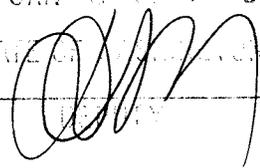


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 38902-9-II Consolidated

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Winter,

Appellant.

Thurston County Superior Court Cause No. 08-1-02088-0

The Honorable Judge Richard D. Hicks

Appellant's Reply Brief

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P.M. 1-5-2010

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ARGUMENT

I. THE FIREARM ENHANCEMENT MUST BE VACATED.

Due process requires the state to prove sentencing enhancements beyond a reasonable doubt. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). Where evidence is insufficient to prove a sentencing enhancement, the sentence must be vacated. *State v. Brown*, 162 Wn.2d 422, 435, 173 P.3d 245 (2007).

A. The gun admitted into evidence was not a firearm.

A firearm enhancement may only be imposed upon proof that a purported firearm is capable of firing a projectile by means of an explosive. RCW 9.94A.533. *Recuenco*, at 437. The enhancement applies only to working firearms. *Id.*, at 437. Here, the gun introduced at trial was not operable, and thus did not qualify as a firearm. It lacked a firing pin; furthermore, finding a replacement part would be difficult, and repair would take an hour. RP (2/4/09) 314, 324-25, 334-35. The gun was also inoperable because the trigger housing had been tampered with. RP (2/4/09) 314. The state's expert had not determined whether or not additional problems would need attention to make the gun operable. RP (2/4/09) 335.

An assemblage of parts that cannot be fired or made operable within a reasonable amount of time may be a “gun-like object,” but it is not a firearm. *State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). Respondent erroneously claims that “real guns” automatically qualify as firearms. Brief of Respondent, p. 38.

The *Recuenco* majority made clear an inoperable “real” gun does not qualify as a firearm. In *Recuenco*, the defendant “threatened [his wife] with a handgun.” *Id.*, at 431. There was no dispute that the handgun was a “real” gun; however, the majority made clear that the rule enunciated in *Pam* would still apply:

The dissent appears to argue that because the only deadly weapon discussed at trial was a handgun, it was appropriate to ask for the firearm enhancement at sentencing rather than the charged and convicted deadly weapon enhancement. The dissent overlooks here that in order to prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a “firearm:” “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.10.01 (Supp.2005) (WPIC). We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

Recuenco, at 437 (citing *Pam*). Indeed, in *Pam* itself, police recovered the wooden forestock of what appeared to be a “real” shotgun. *See Pam*, at 751.

Because the prosecution failed to establish that the antique gun qualified as a firearm, the enhancement must be stricken. *Id.*, *supra*. Mr. Winter’s case must be remanded to the trial court for resentencing without the enhancement. *Recuenco*, *supra*.

B. The gun admitted into evidence was not “readily available for use.”

A person is “armed” with a firearm if it is “easily accessible and readily available for use.” *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Whether a gun is loaded or unloaded is one factor to be considered in making the determination. *State v. Simonson*, 91 Wn.App. 874, 960 P.2d 955 (1998). Logically, operability must also be considered. *See Id.*, *supra*.

In this case, the gun was not readily available for use, because it was unloaded, because no ammunition was available, and because it was inoperable (as outlined above). RP (2/3/09) 156, 164; RP (2/4/09) 314-335. Accordingly, the defendants were not “armed” with a firearm. The enhancement must be stricken, and the case remanded for resentencing. *Valdobinos*, *supra*.

II. THE ACCOMPLICE LIABILITY STATUTE CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH AND CONDUCT.

A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000). A statute that reaches a “substantial” amount of protected conduct is unconstitutionally overbroad. *Virginia v. Hicks*, 539 U.S. 113, 118-119, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). The First Amendment protects speech that encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) has not been limited to the *Brandenburg* parameters. Instead, a person may be convicted for providing aid, which includes “all assistance whether given by words, acts, encouragement, support, or presence.” WPIC 10.51; *see* Instruction No. 9, CP 34. This standard—even when coupled with the requisite knowledge—is inadequate under *Brandenburg* for two reasons. First, it encompasses speech that encourages future (non-imminent) criminal activity. Second, it encompasses speech that is unlikely to incite or produce lawless action. Respondent’s contention that the knowledge

requirement solves the *Brandenburg* problem is incorrect. Furthermore, although Respondent “chooses to believe that common sense” will prevent the “parade of horrors” set forth in Mr. Winter’s Opening Brief, the First Amendment requires more.

The prevailing interpretation of RCW 9A.08.020 (embodied in WPIC 10.51 and Instruction No. 9) criminalizes a vast amount of speech and conduct protected by the First Amendment.¹ It is therefore unconstitutional. *Brandenburg*. Because the statute is unconstitutional, Mr. Winter’s convictions must be reversed and the case remanded to the trial court for a new trial. Upon retrial, the state may not pursue a theory of accomplice liability.

III. THE ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE AN OVERT ACT.

Accomplice liability requires proof of an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient to show approval or assent; instead, the state must prove the accused said or did something to carry the crime forward. *State v. Peasley*, 80 Wn. 99, 100, 141 P. 316 (1914). Respondent contends that the *Matthews* court erroneously clung to the requirement of an overt act,

¹ Examples are provided in Mr. Winter’s Opening Brief.

and that proof of an overt act is no longer required.² Brief of Respondent, p. 56-57. But an overt act is still required, even under the current statute. *See, e.g., State v. Alford*, 25 Wn.App. 661, 665-666, 611 P.2d 1268 (1980) (discussing evidence that satisfies the overt act requirement under RCW 9A.08.020).

Respondent also claims that “[s]imple unexpressed approval” would not meet the standard set forth in Instruction No. 9.³ Brief of Respondent, p. 57. This is incorrect: a person can provide encouragement through mere presence (if accompanied by knowledge that presence will facilitate the crime and silent approval of the crime). *See* Instruction No. 9, CP 34 (“The word ‘aid’ means all assistance whether given by words, acts, encouragement, support, or presence.”)

Here, the court’s instruction allowed conviction without proof of an overt act: the jury was permitted to convict upon proof that Mr. Winter was present and silently assented to his codefendants’ crimes, even if he committed no overt act. Instruction No. 9, CP 34. Because of this, the instruction violates the “overt act” requirement. *Peasley, supra*. This infringed Mr. Winter’s Fourteenth Amendment right to due process. U.S.

² It’s notable that Respondent appears to contradict this position by acknowledging that *Peasley* is still controlling precedent.

³ Again, this seems like tacit acknowledgment that an overt act is required.

Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). His convictions must be reversed, and the case remanded for a new trial. *Peasley, supra*; *State v. Renneberg*, 83 Wn.2d 735, 522 P.2d 835 (1974).

IV. MR. WINTER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Ineffective assistance claims are reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required whenever the accused person is prejudiced by defense counsel's deficient performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption of adequate performance is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Id.*, at 130. Defense counsel's strategy must be based on reasoned decision-making, and can only be inferred from some indication in the record that counsel was actually pursuing the alleged strategy. *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007); *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996).

Here, the state failed to show that the gun introduced as Exhibit 25 was relevant to the case. RP (2/3/09) 294-95; RP (2/4/09) 352, 379, 381. Despite this, defense counsel did not object. There was no conceivable

strategic reason for this failure: without Exhibit 25 (and the associated testimony), the prosecutor would have been left with only weak evidence that there even was a gun. Respondent argues that Exhibit 25 was relevant, and that sufficient proof established that Exhibit 25 was used during the incident. Brief of Respondent, p. 43. This argument is without merit for two reasons.

First, the record does not support Respondent's claim⁴ that Exhibit 25 had not been in the ditch for very long. Brief of Respondent, p. 43. RP (2/3/09) 108-109. Second, Respondent cites no authority for its argument that "[i]t does not matter that Woods' statement could not be used against the other defendants." Brief of Respondent, p. 43. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

The evidence did not show that Exhibit 25 was used during the incident. There is a reasonable possibility that the outcome of the proceeding would have been different if defense counsel had objected; accordingly, Mr. Winter's conviction must be reversed and the case remanded for a new trial. *Reichenbach*.

⁴ Made without citation to the record.

V. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.

An offender has a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008). The court may not draw adverse inferences from silence pending sentencing. *Mitchell v. United States*, 526 U.S. 314, 328-329, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). Respondent misunderstands Mr. Winter's argument regarding his privilege against self-incrimination. See Brief of Respondent, pp. 68-69

Under the current statute, the state is not obligated to prove criminal history, but may satisfy its burden through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999); see RCW 9.94A.500(1). Respondent's silence in the face of these bare assertions is taken as acknowledgment of their truth. RCW 9.94A.530(2). This violates the privilege against self-incrimination. *Mitchell, supra*.

Without citation to authority, Respondent claims that "a summary provided by the prosecution" satisfies the preponderance standard. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio, supra*. But a summary provided by the prosecution—

even if based on some minimal amount of evidence—is not, by itself, evidence. *Ford, supra*. Respondent’s argument is equivalent to saying that deficiencies in the state’s proof at trial could be filled by statements made by the prosecutor during opening statements or closing arguments.

Due process and the privilege against self-incrimination require more than bare assertions—both at trial, and at sentencing. *Ford, supra*. If the prosecution seeks a sentence based on past offenses, it must go through the minimal steps of providing some proof—consisting of actual evidence—that the prior offenses exist.

Mr. Winter should have been sentenced with an offender score of one instead of six. Accordingly, the judgment and sentence must be vacated and the case remanded to the trial court for resentencing. *Ford, supra*.

VI. MR. WINTER ADOPTS THE ARGUMENTS OF HIS CODEFENDANTS.

By supplemental brief, Mr. Winter adopted relevant arguments set forth in his codefendants’ opening briefs. Should any of the codefendants file additional briefing relating to those arguments, Mr. Winter adopts and incorporates such additional briefing pursuant to RAP 10.1(g).

CONCLUSION

Mr. Winter's convictions must be reversed and the case remanded for a new trial. In the alternative, if the convictions are not reversed, Mr. Winter's case must be remanded for sentencing without the firearm enhancement and with a new determination of his offender score.

Respectfully submitted on January 5, 2010.

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CERTIFICATE OF MAILING

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I certify that I mailed a copy of Appellant's Reply Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 5, 2010.

Further, I delivered an electronic copy of the brief to:

Patricia Pethick, counsel for codefendant Rigoberto Contreras
Lisa Tabbut, counsel for codefendant Timothy Baxter
Anne Cruser, counsel for codefendant Toby Anderson
Thomas Doyle, counsel for codefendant Jason Woods

on January 5, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 5, 2010.



Jodi R. Backlund, WSBA No. 22917
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