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NO. 53202-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WILKINS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. The evidence did not meet the specific legal standard required for a deadly weapon enhancement

The prosecution always bears the burden of proving all elements of all charged offenses, including enhancements that mandate additional punishment. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). Defense counsel in no way stipulated that the prosecution proved the deadly weapon enhancement, as the prosecution misleadingly contends. *See State v. Humphries*, 181 Wn.2d 708, 717-18, 336 P.3d 1121 (2014) (explaining defendant stipulates to element of crime upon waiver that is “knowing, voluntary, and intelligent”). By focusing on the tenuous evidence Mr. Wilkins caused the injury, rather than the degree of the injury, counsel in no way relieved the prosecution of its burden of proof.

There is no dispute in this case that some implement injured Deonta Wilkerson, but whatever implement it was, no one recovered it or saw it being used with any degree of reliable specificity.

In order for this item to qualify for a deadly weapon enhancement, the prosecution needed to prove both (1) it had the capacity to inflict death and, (2) it was actually used in a manner that was “likely to produce or may easily and readily produce death.” RCW 9.94A.825. A likelihood of producing a serious injury is insufficient to prove the essential elements of the deadly weapon enhancement. *State v. Cook*, 69 Wn. App. 412, 417-18, 848 P.2d 1325 (1993). While the weapon does not have to actually cause a person’s death, it must be actually “used” in a way that has the capacity to cause “death and death alone.” *Id.*

An unknown implement injured Mr. Wilkerson. The prosecution was required to prove it had the “capacity” to cause death *and* by the “manner in which it was used,” must also show it was in fact “likely” to produce death as it was used. *Id.*

Yet the “manner in which it was used” involved such a quick and subtle act that the complainant did not even notice any weapon or feel any injury until later. *See* RCW 9.94A.825; 6RP 914. Mr. Wilkerson did not realize there was any weapon used against him until he saw he was bleeding. 6RP 914.

The “manner in which it was used” created an injury with a speculative, potential risk. Despite initially bleeding at the scene, Mr. Wilkerson was not bleeding and received only a “small bandage” when first seen for medical care. 6RP 788.

Doctors could not deduce the extent of unseen internal injuries and that left them to speculate that even though the radiologist saw “no active bleeding” internally after a CAT scan, they could not rule out a more serious injury. RP 788-89. There were “potential injuries” that “can happen” but Mr. Wilkerson in fact was not injured in this way. RP 790, 792. The mere fact that a doctor expressed concern that a more severe injury could have occurred and was careful in his treatment in case the injury was different than it turned out to be, this “concern” does not meet the base requirements of a deadly weapon enhancement. 6RP 793-94, 797, 800 (doctor describing “small nick” in one rib and careful treatment in case patient was more seriously injured).

Dr. Tran did not testify the injuries were life-threatening. 6RP 801-04. Despite being repeatedly pressed by the prosecutor, he only finally stated that the risk of death would be “in our

thoughts,” as opposed to a risk that he deemed to be actually present in this case. 6RP 803.

The prosecution misleadingly re-casts the Opening Brief by insisting it asserts that a deadly weapon enhancement does not apply when the victim “was lucky enough to survive.” Dr. Tran conservatively explained the medical professionals’ need to watch out for the worst case scenario. But the deadly weapon enhancement is not satisfied by the mere outside risk of a more serious injury that exists only as a “concern” not borne out by actually occurring. 6RP 804.

The prosecution did not meet its burden of proving the essential elements of the deadly weapon sentencing enhancement.

2. The court’s refusal to accept a properly submitted special verdict form and its instruction that the jurors must complete it differently than as delivered undermined Mr. Wilkins’ right to a trial by jury free of judicial coercion.

Jurors are authorized to “leave a special verdict form blank” if they cannot agree and courts should instruct them they have this option. *State v. Guzman Nunez*, 174 Wn.2d 707, 719,

285 P.3d 21 (2012). This instruction accurately reflects the State's burden of proof and serves the purposes of jury unanimity. *Id.*

Here, the court's written instructions directed the jurors to "not fill in" the special verdict form if they were not able to agree unanimously on the answer, consistently with *Guzman Nunez*. CP 63 (Instruction 64).

The prosecution insists the court is allowed to intervene and press the jury to reconsider its verdict, relying on *State v. Ford*, 171 Wn.2d 185, 189, 250 P.3d 97 (2011). In *Ford*, the defendant was charged with two separate counts of child molestation. After announcing it had reached a "unanimous verdict," the jury gave the court only one of the verdict forms, stating its decision on count 2. *Id.* at 186-87. When the court realized the jurors had turned in only the verdict form for count two, and not count one, it told the jurors they needed to fill out this other verdict form as well. *Id.* at 187.

On appeal, the court reasoned that the judge had not improperly questioned the jury's verdict because the verdict was already complete and unanimous, as the jury clearly stated

before any judicial inquiry. *Id.* at 189. In addition, the jury's failure to return the verdict form at all, either blank or filled out, reflected a failure to complete the mandatory tasks the jury had. *Id.* at 186, 191. The jury did not have the option of withholding the verdict form. It had to report a verdict, even if this verdict was a blank form.

But the circumstances of *Ford* do not apply here. The jury was allowed to give the court a blank special verdict form. It was instructed that this was allowed. CP 63. The blank verdict form was a permissible verdict. The court was not allowed to direct the jury to complete it.

Also unlike *Ford*, the defense objected to the court's intervention. 171 Wn.2d at 188. Here, the record shows defense counsel signaled an objection but the court told him to wait to voice it until after the jury returned with a new verdict. 8RP 1221, 1223. Immediately after the court accepted the jury's revised verdict, defense counsel noted his objection to the court ordering the jury to continue deliberations. 8RP 1223.

Once verdicts are delivered, a judge may not second-guess jurors when the verdicts appear inconsistent. Courts accept the

jury verdicts may be inconsistent for a variety of reasons, including mistaken understanding of the law, a desire to compromise, or interests of lenity. *State v. Goins*, 151 Wn.2d 728, 732–34, 92 P.3d 181 (2004); *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L. Ed. 356 (1932); *United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Due to the principles of “jury lenity” and “problems inherent in second-guessing the jury’s reasoning,” the jury has the power to rest its verdicts on impermissible reasons or conflicting determinations. *Goins*, 151 Wn.2d at 734, quoting *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) and *Powell*, 469 U.S. at 63.

It is “no less problematic to second-guess the jury when a general verdict conflicts with a special verdict than when two general verdicts conflict.” *Goins*, 151 Wn.2d at 734, citing *State v. McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002). “[R]espect for the jury’s resolution of the case” and the strict prohibition against intruding into jury deliberations require courts to accept the verdict as the jury delivers it even if the judge thinks the jury made a mistake. *Id.*

The court was required to accept the jury verdicts as delivered, rather than ask the jurors to fill out a form that was permissibly left blank.

3. The prosecution improperly tainted the fairness of the proceedings by deliberately refusing to comply with the court's order that it stop giving the jury information outside the record in its opening statement.

The Response Brief dramatically downplays the content and repetitive nature of the improper remarks the prosecutor made during jury voir dire and opening statements. This minimization of the challenged remarks shows the State needs to evade or ignore the nature and extent of the comments actually made to the jury, rather than acknowledging the impropriety.

A prosecutor is not permitted to refer to rules that prevent it from presenting all the evidence it has. *State v. Thorgerson*, 172 Wn.2d 438, 444, 258 P.3d 43 (2011) (“we do not condone the prosecutor’s reference to the hearsay rules and how they affect production of evidence at trial”). Despite this established rule, the prosecutor repeatedly pressed the jurors to

acknowledge they would not receive all the evidence the State had. Opening Brief at 22-27 (detailing these remarks).

It is disingenuous and unrealistic to assert, as the prosecution does in its response brief, that jurors were not expressly told this withheld evidence only favored the prosecution, so the State's misconduct must be disregarded as harmless. Response Brief at 20-21. The prosecutor's unrelenting concern with telling jurors there was evidence the State had that they would not receive could only send the message this information would have favored the prosecution.

In addition to misrepresenting the tenor and tone the prosecutor used despite the court's numerous efforts to prohibit these improper statements, the prosecution insists any improprieties may be deemed harmless because the court sustained so many of the defense objections and tried to cure the error. Response Brief at 21. This argument is also disingenuous. The defense was forced to object and the court was required to repeatedly intervene because the prosecuted persisted in making improper assertions and arguments despite the court telling the prosecutor not to. When the prosecutor "initiate[s]

and pursue[s]” the inquiry into whether there is relevant information outside of the court record, these arguments are likely to have affected the jury. *Thorgerson*, 172 Wn.2d at 448.

Thorgerson approvingly cited *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005), where the prosecutor implied there was off-the-record information pertaining to the complaining witness’s credibility consistent with her in-court testimony. *Id.* The *Boehning* Court ordered a new trial because the prosecutor’s reference to unexplained out-of-court evidence sent a signal to the jury that the prosecution had plentiful information supporting its charges even if the jury did not hear all of it, even though there was no timely objection from the defense. 127 Wn. App. at 522.

When a prosecutor repeatedly tells the jury that its witnesses have evidence that the jury will not see, and in opening statement gives an inaccurate and misleading summary of the law, its deliberate efforts to create a false lens through which the jury will view the case undermines the fairness of the trial. As explained in further detail in the Opening Brief, this

misconduct likely affected the outcome of a close and heavily contested case.

4. The improperly imposed LFOs should be stricken.

The prosecution insists this Court should refuse to strike interest imposed on non-restitution legal financial obligations that is statutorily barred even though it agrees this was imposed as an oversight. This argument shows a perplexing refusal to concede a plain legal error.

At sentencing, Mr. Wilkins told the court he was indigent and “does not have the ability to pay” any non-mandatory costs. 9RP 1245-46. He asked the court to waive any discretionary fees. *Id.* The court agreed and struck the filing fee, which was the only discretionary fee the prosecution mentioned. 9RP 1247.

By recently amended statutory authority, the court is prohibited from imposing “interest on the nonrestitution portions of LFOs on defendants found indigent under RCW 10.101.010(3)(a) through (c).” *State v. Houck*, 9 Wn. App. 636, 651, 446 P.3d 646 (2019), *rev. denied*, 194 Wn.2d 1024 (2020). “These statutory amendments apply to any case not yet final at

the time of their passage.” *Id.*, citing *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018).

The prosecution agrees it used an outdated judgment and sentence that erroneously contained this interest provision. Response Brief at 25. It says the clerk would not purposefully enforce this obligation in the future. Its insistence that Mr. Wilkins should not receive relief despite the change in the law that applies to him appears both frivolous and mean-spirited. This interest accrual provision should be stricken from the judgment and sentence.

B. CONCLUSION.

Mr. Wilkins should receive a new trial due to the prosecution's misconduct which denied him a fair trial. Further, the deadly weapon enhancement should be reversed and dismissed and the interest accrual on the judgment and sentence must be stricken.

DATED this 16th day of April 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written in a cursive style.

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MICHAEL WILKINS,)	
)	
Appellant.)	

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