FILED
APR 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY

28093-4-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DWIGHT L. RUSS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE KATHLEEN M. O'CONNOR

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Trial judge erroneously refused to instruct the jury on the less included offenses of residential or second degree burglary and misdemeanor assault.
2. The judge erred in imposing sentences of life without the possibility of parole.

II.

ISSUES PRESENTED

A. Are lesser included crimes warranted by the facts of this case?

B. Did the defendant's POAA sentence violate equal protection?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

A. THE LESSER INCLUDED CRIMES URGED BY THE DEFENDANT ARE LEGALLY POSSIBLE BUT NOT AVAILABLE UNDER THE FACTS OF THIS CASE.

The Washington State Supreme Court uses the *Workman* analysis to determine the status of lesser included crimes. *State v. Porter*, 150 Wn.2d 732, 82 P.3d 234 (2004). There is a two-pronged test derived from *Workman*. "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Court held that the evidence must give the inference that *only* the lesser crime was committed to satisfy the factual prong of *Workman*. *Id. See also: Porter, supra* at 737.

As the trial court noted in its decisions, there was testimony that the defendant entered the residence uninvited. 265-67. There was also testimony that he was armed with a firearm. There was testimony that the defendant pointed the firearm at Mr. Rijon. RP 81, 107, 109, 125, 126.

Pointing a gun at another person is second degree assault. RCW 9A.36.021(1)(c). It would not be possible to find just the elements of residential burglary or a misdemeanor assault due to the presence of the gun. There is essentially zero doubt that there was a gun present during the second entry of the defendant into the house.

The defendant was charged as both a principle actor and an accomplice. The presence of the gun makes the proposed lesser included crimes of residential burglary and misdemeanor assault outside of *Workman*. There was nearly unanimous testimony that a gun was present. Even the defendant's compatriot, Mr. Marshall, said there was a gun. The jury could have found that the defendant did not have a gun -- Mr. Marshall had a gun. If the jury concluded that the defendant did not have a gun, they could still find the defendant guilty as an accomplice, so long as the defendant knew of the presence of the gun.

If, on the other hand, the jury concluded the defendant knew nothing of the gun, there could be no assault of any kind as there was no testimony that Mr. Rijon was struck by the defendant or anyone else.

Antoine Marshall testified that he accompanied the defendant to the residence in question. RP 218. According to Mr. Marshall, he stayed in the car for a time, and then went to the residence to retrieve the

defendant. RP 218-19. Mr. Marshall testified that he got a gun from an unlocked car (apparently not the car in which he arrived at the scene) and approached the residence. RP 228. Mr. Marshall's testimony was disjointed at best. According to Mr. Marshall, the defendant did not know about the gun and never touched the gun. RP 224. It is difficult to understand how Mr. Marshall could know the defendant's mind and know what the defendant knew or did not know.

It is worth noting that Mr. Marshall did not testify to any actions on the part of the defendant that would support a charge of residential burglary. Mr. Marshall did not testify that the defendant was told to leave, did not have permission to return, entered uninvited into the residence or any other actions typically associated with residential burglary. That testimony would have to come from State's witnesses.

William Goode testified that after being forced out of the house, the defendant came back into the house with a gun in his trousers. RP 80. He was not invited. RP 80. At this point a first degree burglary has occurred. Mr. Goode testified that the defendant drew the gun and pointed it at Steve Rijon. RP 81. This constitutes a second degree assault. At one point, Mr. Marshall was in a foyer inside the door, with a gun. RP 81.

This would mean Mr. Marshall was potentially guilty of first degree burglary and the defendant was guilty by accomplice theories.

According to Earl Davis, the defendant was in an argument of an unknown nature involving Mr. Rijon. RP 122-23. According to Mr. Davis, the defendant left the residence and returned with a gun. RP 123. Mr. Davis testified that the defendant stuck a gun in Mr. Rijon's chest. RP 126. The testimony was that Mr. Marshall was with the defendant when he entered the residence the second time. RP 126.

Mr. Jayson Baker was a neighbor across the street from the residence in question. Mr. Baker arose early in the AM to plow snow. RP 138. Mr. Baker saw two black males get into a car and leave the area. RP 140. Because he had forgotten some keys, Mr. Baker returned home and the same car he had seen leave was now back at the residence. Mr. Baker heard yelling and screaming and he heard someone say, "I got a gun." RP 141. He saw two black males come out of the residence, one taller than the other. RP 141. According to Mr. Baker, the taller male handed the shorter male a gun. RP 142.

When Officer Tim Ottmar arrived, he noticed a gun inside a Chevrolet Impala and the gun was retrieved. RP 163.

Essentially, with the exception of Mr. Marshall, everyone involved with the altercations at the Goode residence saw a gun. Mr. Marshall testified that he had the gun and the defendant did not. This is completely contrary to all the other testimony. In order for the defendant's theories on lesser included instructions to function, the jury would have to reject parts of most of the witness' testimonies and accept those same witnesses' versions of the defendant's uninvited entries into the residence.

A lesser included instruction cannot be based solely on jury's disbelief of State's witnesses. *State v. Fowler*, 114 Wn.2d 59, 66-67, 785 P.2d 808 (1990) (*citing State v. Workman*, 90 Wn.2d at 447-48). In this case, the jury would have to disregard parts of multiple witnesses' testimony. The defendant cannot rely on the testimony of Mr. Marshall to establish the proposed lesser crimes of residential burglary and misdemeanor assault. Mr. Marshall's testimony does not indicate that the defendant entered or remained unlawfully in the residence. Further, Mr. Marshall's testimony does not shed light on a misdemeanor assault. The defense would have to rely upon a hypothetical "selective" disbelief on the

part of the jury in an attempt to support his request for lesser included instructions.

Ultimately, it would have been error for the trial court to give instructions on any crime that did not involve a gun. As mentioned above, the evidence has to show that *only* the lesser crimes were committed. In this case, the only person denying the defendant's possession of a handgun was Mr. Marshall, the defendant's long time friend and resident in the Washington penal system. Even so, as an accomplice to the defendant, the evidence shows that the defendant or an accomplice was armed with a deadly weapon.

B. THE DEFENDANT'S SENTENCE UNDER THE POAA IS NOT COMPLETELY IRRATIONAL AND THEREFORE DOES NOT VIOLATE EQUAL PROTECTION CLAUSES OF THE CONSTITUTION.

The defendant on appeal argues that his Persistent Offender Accountability Act [POAA] sentence was a violation of equal protection. The defendant's arguments center on whether an offender is treated differently when the offender's crime is elevated by a prior felony and a situation in which an offender has a criminal history such that the POAA is applicable. In the first case, the enhancing crime is found by the jury as

an element of the current crime. In the second case, the trial court finds the existence of the requisite convictions.

RCW 9.94A.555(2), the POAA "three strikes statute," reads:

> (2) By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to: (a) Improve public safety by placing the most dangerous criminals in prison. (b) Reduce the number of serious, repeat offenders by tougher sentencing. (c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand. (d) Restore public trust in our criminal justice system by directly involving the people in the process.

RCW 9.94A.555(2).

Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification: (1) strict scrutiny when a fundamental right is threatened; (2) intermediate or heightened scrutiny when important rights or semisuspect classifications are involved; and (3) rational basis scrutiny when none of the above rights or classes is threatened. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996).

Because the defendant in this case is urging what amounts to a liberty interest, the lowest level of scrutiny applies. Only a rational basis for the sentencing scheme must be shown. Stated differently, the

defendant must show that the POAA is completely arbitrary. *State v. Flores*, 114 Wn. App. 218, 225-26, 56 P.3d 622 (2002).

The defendant does not have a right to have his prior convictions proven to a jury. *See*: *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005); *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909, 124 S. Ct. 1616, 158 L. Ed. 2d 256 (2004); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996, 122 S. Ct. 1559, 152 L. Ed. 2d 482 (2002); *see also State v. Ortega*, 120 Wn. App. 165, 84 P.3d 935 (2004); *accord Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Relying on *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008), the defendant argues that the standard of proof for prior crimes that qualify an offender for persistent offender status should be the same as the standard of proof required to use a prior crime to elevate the level of the current crime. The State submits that *Roswell* is not on all fours with this case as the crime involved in *Roswell* was communication with a minor for immoral purposes. *Id.* at 190. The statutes for that crime elevate what is otherwise a misdemeanor to a felony. *Id.* In the case here,

neither first degree burglary nor second degree assault are changed (elevated) by the existence of prior felonies.

The Washington State Supreme Court has rejected such equal protection arguments as are being urged by the defendant in this appeal. *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

This court has rejected POAA equal protection arguments of the type presented by the defendant in this case. This court held: "We conclude then that proof of his prior convictions by a preponderance of the evidence is not entirely irrelevant to the purposes of the persistent offender statutes. His sentence is rationally related to the purposes of the Persistent Offender Accountability Act and is not, then, a violation of equal protection." *State v. Williams*, 156 Wn. App. 482, 488, -- P.3d --, (June 15, 2010). *Id.*

The defendant's arguments fail for lack of decisional support in Washington State caselaw.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 12TH day of August, 2010.

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