

FILED
Court of Appeals
Division II
State of Washington
7/12/2018 3:24 PM

No. 51531-8-II

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL OLSEN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
THE HONORABLE MARK F. MCCAULEY

BRIEF OF APPELLANT

Marie J. Trombley
Attorney for Appellant
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS.....1

III. ARGUMENT5

 A. The Court Abused Its Discretion When It Required Mr. Olsen To Register As A Felony Firearm Offender Because The Factors Weighed In Favor Of Not Imposing The Registration Requirement.5

 B. The Prosecutor Committed Misconduct During Closing Argument Requiring Reversal.....11

IV. CONCLUSION13

TABLE OF AUTHORITIES

Cases

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..9
State v. Boehning, 127 Wn.App. 511, 111 P.3d 899 (2005)..... 13
State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984)..... 12
State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) 10
State v. Miller, 159 Wn. App. 911, 247 P.3d 457, review denied,
172 Wn.2d 1010 (2011)9
State v. Pierce, 169 Wn.App. 533, 280 P.3d 1158 (2012)..... 13
State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003)9
State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) 13

Federal Cases

Estelle v. Williams, 425 U.S. 501,96 S.Ct. 1691, 48 L.Ed.2d 126
(1976) 11
Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825
(2010) 10
Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407
(2010) 10
Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1
(2005) 10

Statutes

RCW 9.41.0105
RCW 9.41.010(10)(a)-(e).....7
RCW 9.41.040(1)(a)7
RCW 9.41.330(1).....9
RCW 9.41.330(2).....8

RCW 9.41.330(3).....	6
RCW 9.41.333(2)(a)-(f).....	7
RCW 9.41.333(3)(4)	7
RCW 9.41.333(5)(a)(b).....	7
RCW 9.41.333(8).....	7
RCW 9.41.335.....	7
RCW 43.43.822.....	7

Constitutional Provisions

U.S. Const. amend. XIV	11
Wash. Const. Art. I, §22	11

I. ASSIGNMENTS OF ERROR

- A. The trial court abused its discretion when it required the defendant to register as a felony firearm offender.
- B. Prosecutorial misconduct during closing argument violated Mr. Olsen's right to a fair trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court abuse its discretion when it required the defendant to register as a felony firearm offender?
- B. Did the prosecutor commit misconduct, violating Mr. Olsen's right to a fair trial?

II. STATEMENT OF FACTS

Thirty-year old Michael Olsen went to the "Shootin' Shak" pawn shop on June 15, 2017, hoping to sell his camera. The entire interaction was recorded on a surveillance DVD. (10/31/17 RP 9-10,19; CP 1).

The clerk, Steven Vetter, said they only bought firearms. Mr. Olsen asked the clerk, Steven Vetter, if a handgun was a firearm. When the clerk confirmed that it was, he pulled a gun from a shoulder holster and laid it on the counter. (10/31/17 RP 10). It

was a Ruger, single-six revolver, .22 caliber, and it was loaded with six bullets. (10/31/17 RP 11,55). Mr. Vetter took a picture of Mr. Olsen's driver's license and a picture of the serial number on the gun. (10/31/17 RP 12).

Mr. Vetter inspected the gun, finding there were no visible missing components. He unloaded the gun, cocked, and released the hammer. He did not dry fire the weapon. (10/31/17 RP 16-17). Because he did not dry fire the gun, Mr. Vetter could not testify it was operable. (10/31/17 RP 42,45). He declined to buy the gun because Mr. Olsen wanted \$250 for it and he was only willing to pay \$125. (10/31/17 RP 14, 32).

He told Mr. Olsen that if he brought in the .22 long cylinder that fit the gun he could pay a higher price. Mr. Olsen said he would bring it back and left on his bicycle. (10/31/17 RP 33,36). Instead, Mr. Olsen left the store, returned the gun to his friend, and told him he wanted nothing to do with it. (10/31/17 RP 55).

Mr. Vetter called the police to verify the gun was not a stolen weapon. (10/31/17 RP 36). He also called Mr. Olsen to tell him he notified the police about the gun. (10/31/17 RP 55). In response to the phone call, Officer Blodgett went to the Shootin' Shak. (10/31/17 RP 48). Several hours later, Mr. Olsen telephoned

Officer Blodgett and went to the police department to talk with him. (10/31/17 RP 50).

Mr. Olsen told the officer he was trying to sell what he thought was a BB gun for his friend, Jessie Cude. (10/31/17 RP 52). He said that it was not until the clerk opened up the revolver he realized it was a real firearm. He became nervous, afraid it would go off because it had ammunition in it. (10/31/17 RP 54-55).

Police later learned that Mr. Cude was not allowed to possess a gun. (10/31/17 RP 56-57). Although they searched the Cude's tent down by the river, they did not find the gun. Officer Blodgett arrested Mr. Olsen for unlawful possession of a firearm. (10/31/17 RP 50,55). Grays Harbor County prosecutors charged Michael Olsen by amended information with first degree unlawful possession of a firearm. CP 6.

Marty Hayes, the president and director of the Firearms Academy of Seattle, testified as a defense expert witness. (10/31/17 RP 69). To prepare for his testimony, Mr. Hayes, a certified firearms instructor for 31 years, purchased the same make and style gun seen in the surveillance video (10/31/17 RP 71,73). He prepared a video of himself taking the gun apart and showing the necessary steps to determine if the gun was operable.

(10/31/17 RP 79-91). He opined that one could not determine if the gun seen on the Shootin' Shak video was operable because the clerk had not conducted the necessary examination. (10/31/17 RP 86).

During closing argument the prosecutor stated:

Now, certainly the firing pin could have been sanded down or broken, or at least - or the cylinder might not have been perfectly in time. But who cares?

The person on the street who gets a firearm stuck in their face and a demand for your money or your life, do you think they think, you know maybe the firing pin doesn't work. The police officer shows up to a domestic disturbance and one of the parties is waiving around a revolver. Do you think the police officer thinks, gee, I wonder if that cylinder is in perfect time? No, it doesn't matter. That's why the squishy language is may, not can.

You don't want to create - people that wrote these laws don't want to create an imperative. The firing arm perfectly working when the person gets caught. It's enough that it worked at some point, a reasonable time before or after the incident, that it's a real gun.

11/1/17 RP 146-147.

Folks, it is up to you whether this weapon, that was never recovered, was gone. This revolver, it's firearm as the Court has instructed. Okay. I told you a little bit about why it's worded the way it is. *How many pistols, guns, firearms, you think have been tossed over the Chehalis River bridge? The Hoquiam River bridge? Over on the Wishkah? Somebody committed a crime with a gun and they needed to get rid of it. Do you really think that people who wrote these laws wanted all of those people to get away with it just because they got rid of that gun so well that nobody could ever*

find it? Of course not. Of course not. That's why it's written in there...

And there's no reason to believe that the defendant didn't believe it was. After all, he gave the BB gun excuse. *Only - only a lawyer could argue that a gun like that wasn't a firearm, right.*

11/1/17 RP 158-159.

The jury found Mr. Olsen guilty of unlawful possession of a firearm in the first degree. CP 51. At sentencing, over defense objection, the court ordered Mr. Olsen to register as a felony firearm offender. The court imposed a 90-month term of incarceration. CP 61-62. Mr. Olsen makes this timely appeal. CP 72.

III. ARGUMENT

A. The Court Abused Its Discretion When It Required Mr. Olsen To Register As A Felony Firearm Offender Because The Factors Weighed In Favor Of Not Imposing The Registration Requirement.

1) The State Legislature Did Not Announce An Intended Purpose For the Felony Firearm Registration Requirement And It Is Unclear Whether The Court's Exercise Of Discretion Actually Meets Any Purpose.

As a preliminary matter, the State Legislature did not include an intended purpose for the statute when it enacted RCW 9.41.010 et seq. See Laws of 2013, ch. 183. Because the purpose is

unstated, it is unclear why the registry requirement exists and whether a trial judge's exercise of discretion to impose the requirement on some individuals convicted of a qualifying firearm offense and not mandatory for all individuals convicted of any qualifying firearm offense.

In 2016, the Legislature tightened the registration requirement by adding another section to RCW 9.41.330. The 2016 statute makes it mandatory for the court to impose the registration requirement only on individuals whose felony firearm offense was committed in conjunction with (a) an offense involving sexual motivation; (b) an offense committed against a child under the age of eighteen; or (c) a serious violent offense. RCW 9.41.330(3).

Nevertheless, whenever a defendant is convicted of a felony firearm offense, the court must consider whether to order him to comply with the registration requirements of RCW 9.41.333. A felony firearm offense means any felony offense under Chapter RCW 9.41, which includes unlawful possession of a firearm, and any felony offense where the defendant is armed with a firearm in the commission of the offense, drive-by shooting, theft of a firearm,

and possession of a stolen firearm. RCW 9.41.010(10)(a)-(e); RCW 9.41.040(1)(a).

The required registration means that upon release from confinement, as a result of having been found in unlawful possession of a firearm, Mr. Olsen must personally register with the county sheriff of his county of residence within 48 hours. RCW 9.41.333(5)(a)(b). He would be required to provide his name, address, his physical description, the offense for which he was convicted, the date and place of conviction, and the name of previous counties where he has registered. RCW 9.41.333(2)(a)-(f). The county sheriff may require documentation that verifies the contents of his registration and may take Mr. Olsen's photograph or fingerprints to include in the record. RCW 9.41.333(3)(4).

The annual or earlier duty to register continues for four years from the date he was first required to register. RCW 9.41.333(8). If an individual who has a duty to register knowingly fails to comply with the registration requirements, he may be found guilty of a gross misdemeanor. RCW 9.41.335. The Washington State Patrol keeps the registrant's information, which is not subject to public disclosure. RCW 43.43.822.

The statute requires that before imposing such a duty to register, the sentencing court “*shall* consider all relevant factors, including but not limited to:

- (a) the person’s criminal history
- (b) whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) evidence of the person’s propensity for violence that would likely endanger persons.”

RCW 9.41.330(2).

Here, when imposing the incarceration term, the trial judge considered Mr. Olsen’s criminal history. (11/13/17 RP 56-57). The court reasoned that given the offender score a mid-range sentence was appropriate.

However, when discussing his reason for imposing the registration requirement, the court simply said:

I think that’s a good idea. Hopefully you will follow through and obey that registration, so I will include that.

(11/13/17 RP 58).

Assuming the court’s recitation of the criminal history for the purpose of imposing the time of confinement was the basis for the registration requirement, this Court reviews the order for abuse of discretion.

It is within the sentencing court's discretion to require the defendant to register as a felony firearm offender. RCW 9A.41.330(1). A sentencing court's discretionary decisions are reviewed for abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457, *review denied*, 172 Wn.2d 1010 (2011). The sentencing court abuses its discretion where its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

a. The Court Should Have Considered Mr. Olsen's Age At The Time Of The Serious Offenses When Deciding Whether To Impose The Registration Requirement.

The court expressed concern that Mr. Olsen had two convictions classified as violent offenses. The first offense occurred 18 years earlier, when Mr. Olsen was 12 years old and the second occurred 11 years earlier, when he was 18 years old. CP 60.

“Children are different than adults.” *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2010). Scientific and technical advances in understanding the adolescent brain, served as the foundation for the U.S. Supreme Court decisions in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *Miller*, and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). A defendant’s youthfulness must be taken into account at sentencing, regardless of whether the youth is sentenced in adult or juvenile court. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

The felony firearm offense registration is not a sentence being imposed on a juvenile in this case. However, in deciding whether to impose the requirement, the trial judge should have considered the circumstances related to Mr. Olsen’s youth at the time of the offenses- his age, the hallmarks of “immaturity, impetuosity, and failure to appreciate risks and consequences” of his actions. *Houston-Sconiers*, 188 Wn.2d at 23.

And one consideration for a trial court at a juvenile sentencing is whether the child can be rehabilitated. *Id.* Here, for over 10 years there was no indication of a continuance or escalation of serious offense behavior. Ironically, the majority of Mr.

Olsen's previous convictions were for a failure to register, the last of which was in 2012, five years earlier.

b. Mr. Olsen's Previous Offenses Did Not Involve A Firearm And The Record Cannot Uphold A Decision To Impose The Registration Requirement.

Significantly, none of Mr. Olsen's previous offenses involved a firearm. Nothing in this record contradicts his statement that the gun belonged to his friend. Nothing in this record suggests the handgun had ever been used in a crime. Nothing in this record suggests it was a stolen gun. Mr. Olsen exhibited no serious offense behavior for over 10 years. Mr. Olsen's criminal history does not support imposition of a felony firearm registration requirement and the trial court abused its discretion when it imposed the requirement.

B. The Prosecutor Committed Misconduct During Closing Argument.

The right to a fair trial is a basic federal and state constitutional liberty. U.S. Const. amend. XIV; Wash. Const. Art. I, §22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Prosecutorial misconduct may deprive a defendant of this constitutional right. *State v. Davenport*, 100

Wn.2d 757, 762, 675 P.2d 1213 (1984). The prosecutor in this case committed misconduct when he appealed to the passion and prejudice of the jury.

During closing argument, the prosecutor stated:

The person on the street who gets a firearm stuck in their face and a demand for your money or your life, do you think they think, you know maybe the firing pin doesn't work. The police officer shows up to a domestic disturbance and one of the parties is waiving around a revolver. Do you think the police officer thinks, gee, I wonder if that cylinder is in perfect time? No, it doesn't matter. That's why the squishy language is may, not can.

11/1/17 RP 146-47.

Folks, it is up to you whether this weapon, that was never recovered, was gone. This revolver, it's firearm as the Court has instructed. Okay. I told you a little bit about why it's worded the way it is. *How many pistols, guns, firearms, you think have been tossed over the Chehalis River bridge? The Hoquiam River bridge? Over on the Wishkah? Somebody committed a crime with a gun and they needed to get rid of it. Do you really think that people who wrote these laws wanted all of those people to get away with it just because they got rid of that gun so well that nobody could ever find it? Of course not. Of course not. That's why it's written in there...*

And there's no reason to believe that the defendant didn't believe it was. After all, he gave the BB gun excuse. *Only - only a lawyer could argue that a gun like that wasn't a firearm, right.*

11/1/17 RP 158-159.

A prosecutor has wide latitude in closing argument to draw reasonable inferences and to express such inferences to the jury. *State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005). However, the prosecutor may not make statements not supported by the evidence. *Id.*

Here, the prosecutor's remarks about domestic disturbances involving firearms and guns being tossed into rivers because someone committed a crime with them created a picture that did not match the facts of this case. They were exaggerations and designed to prejudice Mr. Olsen, encouraging the jury to infer violence and criminality where there was none.

Where a prosecutor's remarks are both prejudicial and improper, misconduct has been established. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Such misconduct demands reversal of the convictions. *State v. Pierce*, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012).

IV. CONCLUSION

Mr. Olsen respectfully asks this Court to reverse his conviction and remand for a new trial, or in the alternative, to

reverse the imposition of the felony firearm offender registration requirement.

Respectfully submitted this 12th day of July, 2018.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

WSBA 41410
PO Box 829
Graham, WA 98338
marietrombley@comcast.net
253-445-7920

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on July 12, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Grays Harbor County Prosecuting Attorney at appeals@co.grays-harbor.wa.us and to Michael Olsen/DOC#899356, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520



WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

July 12, 2018 - 3:24 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51531-8
Appellate Court Case Title: State of Washington, Respondent v. Michael S. Olson, Appellant
Superior Court Case Number: 17-1-00354-1

The following documents have been uploaded:

- 515318_Briefs_20180712152323D2660212_0096.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Olsen 515318 AOB.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net

Address:

PO BOX 829

GRAHAM, WA, 98338-0829

Phone: 253-445-7920

Note: The Filing Id is 20180712152323D2660212