous verdict to the jury undermines the authority to impose firearm enhancements.

The jury was never instructed that its decision in the special verdict interrogatories for the firearm sentencing enhancements must be unanimous. CP 86-144. Juror unanimity is a fundamental requirement for any aggravating factor. State v. Nunez, __ Wn.2d __, . P.3d __, 2012 WL 2044377, *2 (2012) (“Regardless of the statutory source of the aggravator, the jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime.”); see Apprendi v. New Jersey, 530 U.S. 466,

490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ; U.S. Const. amends. 6, 14: Wash. Const. art. I, §§ 21, 22. The court may not impose a firearm enhancement “in the absence of a jury finding *by special verdict* that the defendant used a firearm (or deadly weapon),” and this jury finding must be unanimous. State v. Williams-Walker, 167 Wn.2d 889, 898, 225 P.3d 912 (2010) (emphasis in original).

Although the Nunez Court overruled the “nonunanimity” requirements set forth in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), Nunez reaffirmed the necessity of jury unanimity in imposing an enhanced sentence based on any aggravating circumstance. As a matter of policy, statutory authority, and constitutional requirement, the same unanimity requirements apply to aggravating factors as that which is required in proving the substantive elements of offenses.

The prosecution’s response brief neglects any mention of Williams-Walker. This omission may stem from the fact that the prosecution asks this Court to do exactly what the Williams-Walker Court forbid. 167 Wn.2d at 899-901. It urges the court to render its

own factual determination of whether the evidence supported a firearm enhancement. Williams-Walker held that the right to a jury trial means that the jury decides each element and it must do so under proper instructions. Id. at 901. When the jury is not accurately instructed on the elements of a firearm enhancement, the court may not substitute its own decision. Id. The failure to request the jury to render a unanimous decision in the special verdict form deprives the court of authority to impose a firearm enhancement.

The prosecution also claims that the instructions informed the jury of the appropriate unanimity requirement, but it ignores the jury's question about unanimity. The jury asked whether it needed to be unanimous to decide one of the charged crimes, unlawful possession of a firearm. CP 82. The court did not answer the question directly, but instead told the jury to re-read the instructions, especially Instruction 48. CP 83. This question from the deliberating jury shows that the instructions did not clearly explain the unanimity requirement. Because no instruction, including Instruction 48, spoke to whether unanimity was required for the special verdict answer, the instructions do not cure the error.

Furthermore, the error amounts to a structural error akin to an erroneous reasonable doubt instruction that requires reversal of the conviction without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The Supreme Court held: “[t]o hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.” Id. at 279. The same is true with regard to the lack of unanimity instruction, as that instruction vitiates all of the jury’s findings with regard to that instruction.

Under article I, sections 21 and 22, the special verdict form authorizes the precise punishment imposed by the court and the court may not construe a special verdict to be based on anything other than what was expressly instructed. Williams-Walker, 167 Wn.2d at 899. The jury was not expressly instructed that its yes or no answer must be unanimous, therefore the court may not assume the special verdict was unanimous, and without such a finding, the court lacked authority to impose the additional punishment. Nunez, 2012 WL 2044377 at *2.

2. The prosecution's improper arguments to the jury denied King a fair trial.

The prosecutor engaged in numerous improper tactics that the State tries to split apart and thereby minimize. However, the impact of each error must be considered together because they made a cumulative impact on the jury. Furthermore, the outcome of the case was hardly a forgone conclusion in favor of the State – the jury rejected the evidence against the co-defendant Walker even though he was portrayed as the leader and primary instigator of the incident. The State's improprieties tainted the trial.

The prosecutor committed numerous well-established violations of its duty to seek a verdict based on the evidence and not based on inflammatory arguments that undermine the basic constitutional protections afforded an accused person.

For example, the prosecutor criticized King for having a trial and cross-examining the complaining witnesses, which are plainly rights he is free to exercise without any negative inference to be drawn. See e.g., 9RP 96 (asserting it was "certainly appropriate" for the complainant to get "annoyed" during cross-examination); 9RP 99 (complainants "lose" by testifying, because King asked "a whole lot of questions" that made them ashamed and embarrassed); 9RP

100 (“embarrassing” for complainant Rosier ‘to be talked down to . . . by [King’s] attorney”). The prosecutor did not explain that King had a constitutional right to have a trial and, at that trial, to ask the complainants’ questions about the incident. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 21, 22. Instead, the prosecution argued that it was “appropriate” for the jury to think negatively of King because King exercised these rights, and to credit the complainants merely because they showed up at trial and exposed themselves to questions.

The prosecution also concocted a claim that the complainants faced criminal liability if they were not telling the truth. 9RP 100. The potential for a perjury prosecution was not only absent from the record, and an impermissible argument on that basis alone, it is well-established that the prosecution may not urge the jury to believe that there will be other legal repercussions if it’s witness is not being truthful. See United States v. Witherspoon, 410 F.3d 1142, 1146 (9th Cir. 2005).

The prosecution’s additional arguments assuring the jury that Rosier and Johnson testified with “appropriate” demeanor and credibility drew on the prosecution’s own experience in evaluating witnesses and watching them testify. As discussed in appellant’s

opening brief, it is improper for the prosecutor to tell the jury what she thinks of her own witnesses and how well they have done testifying. The prosecution disparaged defense counsel to his face and during argument, and the court exacerbated the error by agreeing defense counsel had misstated the evidence when this assertion was incorrect. 9RP 133-34.

These arguments far exceed the fair advocacy that is permitted by the parties. Moreover, the bulk of the State's misconduct occurred during the main argument and not in the rebuttal portion, as the State tries to imply in its response brief.

The prosecution's makes the blanket statement that King "failed to object to any of the above alleged instances of misconduct." Resp. Brf. at 35. This contention misstates the record. King registered numerous objections. Additionally, King's trial was tape-recorded and transcribed for purpose of appeal from that recording. The tape recordings are rife with inaudibles that leave King without a complete record. As King explained in his Opening Brief, it is impossible to recreate the spontaneous objections lodged during the course of the trial, such as during the prosecution's closing argument. The time that has passed since the trial leaves the trial attorney without specific enough memory of

what he said to create a reliable record. See State v. Tilton, 149 Wn.2d 775, 783, 72 P.3d 735 (2003) (when attorneys are “unable to produce a record which satisfactorily recounts the events material to the issues on appeal,” the existing record cannot solve appellate issues). The State does not try to re-create the record or offer any claim that King is wrong when he asserts that it record indicates he objected by registering an “inaudible” by defense counsel. Accordingly, the issue of whether King objected should not be resolved against him. Even if King did not object to each challenged and improper argument, these arguments were so woven into the fabric of the State’s summation to the jury that they tainted the trial and could not be cured by an isolated instruction from the court.

The harm from the improper attacks on King’s attorney is apparent from the verdict the jury rendered. The jury rejected the State’s principle theory that Walker was directing King to hold the complainants with his unloaded gun, and convicted Walker of misdemeanor offenses. The trial court acknowledged this verdict was inconsistent. 10RP 17. The complainants gave conflicting or inconsistent testimony about how much they had to drink or where other people were during the incident. The jury did not believe all of

the complainants' testimony. By disparaging defense counsel, blaming King for subjecting the complainants to the rigors of trial, and assuring the jury that the complainants faced criminal liability if they lied, the prosecution gained a conviction by improper means.

3. The essential overlap between assault and harassment based on the identical conduct constitutes the same crime for purpose of double jeopardy.

Contrary to the prosecution's rendition of the accusations and evidence against King, he was charged with and convicted of second degree assault and felony harassment for the same acts.

For second degree assault, King was charged with displaying a deadly weapon at both Rosier and Johnson and thereby creating a "threat or fear of bodily injury." CP 101, 106; RCW 9A.36.021(1)(c). For felony harassment, King was charged with threatening to kill Rosier (for count three) or Johnson (for count four), and thereby creating a reasonable fear in both complainants that the threat to kill would be carried out. CP 118, 122; RCW 9A.46.020(1)(b). These legal predicates are the same.

King was not accused of actually touching, harming, or injuring anyone. He was accused of pointing a gun, and using threatening words – those same acts constituted both crimes –

unlike State v. Mandanas, 163 Wn.App. 712, 717-18, 262 P.3d 522 (2011), where the assault rested on actual infliction of harm.

The remedy for the double jeopardy violation is to strike the lesser offense. State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010); State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007). King's felony harassment convictions should be vacated because they violate double jeopardy.

4. The prosecution misrepresents the sufficiency of the evidence

The inadequacies of the prosecution's evidence involving the charges made on behalf of Ronny Johnson are discussed in King's Opening Brief. The prosecution appropriately concedes Johnson offered little evidence against King, but tries to bootstrap her claims against King under Rosier's story by misrepresenting the testimony. Resp. Brf. at 18 (agreeing that Johnson said King did not point gun at her). The prosecution uses Rosier's testimony as if it was Johnson's, but that is an unreasonable view of the evidence. Rosier made the complaints that the prosecution claims they made together. Unlike Rosier, Johnson did not claim she saw King point a gun at her. The lack of evidence establishing that King committed

second degree assault and felony harassment against Johnson requires reversal of those convictions.

5. The inadequate jury instruction explaining the essential elements of felony harassment did not apprise the jury of all necessary facts that the State had to prove

The “to convict” instruction must contain all elements essential to the conviction. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). A reviewing court “may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The “to convict” instruction “carries with it a special weight” because it is the “yardstick” by which the jury measures guilt or innocence. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). For this reason, the omission of an essential element from the instruction is a manifest error affecting a constitutional right that may be reviewed for the first time on appeal. Id.

Because only “true threats” may be prosecuted, the “true threat” requirement is an essential element of a harassment statute. The to-convict instructions for felony harassment purported

to list the “following elements” that the State needed to prove to trigger a “duty” to return a guilty verdict. CP 118, 122. These to-convict instructions did not require that the threat to kill be one that constituted a “true threat,” or a serious expression of intent to carry out the threat.

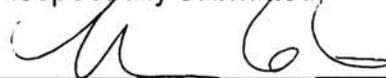
The omission of this element from the to-convict instruction denied King the notice to which he was constitutionally entitled, and permitted the jury to convict even if it concluded that the young man who allegedly threatened Rosier or Johnson was engaging in mere braggadocio. This Court should conclude the omission of the essential “true threat” element was error.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant’s Opening Brief, Marcelis King respectfully requests this Court reverse the tainted convictions and remand his case for further proceedings.

DATED this 3rd day of July 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67413-7-I
v.)	
)	
MARCELIS KING,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JULY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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