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No. 53935-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MAYKIS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court prohibited Mr. Maykis from questioning potential jurors about their reactions to a powerful racial slur, denying him his right to an impartial jury.

An impartial jury is required to protect a defendant's constitutional right to a fair trial. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). In order to seat an impartial jury, a trial court should not restrict a defendant's ability to ask questions "to ferret out bias and partiality" during voir dire. *Lopez-Stayer ex rel. Stayer v. Pitts*, 122 Wn. App. 45, 51, 93 P.3d 904 (2004); *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). Here, Mr. Maykis was prohibited from asking prospective jurors about their reaction to the n-word, a powerful racial slur he was accused of levying against the victim, Mr. Brewster. Given the inflammatory effect of this particular word, the trial court's decision to preclude Mr. Maykis from asking any questions to prospective jurors about it was highly prejudicial.

The State asserts that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him," quoting *State v. Davis*,¹ 141 Wn.2d 798, 838, 10 P.3d 977 (2000). Brief of

¹ The State repeatedly refers to this case as "*State v. Brown*," although its citations and quotations clearly reference *State v. Davis*.

Respondent at 5. *Davis* in turn cites *Ristaino v. Ross*, 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976) for this proposition. However, the *Ristaino* Court articulated an exception to this rule: cases that “may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court’s refusal to question prospective jurors specifically about racial prejudice during Voir dire.” *Id.* at 595. The *Ristaino* Court noted this exception applied to cases where issues of race “were inextricably bound up with the conduct of the trial.” *Id.* at 597.

The case at bar concerned conduct allegedly motivated by racial animus. It is thus one of those cases identified by the *Ristaino* Court where the defendant was entitled to question prospective jurors about specific matters related to race that might prejudice him. As averred in the Opening Brief, the n-word stands alone in its offensive power. Brief of Appellant at 13. Accordingly, testing potential jurors’ reaction to the specific word itself was required in order to seat an impartial jury.

The State next argues that asking about juror’s reactions to the “n-word” would improperly “educate the jury panel to the particular facts of the case.” Brief of Respondent at 6–7. However, when the evidence may elicit a strong emotional response, specific questions during voir dire may be necessary to assure the jury’s objectivity. *See, e.g., State v. Whitaker*,

133 Wn. App. 199, 227, 135 P.3d 923 (2006) (potential jurors asked if they could be objective about autopsy photographs); *State v. Strange*, 188 Wn. App. 679, 682, 354 P.3d 917 (2015) (voir dire on personal experiences with child molestation in child molestation case).

Accordingly, other state courts have found that questioning potential jurors about their reaction to the n-word is entirely proper, so long as voir dire does not delve into the particular facts of the case.

For example, in *State v. Wilkins*, the victim was purported to be a member of the Ku Klux Klan (KKK) who used racial slurs, including the n-word. *Wilkins*, 94 So. 3d 984, 991 (La. Ct. App. 2012). In light of this evidence, the prosecutor elected to strike three Black venire members, stating he was concerned they would not be willing to be impartial. *Id.* at 991–92. The Court of Appeal of Louisiana found the striking of these venire members improper, and noted the prosecution could have served its goal of seating an impartial jury by “question[ing] all prospective jurors on the issues of the use of the ‘N-word’ and a person’s affiliation with extremist groups such as the KKK without indicating any particular facts in the case at bar.” *Id.* at 995–96, 1000–1001.

Similarly in *People v. Johnson*, a key witness for the State had called the defendant the n-word, and the prosecution sought to strike all Black venire members as a result. *Johnson*, 583 P.2d 774, 774–75 (Cal.

1978). The Supreme Court of California held this denied the defendant an impartial jury, concluding the prosecutor instead should have used voir dire to determine if any of the Black venire members would be offended by the n-word. *Id.* at 775. The Court also noted it could also not be presumed that the white jurors were “immune” from the “emotional impact” of the word given its “long and unfortunate history.” *Id.* at 776. The Court acknowledged “its appearance in a court of law will inevitable inject some degree of bias whether conscious or unconscious . . .” *Id.* at 775–76; *see also Commonwealth v. Cruzado*, 103 N.E. 3d 732, 739–38 & n.1 (Mass. 2018) (admission of defendant’s interview in which he called the victim the n-word held not prejudicial as trial court conducted individual voir dire on whether this evidence would affect jurors’ ability to be fair and impartial).

Here, the defense could have questioned potential jurors about their reaction to the n-word without “educating” them on the specific facts of the case. Given the power of the word itself, coupled with the fact the trial itself concerned a supposed hate crime, the trial court’s decision to prohibit Mr. Maykis from asking questions to ferret out bias related to this word was prejudicial. A new trial is required.

2. Mr. Brewster’s testimony regarding his brain surgeries was irrelevant and misleading.

The admission of prejudicial, irrelevant evidence requires reversal. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Here, the victim in the case, Mr. Brewster, was permitted to testify over objection that he had brain surgeries before the incident and had been warned by his surgeon to not let anything hit his head. RP 475. This testimony was irrelevant to any fact of consequence. *See* ER 401. Further, this testimony had the potential to mislead the jury, specifically regarding whether the rock Mr. Maykis threw qualified as a “deadly weapon” within the meaning of second degree assault and the deadly weapon enhancements. CP 54–55, 58. The prosecutor in fact argued in his closing argument this testimony was relevant to the “deadly weapon” analysis. RP 739–40. The admission of this prejudicial, irrelevant evidence requires reversal.

The State argues that the susceptibility of the victim is in fact relevant to determining whether the rock was a “deadly weapon.” Brief of Respondent at 7–10. The State cites no authority for its position that the victim’s particular vulnerabilities are relevant to this analysis. Where the State cites no authority in support of an argument, this Court “may assume that counsel, after diligent search, has found none.” *State v. Logan*, 102

Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

To prove a particular item is a “deadly weapon” for the purposes of second degree assault, the State must prove it is an “explosive or loaded or unloaded firearm . . . [or] any other weapon, device, instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). This Court has held “circumstances” within the statutory meaning include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (citation omitted); *see also State v. Barragan*, 102 Wn. App. 754, 761, 9 P.2d 942 (2000). This list does not include the particular susceptibility of the victim.

The deadly weapon enhancement defines a “deadly weapon” as “an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.” RCW 9.94A.825. Similar to a deadly weapon in the second degree assault context, this language may include consideration of “the defendant’s intent and present ability, the degree of force used, the part of the body to which the weapon was applied and the injuries

inflicted.” *State v. Zumwalt*, 79 Wn. App. 124, 129, 901 P.2d 319 (1995),² *disapproved of on other grounds by State v. Bisson*, 156 Wn.2d 507, 520 n.5, 130 P.3d 820 (2006).

Pursuant to this criteria, whether a defendant *knows* about a victim’s particular vulnerability ostensibly could be relevant to intent, although the State does not raise this argument. Here, however, there was no evidence Mr. Maykis knew Mr. Brewster prior to the incident or was aware his head was more susceptible to injury. There was also no evidence Mr. Maykis intended to hit Mr. Brewster in the head. Mr. Brewster testified the rock “missed” his head entirely, hitting his knee before he “could get out of the way.” RP 468–69.

In sum, the State can cite to no authority supporting its position that the testimony regarding Mr. Brewster’s brain surgery was relevant. The statutes defining deadly weapons and the related case law merely contemplate the inherent qualities of the weapon itself as well as the user’s intent and actions, not the susceptibility of the victim. The testimony was not relevant, and the State’s representations that it was relevant to determining if the rock was a deadly weapon likely misled the jury. Reversal is required.

² *Zumwalt* parsed the meaning of RCW 9.94A.125, which was later recodified at CW 9.94A.602 and then at RCW 9.94A.825.

3. The trial court prevented Mr. Maykis from eliciting testimony that he apologized to Mr. Brewster, which was both relevant and necessary rebuttal evidence.

Defendants have a right to present relevant evidence in support of their defense. *State v. Horn*, 3 Wn. App. 2d 302, 310, 415 P.3d 1225 (2018). Here, Mr. Brewster testified on direct he and Mr. Maykis had “a run-in or two since” the incident. RP 480. On cross, Mr. Maykis sought to elicit testimony these were not “run-ins,” but rather interactions in which Mr. Maykis had apologized for his behavior. RP 492–93. 500. This evidence was relevant to show Mr. Maykis did not attack Mr. Brewster “because of” his race, color, ancestry, or national origin, as he was charged with doing. CP 13. Specifically, this evidence demonstrated Mr. Maykis had gone out of his way to make amends with Mr. Brewster, thus making it “less probable” he had selected Mr. Brewster as a victim because of any racial animus towards him. ER 401. This evidence also rebutted any prejudicial implication Mr. Maykis had harassed Mr. Brewster after the fact. Nevertheless, the court excluded this evidence on relevancy grounds. RP 504–505.

The State devotes most of its briefing to its argument this evidence was hearsay. Brief of Respondent at 11–17. The State even implies the trial court excluded the evidence on hearsay grounds. *Id.* at 16. It did not. The court’s final ruling clearly excluded the evidence on relevancy

grounds alone. RP 504–505. Although the State raised a hearsay objection at one point, RP 494, the defense explained the apology wouldn't be offered for the “truth of the matter asserted, but rather for the fact it was made.” RP 498. The court seemed to accept this argument, reiterating it was ruling the evidence inadmissible on relevancy grounds. RP 498.

As the defense argued, the evidence regarding the apologies was not hearsay because it was not being offered for the truth of the matter asserted, *i.e.*, that Mr. Maykis was actually apologetic. Instead, it was offered to show Mr. Maykis made apologies to Mr. Brewster. Even if the evidence regarding the apologies *was* hearsay, Mr. Maykis was still permitted to present this evidence to rebut any impression left by Mr. Brewster's testimony that he and Mr. Brewster had negative “run-ins” after the alleged assault. *See State v. Wafford*, 199 Wn. App. 32, 36–37, 397 P.3d 926 (2017) (“A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth.”); *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969) (“It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.”) The State concedes rebuttal may include

otherwise inadmissible evidence. Brief of Respondent at 15.

Accordingly, the State's hearsay argument is irrelevant to the issue presented.

The State also asserts Mr. Brewster's testimony would have "too widely opened the door," because in defense voir dire of Mr. Brewster expressed discomfort at seeing Mr. Maykis around their neighborhood. Brief of Respondent at 15–16; RP 500–501. The State contends this evidence "did not tend to rebut the supposed negative implication of the 'run ins' remark." Brief of Respondent at 16. However, this testimony was given during a defense voir dire before the judge, and was not necessarily the testimony defense counsel would have elicited in front of the jury. RP 500–501.

Finally, the State asserts that "after-the-fact behavior does not inform the question of [Mr.] Maykis' malice or intent at the time of the incident." Brief of Respondent at 16; *see also id.* at 14. Supreme Court precedent holds otherwise, recognizing that character evidence a defendant lacked the necessary intent or malice may be relevant and admissible. *State v. Eakins*, 127 Wn.2d 490, 495, 902 P.2d 1236 (1995).

This Court's decision in *State v. Pollard*, 80 Wn. App. 60, 906 P.2d 976 (1995) is instructive on this point. There, the defendant threatened two Black children while yelling racial slurs. *Id.* at 62. After

police were called to the scene some time later, the defendant continued to yell racial slurs and made other racist statements. *Id.* at 63. This trial court considered the defendant's behavior both during the assault and during his arrest to conclude the assault was motivated by racial animus. *Id.* at 66–67. This Court upheld the trial court's analysis, finding there was sufficient evidence to conclude the victim was selected because of his race and color. *Id.* at 66–67. In doing so, this Court rejected the defendant's claim that the trial court erred in considering the events that occurred after the assault, noting the defendant's lack of legal argument as well as his failure to object below. *Id.* at 67–68. Similarly here, that Mr. Maykis apologized to Mr. Brewster was relevant to determining whether he was motivated by racial animus during the assault. The State provides no compelling legal argument to the contrary.

The trial court's decision to exclude evidence related to the apologies denied Mr. Maykis his right to present relevant, admissible evidence in support of his defense. It also denied Mr. Maykis' the ability to rebut the implication he had negative "run ins" with Mr. Brewster after the incident. A new trial is required.

4. Because the rock was not a deadly weapon, the enhancements must be stricken from the sentence.

Mr. Maykis' sentence was enhanced by 18 months because he was armed with an allegedly "deadly weapon"—a rock. RCW 9.94A.825. As explained at length in Mr. Maykis opening brief, a rock is not a deadly weapon. Brief of Appellant at 25–29. The plain language of the enhancement punishes the use of deadly "implements" and "instruments," *i.e.*, man-made items "*designed to injure or kill.*" RCW 9.94A.825; *State v. Shepherd*, 95 Wn. App. 787, 792 (1999)³ (emphasis added) (quoting *State v. Ross*, 20 Wn. App. 448, 454, 580 P.2d 1110 (1978)). A rock does not fit within the plain meaning of the statute. Further, the deadly weapon enhancements statute was passed to discourage armed crime, and thus should not apply to everyday items typically used for non-deadly purposes, including rocks. *Shepherd*, 95 Wn. App. at 793 (quoting *Ross*, 20 Wn. App. at 454).

The State's arguments to the contrary are unavailing. The State first argues that rocks are "the most primordial weapon known to humans." Brief of Respondent at 18. But the enhancement imposes significant punishment for the defendant's use of a "*deadly weapon*," a particular class weapons as defined by statute. RCW 9.94A.825. It does

³ *Shepherd* addressed RCW 9.94A.125, which was later recodified at RCW 9.94A.602 and then at 9.94A.825.

not contemplate increasing the punishment for any item used as a weapon. It is notable that, despite the “history of using rocks as weapons,” the State identifies no other case in which the deadly weapon enhancement has been applied due to the defendant’s use of a rock. *See* Brief of Respondent at 18.

The State next argues the statute contemplates a rock as a deadly weapon because a *per se* deadly weapon listed by statute, sling shots, are used to “throw rocks.” Brief of Respondent at 19; RCW 9.94A.825. The State’s argument conflates ammunition with the weapon itself. While a pistol, another *per se* deadly weapon, fires bullets, the statute does not list bullets alone as a deadly weapon. RCW 9.94A.825.

The State next asserts a screwdriver is an instrument that, while not designed to be deadly, can enhance a sentence if used in a deadly manner. The State cites no on-point authority for this proposition. The case the State does cite, *State v. Barragan*, held a pencil could be a “deadly weapon” for the purposes of first degree assault. *Barragan*, 102 Wn. App. at 761–62. However, the definition of a deadly weapon for the purposes of first (and second) degree assault is broader than it is for the deadly weapon enhancement. *See* RCW 9A.04.110(6).

Specifically, the assault deadly weapon definition includes explosives, firearms, other weapons, devices, instruments, articles, or

substances that are “readily capable of causing death *or substantial bodily harm.*” *Id.* The definition also explicitly recognizes vehicles are deadly weapons. *Id.* Conversely, the enhancement only recognizes “an implement or instrument which has the *capacity to inflict death* and from the manner in which it is used, is *likely to produce or may easily and readily produce death*” as falling within the gambit of a deadly weapon. RCW 9.94A.825 (emphasis added). Accordingly, only weapons that are deadly—not merely those weapons that have the capacity to inflict substantial bodily harm—qualify for the enhancement. Further, as this Court held in *Shepherd*, cars and other objects most commonly used for non-deadly purposes do not warrant a sentencing enhancement. *Shepherd*, 95 Wn. App. at 793 (citation omitted); *see also Ross*,⁴ 20 Wn. App. at 454. Accordingly, while a pencil or a screwdriver may qualify as a deadly weapon for the purposes of first degree assault, the use of these items does not provide a basis for an enhancement. *Shepherd*, 95 Wn. App. at 793.

The State does not cite nor attempt to distinguish *Shepherd*. The State instead relies on authority from Florida to argue a rock is a “deadly weapon.” Brief of Respondent at 20–21 (citing *Saint-Fort v. State*, 222

⁴ *Ross* concerned RCW 9.95.040, which established mandatory minimum penalties for felonies committed with a deadly weapon before the Sentencing Reform Act’s effective date. *Shepherd*, 95 Wn. App. at 792. RCW 9.95.040 contains the same nonexclusive list of instruments as RCW 9.94A.825. *See id.*

So. 3d 624 (Fla. Dist. Ct. App. 2017)). However, Florida does not define “deadly weapon,” in statute, let alone one comparable to Washington’s. *Simmons v. State*, 780 So. 2d 263, 265 (Fla. Dist. Ct. App. 2001) (relying on case law to define a deadly weapon as “one likely to produce death or *great bodily injury*.”) (emphasis added). Accordingly, *Saint-Ford*’s holding that a rock can be deadly is irrelevant to the question presented here. *Saint-Ford*, 212 So.3d at 626. To be clear, Mr. Maykis does not challenge the general proposition that a rock can be deadly. A car can also be deadly. That does not mean the use of either warrants a sentencing enhancement under RCW 9.94A.825. *See Shepherd*, 95 Wn. App. at 793.

The State also asserts that it is the *use* of a thing rather than its design that determines whether it is a deadly weapon warranting a sentence enhancement. Brief of Respondent at 20. If this were true, a car used to run someone over would be considered a deadly weapon, but, again, *Shepherd* holds otherwise. Further, even if *use* were dispositive, the manner in which the rock was used here did not qualify it as a deadly weapon.

In *State v. Zumwalt*, this Court assessed whether a knife shorter than three inches was a “deadly weapon,” considering “the defendant’s intent and present ability, the degree of force used, the part of the bodily to which the weapon was applied and the injuries inflicted.” *Zumwalt*, 79

Wn. App. at 129. Applying these considerations, it is clear the rock was not a deadly weapon. As previously explained, the State's theory was that the rock was "deadly" within the meaning of the statute because Mr. Brewster's head was particularly susceptible to injury due to previous brain surgeries. RP 739–40. However, the State presented no evidence Mr. Maykis intended to kill Mr. Brewster with the rock, knew about Mr. Brewster's brain surgeries, or even intended to throw the rock at Mr. Brewster's head. *See* pg. 7, *supra*.

Nor did the State present any evidence Mr. Maykis had the actual ability to throw the rock at Mr. Brewster's head. Mr. Brewster testified Mr. Maykis "launch[ed]" or "chuck[ed]" the rock in an "arc," implying Mr. Maykis was unable to throw the rock directly at him. RP 467–68. The evidence suggested the rock was too heavy to throw accurately; Mr. Brewster testified that he tried to throw the rock back at Mr. Maykis but was only able to "get it over the fence" due to its weight. RP 476–77. Further, the rock did not in fact hit Mr. Brewster's head, but rather his knee, resulting in a small "bruise" or "scar" and some "bothersome" pain. RP 468, 471–72, 509. Accordingly, even presuming the "use" of the weapon is dispositive, the State here failed to prove the rock was a "deadly weapon" as demonstrated by Mr. Maykis' intent, ability, the part of the

body to which the weapon was “applied,” and the actual injuries inflicted.

See Zumwalt, 79 Wn. App. at 129.

In sum, the rock was not a deadly weapon. Rocks do not fit within the plain meaning of the deadly weapon enhancement statute, nor would enhancing a sentence based on their use serve the legislative intent. Mr. Maykis also did not use the rock in a deadly manner. The sentencing enhancements must be stricken.

F. CONCLUSION

For the reasons stated above and in the Opening Brief, this Court should reverse and remand for a new trial, with instructions that the deadly weapon enhancements be stricken from the charges.

DATED this 28th day of September, 2020.

Respectfully submitted,

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