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NO. 79124-4

36257-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPHINE KATHLEEN SPARLING,

Petitioner.

REPLY
BRIEF OF ~~PETITIONER~~ *APPELLANT*

PETITION FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Sergio Armijo
No. 05-1-04714-5

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A. ASSIGNMENTS OF ERROR

Petitioner relies on the Assignments of Error contained in the Brief of Petitioner.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Petitioner relies on the issues contained in the Brief of Petitioner.

C. STATEMENT OF THE CASE

Petitioner relies on the statement of the case contained in the Brief of Petitioner.

D. REPLY ARGUMENT

I. RESPONDENT'S ARGUMENT IS INCORRECT THAT THE DEFENDANT'S ACT OF DRIVING THE VEHICLE DIRECTLY AT THE STORE MANAGER AFTER STEALING GASOLINE CONSTITUTED ROBBERY IN THE FIRST DEGREE UNDER THE "DISPLAYS" WHAT APPEARED TO BE A DEADLY WEAPON ALTERNATIVE.

a. Respondent's argument is based on a misreading and misinterpretation of the language in RCW 9A.56.200 (1) (a) (ii).

The crime of first degree robbery as contained in RCW 9A.56.200 was designed to elevate robbery in the second degree RCW 9A.56.190 to a higher punishable offense if certain aggravating elements existed. The "displays what appears to be a firearm or other deadly weapon" alternative

of RCW 9A.56.200 (1) (a) (ii) is the conduct that establishes an additional aggravating element to elevate robbery in the second degree to the more serious first degree offense. Obviously, RCW 9A.56.200 (1) (a) (i) was drafted to punish only those persons that the State could prove were armed with a real actual deadly weapon, and caselaw has so held. State v Pam, 98 Wn.2d 749, 659 P. 2d 454 (1983), State v Tongate, 93 Wn.2d 751, 613 P. 2d 121 (1980). The deterrent value of section 1 (a) (i) would have been significantly diminished without (a) (ii) in that the State would find it more difficult to convict a person if the weapon could not be recovered for trial. Hence, the legislature enacted (a) (ii) to punish the "displays what appears to be a deadly weapon" alternative.

The focus of the "displays" alternative shifted the focus to the victim's perception of the defendant's conduct and broadened the range of punishable conduct, see State v Scherz, 107 Wn. App 427, 27 P. 3d 252 (2001) and in re Personal Restraint of Bratz, 101 Wn. App 662, 5 P. 3d 759 (2000). These cases required some physical manifestation by the defendant in addition to verbal threats that he is armed with what appears to be a deadly weapon. Mere words alone and the victim's fear is not sufficient to meet the "displays" element. Scherz, Bratz, *supra*.

A major problem with existing Washington caselaw on the "displays" alternative is that the facts of the cases all involve a subtle threat where the robber gestures to some object that has the appearance of a deadly weapon or gestures to a hidden bulge in a pocket, both accompanied by verbal assertions. Respondent, or Petitioner for that fact, could not find a case in which the "displays" alternative was satisfied by a real actual deadly weapon. Petitioner reaffirms her argument in her Brief of Petitioner at 17-19 that the Legislature's use of the "armed" alternative in a (i) was intended to include real actual weapons and the Legislature's use of "displays what appears to be a deadly weapon" alternative was intended for cases where no real actual weapon was found but through words and conduct he displayed to the victim what appeared to be a deadly weapon.

A proper grammatical reading of RCW 9A.56.200 (1) (a) (ii) confirms that above argument. Respondent has interpreted the statute to read that the robber "appears to have displayed a deadly weapon". Petitioner has interpreted the language exactly as it appears in the statute, "displays what appears to be a deadly weapon". Respondent incorrectly interprets the word "appears" as modifying the verb "display" and comes

to the conclusion in their brief that Petitioner "appears to have displayed a deadly weapon", to wit, the vehicle.

The word "appears" is not defined in the robbery first-degree statute or anywhere else in the Criminal Code. Words not defined in a statute are given their ordinary dictionary meaning. Burton v Lehman, 153 Wn. 2d 416, 423, 103 P. 3d 1230 (2005). Webster's Collegiate Dictionary 10th ed (2001) at page 56 defines appear as follows:

Ap·pear \ə-'pir\vi[ME *apperen*, fr. OF *aparoir*, fr. L *apparēre*, fr. *Ad-*+*parēre* to show oneself] (13c) **1a**: to be or come in sight <the sun~s on the horizon> **b**: to show up <~s promptly at eight each day> **2**: to come formally before an authoritative body <must ~ in court to day> **3**: to have an outward aspect " SEEM <~s happy enough> **4**: to become evident or manifest <there ~s to be evidence to the contrary> **5**: to come into public view <first ~ed on a television variety show> <the book~ed in print a few years ago> **6**: to come into existence <hominids~ed late in the evolutionary chain>

The context or appears as used in used in RCW 9A.56.200 (1) (a) (ii) would be "to have an outward aspect SEEM". For example; "he appears to be happy". This does not mean that he is actually happy but his outward appearance makes it seem that way. Applying this meaning to the present statute means that the person displays what seems to be a deadly weapon, not that he displayed a real actual weapon. This interpretation is consistent with the caselaw that takes into consideration

the victim's perception. Scherz, Bratz, supra. In the present case we have an actual real deadly weapon not what "appears" to be one. The defendant should not have been charged and convicted under RCW 9A.56.200 (1) (a) (ii) which petitioner argues was only meant for cases in which the weapon was not actual, real, was not recovered by the State, and can not be proven beyond a reasonable doubt that it is an actual real deadly weapon. Whether Petitioner could have been charged under (a) (i) armed with a deadly weapon is not at issue before the court in this appeal.

Petitioner also reaffirms her argument that the meaning of the word "display" connotes and presumes the apparent weapon was hidden or concealed and cannot be applied where the apparent weapon was openly visible at all times. Brief of Petitioner at P. 15-17.

Respondent in its brief at P. 8-9 claims that Petitioner relied on unfounded and unsupported assumptions to conclude that an actual deadly weapon cannot be the basis for a charge under (a) (ii) the displays alternative to robbery in the first degree. However, Petitioner, unlike Respondent, relied on rules of statutory interpretation and a proper grammatical interpretation of the statute and its terms. Brief of Petitioner

P. 16-19.

Respondent correctly asserts that under the definition of deadly weapon contained in RCW 9A.04.110 (6) that a vehicle or any object other than a firearm, only becomes a deadly weapon when it is used, attempted to be used in or threatened to be used in a manner such that it is capable of causing death or substantial bodily harm. Brief of Respondent at P. 6. Respondent however then concludes that the defendant displayed what appeared to be a deadly weapon when she drove the vehicle at the manager after stealing gasoline. Brief of Respondent P. 6-8. This conclusion is only workable if the robbery in the first-degree statute is read to mean the person appears to have displayed a deadly weapon. Petitioner has argued above that the proper definition of appears and the proper grammatical reading of section (a) (ii) does not allow for Respondent's conclusion.

Respondent attempts to further their conclusion with the following hypothetical on Page 9 of their brief.

In fact, a perpetrator who enters a business with a real gun plainly visible in his hand from the minute he enters the store and robs the clerk could be guilty under both alternatives "armed" and "displays". The perpetrator is "armed if the State can produce evidence that firearm was real. State v Mathe, 35 Wn. App. 572, 574-75, 668 P. 2d 599

(1983) (guns used to charge first degree robbery not recovered, but victims described them in detail). The perpetrator has also "displayed" what appears to be a firearm. The fact it is a real gun does not mean he did not display it to the victim.

Respondent's reliance on Mathe is misplaced here. In Mathe the apparent guns were not recovered and Mathe was only charged with robbery in the first degree under (a) (ii) displays what appears to be a firearm. Mathe was a proper application of the "displays" alternative and what the Legislature intended under the (a) (ii) alternative. The victim in Mathe said that it appeared to be or seemed to be a firearm, not that it actually was a real firearm. Mathe would have been charged under (a) (i) had police recovered a real firearm. However, Petitioner disagrees that a person who enters a store with a real gun plainly visible at all times is guilty under both alternatives (a) (i) and (a) (ii). The proper alternative would depend on whether an actual real gun is recovered, and the State can prove it is real. If so, then the only charging alternative can be (a) (i) armed with a firearm. If no real weapon is recovered you could have the Mathe situation in which the defendant displayed what appeared or seemed to be a firearm and can only be charged, as argued above, under (a) (ii). In the present case, we have an actual, real, deadly weapon. It is a real car, not what appeared to be or

seemed to be a car, and cannot be charged under the (a) (ii) "displays" alternative.

Petitioner reaffirms her argument that the Legislature by using "armed with a deadly weapon" in RCW 9A.56.200 (1) (a) (i) and "displays what appears to be" in (a) (ii) intended them to mean different things and created two mutually exclusive alternatives. One alternative for real actual weapons recovered and proved beyond a reasonable doubt and another for cases where it only seems or "appears" to be a deadly weapon which was displayed.

II. A REVIEW OF THE EVIDENCE IN THE PRESENT CASE DOES NOT LEAD TO THE CONCLUSION THAT THE CRIME COMMITTED HERE WAS IN FACT ROBBERY.

- b. Eventhough the trial court concluded that the defendant drove the vehicle at the store manager, there still existed several other reasons why she left the parking lot and would have done so besides stealing gasoline.

Evidence is sufficient to support a conviction if after viewing all the evidence and all inferences in a light most favorable to the state, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v Green, 94 Wn. 2d 216, 616 P. 2d 628 (1980).

As review of the sufficiency of the evidence in a bench trial is

limited to whether substantial evidence supports the court's findings of fact and whether the findings support the conclusions of law. State v Alvarez, 105 Wn. 2d 215, 19 P. 3d 485 (2001).

Petitioner disagrees with Respondent's conclusion that there existed substantial evidence to support the trial courts conclusion of law that the defendant was guilty of first degree robbery because she both threatened and used force in order to retain the stolen gasoline and overcome resistance to the taking.

Petitioner reaffirms her argument in Brief of Petitioner P. 20-25 that several other reasons existed and were clearly supported by the evidence as to why the defendant would have left at a high rate of speed, driving her vehicle at the manager. Those reasons included, Superior Court warrants for her arrest, illegal controlled substance in her vehicle, possession of stolen or otherwise unlawful bank checks belonging to others, and possible forgery charges. Fleeing for any of these reasons would not constitute the use of force needed to support a robbery charge for the stolen gasoline and only leave a charge of theft in the third degree.

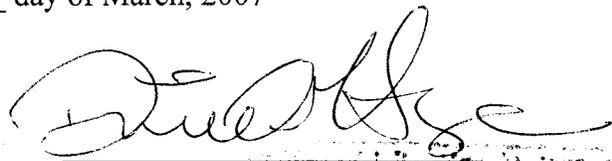
E. CONCLUSION

The Legislature intended RCW 9A.56.200 (1) (a) (ii) to cover only situations where the robber displays an apparent deadly weapon or what seems to be one. Here, the defendant had an actual real weapon and perhaps could have charged under RCW 9A.56.200 (1) (a) (i) "armed with a deadly weapon" but not under (a) (ii) displays what appears to be a deadly weapon.

A proper grammatical reading of the statute leads to the conclusion that the term "appears" modifies deadly weapon not "displays". The dictionary definition of "appears" supports the argument that RCW 9A.56.200 (1) (a) (ii) was intended to apply to cases where a fake or apparent weapon was involved.

The evidence in this case, even when viewed most favorably to the state does not support a conviction for robbery in this case.

Respectfully submitted this 19th day of March, 2007



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