

No. 49620-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V

KONSTANTIN STATOVOY

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A Assignments of Error1
B. Statement of Facts..... 1
C Argument5
D Conclusion..... 8

TABLE OF AUTHORITIES

Cases

Apprendi v New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435
(2000) 6
State v Conover, 183 Wn.2d 706, 355 P.3d 1093 (2015)..... 6
State v Halgren, 137 Wn 2d 340, 348, 971 P 2d 512 (1999)7
State v. Kozey, 183 Wn App. 692, 334 P 3d 1170 (2014)..... 5
State v Mandanas, 168 Wn 2d 84, 228 P.3d 13 (2010)..... 6
State v Ng, 110 Wn 2d 32, 750 P 2d 632 (1988) 7
State v. Recuenco, 163 Wn.2d 428, 180 P 3d 1276 (2008)..... 7

A Assignment of Error

Assignment of Error

The trial court erred by treating the misdemeanor charges as points on the defendant's offender score without an individualized finding that they involved domestic violence.

Issue Pertaining Assignment of Error

The defendant was sentenced with an offender score of "2" after the jury returned guilty verdicts on second degree assault, violation of court order, and fourth degree assault, as well as a single, general verdict that the offenses were committed against a family or household member. Was it error to increase his offender score without an individualized verdict on each count?

B. Statement of Facts

Konstantin Statovoy was charged by amended information with second degree assault against Olga Yermilova, felony violation of a court order (with a special allegation of assault), fourth degree assault against Olga Yermilova, fourth degree assault against Steven Kujava, and reckless driving CP, 13. The first three charges included special allegations of domestic violence against a family or household member, Olga Yermilova. All five charges occurred on April 13, 2016

Olga Yermilova testified she was married to Mr. Statovoy for nineteen years and they have three children together. RP, 166. They were divorced in 2014. RP, 167. In 2014 she also sought a protection order prohibiting Mr. Statovoy from contacting her. RP, 169.

On April 13, 2016, Mr. Statovoy contacted Ms. Yermilova and was expressing some suicidal ideation. RP, 176. The two of them exchanged text messages. RP, 176-77.

Around 6:40 in the evening, Ms. Yermilova drove home from work and was removing some things from her car. RP, 208-09. She heard Mr. Statovoy's voice talking to her daughter. RP, 210. Mr. Statovoy sounded upset and smelled of liquor. RP, 211, 216. He then "attacked [her] from the front." RP, 213. He then turned her around, covered her mouth and was holding her from behind. RP, 213. He pressed her mouth in such a way that she was unable to breathe for twenty to thirty seconds. RP, 213-14. He released her mouth momentarily, but then pressed her mouth a second time. RP, 214. He said "You'll die first." RP, 215. He dragged her to a nearby shed. RP, 216.

In order to defuse the situation, Ms. Yermilova offered to drive Mr. Statovoy to his car. RP, 222. She drove him to his car, dropped him off, and drove back home. RP, 224. Moments later, Mr. Statovoy drove up to her house, losing control of his vehicle and hitting a mailbox. RP, 225-26.

Mr. Statovoy reached into her car window and was trying to pull her out.
RP, 228

Meanwhile, Mr. Statovoy's driving attracted the attention of two neighbors. Steven Kujava first observed the vehicle speeding through his residential neighborhood. RP, 100. He then heard a "big slam" and went to investigate. RP, 101. He saw the vehicle "parked there against the mailbox" and saw a woman screaming. RP, 102. He observed Mr. Statovoy trying to pull Ms. Yermilova out of the car window. RP, 103. Mr. Kujava screamed at him to stop hitting her, which caused Mr. Statovoy to turn around and say, "I'll kill you too." RP, 104. Mr. Statovoy then approached Mr. Kujava and grabbed him, causing Mr. Kujava to "put him down on the ground." RP, 104. Meanwhile, neighbor Jack Hassler arrived to assist and held Mr. Statovoy's hands down. RP, 106. Together they then called 911 and held him down until police arrived. RP, 106.

The jury was advised that a separate crime is charged in each count and that each count must be decided separately. RP, 391. The jury instructions further advised the jury as follows:

You will also be given a Special Verdict Form "A" for crimes charged in Counts One, Two and Three. If you find the Defendant not guilty of all of these crimes do not use Special Verdict Form "A". If you find the Defendant guilty of any of these crimes, One, Two or Three you will then use Special

Verdict Form "A" and fill in the blank with the answer "Yes" or "No" according to the decision you reach. You also will be given Special Verdict Form "B" for the crime of Violation of a Court Order as charged in Count Two. If you find the Defendant not guilty of Violation of a Court Order do not use Special Verdict Form "B"

If you find the Defendant guilty of Violation of a Court Order you will then use Special Verdict Form "B" and fill in the blank with the answer "Yes" or "No" according to the decision you reach. In order to answer this Special Verdict Form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to the question you must answer "no"

RP, 401-02. Special Verdict Form A asked: "Were KONSTANTIN V STATOVOY and OLGA YERMILOVA members of the same family or household?" CP, 124. Special Verdict Form B asked whether the conduct that constituted a violation of the court order was an assault that did not amount to an assault in the second degree. CP, 125

The jury found Mr. Statovoy guilty of all five charges. RP, 443, CP, 118-123. They further answered "Yes" Special Verdict Form A and, surprisingly, "No" to Special Verdict Form B. CP, 124-25

At sentencing, the State argued Mr. Statovoy's offender score on the second degree assault was "2" based upon the fact that he had two current misdemeanor offenses where the allegation of domestic violence was pled and proved. RCW 9A 02.02(21). CP, 127. The Court found he

had an offender score of “2” although the Judgment and Sentence is not a model of clarity. CP, 143 Mr. Statovoy appeals

C. Argument

In order to find Mr. Statovoy had an offender score of “2,” the State was required to plead and prove three things: the second degree assault was domestic violence as defined in RCW 9.94A.030, the violation of court order was domestic violence as defined in RCW 9.94A.030, and the fourth degree assault was domestic violence as defined in RCW 9.94A.030. RCW 9.94A.525(21). Domestic violence has the same meaning as defined in RCW 10.99.020 and 26.50.010. RCW 9.94A.030(20); *State v. Kozey*, 183 Wn App 692, 334 P.3d 1170 (2014).

In the Information, the State pleaded each count separately and, for counts one, two, and three, alleged they were committed by a family or household member. But the verdict forms did not delineate them that way. The jury was asked a single, general question whether the defendant and Ms. Yermilova were family or household members. It was not asked to find that, for purposes of count one, whether they were family or household members. Nor for count two. Nor for count three. In contrast, Verdict Form B specifically directed the jury to refer to count two in answering the question.

The issue is whether a single, general interrogatory not tied to a particular offense is sufficient to act as a sentence enhancement for three separate counts. Under the Sixth Amendment, any fact, other than a prior conviction, that increases the maximum penalty for the offense must be pled and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 253, 1159 L.Ed.2d 403 (2004). It is not sufficient to simply tack on the sentencing enhancement at the end; it must be pled and proved on each count.

Other sentencing enhancements illustrate the point. For instance, firearm enhancements must be proved on each individual count. *State v. Mandanas*, 168 Wn.2d 84, 228 P.3d 13 (2010) (multiple firearm enhancements be served consecutively after the jury found enhancements on each count). School enhancements on drug offenses must be proved on each count. *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) (multiple school enhancements must be served consecutive to the base sentence but concurrent to each other). In the context of sexual motivation sentencing enhancements, the Supreme Court has said, "A finding of sexual motivation will occur only where the State files a special allegation of sexual motivation and proves the allegation beyond a reasonable doubt, and the court or the jury in a jury trial finds that the defendant committed

the crime with a sexual motivation “ *State v. Halgren*, 137 Wn 2d 340, 348, 971 P.2d 512 (1999) (emphasis added). Enhancements attach to individual crimes and a general verdict is insufficient

The final question is whether the error in this case is harmless. Because the jury did not make an individualized finding on each of the three counts and his sentence was increased as a result, the error cannot be harmless. *State v. Recuenco*, 163 Wn 2d 428, 180 P 3d 1276 (2008) (defendant “had a right to have a jury determine beyond a reasonable doubt if he was guilty of the crime and sentencing enhancement charged” and error in applying the enhancement was not harmless)

Juries are allowed to apply lenity in the deliberation room and sometimes that results in an inconsistent verdict. *State v. Ng*, 110 Wn 2d 32, 750 P 2d 632 (1988). In fact, the jury reached an inconsistent verdict in this case. The jury’s determination that Mr. Statovoy violated the protection order but did not assault Ms. Yermilova in the process is entirely impossible to reconcile with the evidence and the other verdicts. But Special Verdict B makes just such a finding. It is impossible to determine what verdicts the jury may have reached in applying the sentencing enhancements to each individual charge. The error is not harmless.

D Conclusion

The Court should order the “domestic violence” finding be vacated on the second degree assault, violation of court order, and fourth degree assault and remand for resentencing with an offender score of “0 ”

DATED this 9th day of March, 2017

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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