

FILED

OCT 19 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 286274

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT DANIEL WEBB,

Petitioner.

BRIEF OF RESPONDENT

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I. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. There was sufficient evidence to convict Mr. Webb of Robbery in the First Degree.

a. Robbery First Degree does not specifically require the victim to be positive that what appears to be a deadly weapon actually is a deadly weapon.

b. The Robbery First Degree Statute does not require that a weapon display be what causes the victim to turn over the property.

c. Even under the Defense reading of the statute, there was sufficient evidence to convict Mr. Webb of Robbery in the First Degree

2. There was sufficient evidence to find the aggravating factor that the robbery involved a destructive and foreseeable impact on persons other than the victim.

3. The Court did not err by failing to give the defendant's proposed diminished capacity/voluntary intoxication instruction.

4. RCW 9.94A.535(3)(r) does not violate Due Process vagueness prohibitions.

a. Aggravating factors are not and should not be subject to Due Process vagueness analysis.

b. This aggravating factor is not unconstitutionally vague.

5. The jury was instructed with the language of the statute in their special verdict form, and any failure to set that language out again in an additional separate instruction was no error, or at the worst, harmless error.

6. It was not error in this case to instruct the jury that unanimity was required for the jury to answer “No” to the special verdict.

II. STATEMENT OF FACTS

On March 31, 2009, Eric Owens, a former air force jet mechanic and I.T. web developer was working at an AM/PM gas station and mini mart (RP I, 4-6)¹. He had the night shift. (RP I, 6). Just before three a.m., after a truck driver was in, a man and a little girl walked into the store. (RP I, 7) The man was the defendant, Daniel Webb (RP I, 7). The girl got a drink and the man got a cup of coffee that was actually two paper cups stacked together. (RP I, 8) Owens told the man to put a sleeve on the cup instead of using two cups, because the cups were inventoried and he would be charged for two. (RP I, 8) Webb immediately became threatening. (RP I, 8-9) His daughter was standing to his right, and he asked the clerk if the clerk would like to throw the hot coffee in his face. (RP I, 9) He seemed to escalate and was upset. He then asked something about the drawer. He pulled out a gun and the clerk asked “Are you robbing me?” (RP I, 10) The clerk testified that at first he was scared and the gun looked very real. (RP I, 10)

The gun was pointed at the clerk. (RP I, 10) The clerk asked Webb how he would like the cash. Webb told him not to call the police or he would come back

¹ RP I refers to Trial Volume I, July 28, 2009 and RP II refers to Trial Volume II, July 29, 2009.

and kill him. (RP I, 10) The clerk at first was looking at the gun and thinking “I’m dead”. (RP I, 10)

The clerk said it looked real at first. (RP I, 11) He said his mind was a roller coaster. He was afraid for his life, fearful for the little girl, and worried what would happen if a customer walked in while this was going on. (RP I, 11)

As the clerk looked at it, the gun appeared to be plastic. (RP I, 12) Then Webb put the gun back into his pocket. (RP I, 12) He continued talking about being out of a job and needing to take care of his daughter. (RP I, 12) The clerk gave him the cash. (RP I, 12) Webb had Owens walk around the counter into the aisle of the store. (RP I, 12) The clerk was concerned for his life and for the little girl, so he did what Webb asked. (RP I, 12) The clerk, Owens, thought it would be best to stay calm and talk to him. (RP I, 13) They talked about Webb’s job and being a parent. (RP I, 14) Then Webb had his daughter go to the car. (RP I, 14) He told Owens “I wasn’t going to hurt you.” (RP I, 14) Webb handed Owens back the cup of coffee, warned him not to call the police, and then left. (RP I, 15) Owens immediately went to the counter and called 911. (RP I, 15)

At the trial, the surveillance video of the robbery was shown to the jury. (RP I, 16 – 20) The clerk commented on his own calmness and on his choice of words

to Mr. Webb, indicating he was hoping to keep Mr. Webb calm so that the clerk and the little girl would not get hurt. (RP I, 19) The clerk told the jury he honestly didn't know if Webb was going to shoot him. (RP I, 20) He also worried Webb would get in a car and get into a high speed chase and wreck, and kill the little girl. (RP I, 20)

At the trial, the 911 tape was also played. (RP I, 21) The clerk, however, indicated to the jury that he was not really feeling as blasé as he sounded on the tape. (RP I, 21) He said he was feeling a lot of emotions, including fear, because Webb told him if he called police Webb would come back and kill him. (RP I, 21) He was also angry that he had to call 911, wake up the manager, and do paperwork.

On the 911 tape, he mentioned a number of times that he didn't think the gun was real. (CP 95-110) He also said on the 911 tape the only reason he had decided the gun was plastic was because of the lighting. Otherwise he would have thought it was real. (CP 99-100).

When asked on the witness stand why he had told the 911 operators so many times it was a toy gun, Mr. Owens said,

“Well, there is a lot of emotions running through my mind. Again, I have

never been through anything like that before. Fear, anger, concern, not only for myself, but especially for the little girl and I guess out of the fear and confusion and everything that happened rather quickly, my brain had trouble processing reality and it's possible maybe my mind may have convinced me it wasn't real. I know at first, the first time I saw it, it certainly looked real and I took the threat as being very real..." (RP I, 22)

Owens was in the military but was not a firearms expert. (RP I, 24) After he was done talking to the dispatcher at 911, the officers arrived and he spoke to them. (RP I, 24) He was concerned for the safety of the little girl, but he was relieved that he was okay and thankful that he was alive. (RP I, 25) He was also fearful because Mr. Webb had threatened to come back and kill him. (RP I, 25) He was fearful enough the next night that he asked the State Patrol to leave a car there, which they did. (RP I, 25) After the robbery, and after hanging up from his 911 call, he told police in his statement that he feared for his life and thought Webb was going to shoot him. (RP I, 26) When Webb pulled out the gun, Owens told police he was fearful for his own life, but also for the little girl. He didn't know if Webb would shoot him and shoot her and shoot a customer when they came through the door. (RP I, 27)

Under cross examination, Webb again stated he at first thought the gun was real but as time progressed he decided there was a strong possibility the gun was not real. (RP I, 28-29) He also indicated that company policy is to hand over the money whether there is a weapon or not. (RP I, 29-30) Owen also testified that when Webb pulled the gun, the girl was absolutely stunned and afraid. (RP I, 39) Some photos from the surveillance tape were admitted as exhibits 1 through 8. (RP I, 38-39, 41) At no time throughout the contact did Mr. Owens testify that Mr. Webb seemed too intoxicated to know what was happening or to form an intent to rob the store. (RP I, 4-41) In fact nothing was said about alcohol or intoxication at all. (RP I, 4-41)

Mr. Bjorklund was a friend of Mr. Webb's from AA. (RP I, 59) That evening, he received a call from Webb asking if Webb and his daughter could come over. (RP I, 61) Webb sounded extremely upset. (RP I, 61) It also "became somewhat evident that he was not sober" when Bjorklund tried to talk back with him. (RP I, 61-62)

During the call, Webb said he had eluded some police and was driving 80 miles an hour. (RP I, 63) He was also concerned whether Bjorklund would call the police on him and "hang him out to dry." (RP I, 63) He sounded angry and

“like he was drunk as well.” (RP I, 63)

Webb called Bjorklund a second time and was still worried whether Bjorklund would call the police. (RP I, 64) He said he had done something real big. Then he put his daughter, Meadow on the phone and said “Meadow, tell him what we did.” (RP I, 64) When she was quiet, he told her again, “Tell him what we did,” and she said, “We robbed a store.” (RP I, 64) Bjorklund then spoke again with Webb, who exhorted him not to call the police. (RP I, 65)

When Webb arrived, it was obvious he had been crying. ((RP I, 65) Bjorklund wanted him to get the girl into the house. (RP I, 66) Webb was talking non-stop and was very angry. (RP I, 66)

Bjorklund said as he watched Webb, Webb seemed so drunk he could barely stand up. (RP I, 67) He was getting sick and his eyes were so impacted from crying Bjorklund thought he couldn't see through his tears. (RP I, 67) Bjorklund said he seemed so drunk or high that it would be impossible to just drive there like he said he did. However, he had. (RP I, 67) As Webb then sat down, he went in and out of consciousness. (RP I, 67) Bjorklund tried to take care of Meadow. (RP I, 68) He was worried that Webb was so drunk or high and so upset that things could go really wrong. (RP I, 68)

Webb would sit up again really agitated and then would lean back again. (RP I, 69) Bjorklund called his own sponsor. Then he tried to lay down a little. (RP I, 69) He heard Meadow get up and he got her some food. (RP I, 69-70) They talked. (RP I, 70) She was stunned and measuring every word. She was not like he had seen in the past. (RP I, 70) Bjorklund went and made another phone call. (RP I, 70) When he came back, Webb sat up and told Bjorklund that Webb had to do it. He said he was doing everything he could to make money but it wasn't working and it was never good enough. (RP I, 71) He also said he couldn't stay [with his wife] any longer and that he had to take care of Meadow. (RP I, 71)

Bjorklund tried to get Webb to leave Meadow with him. (RP I, 71) But Webb said Webb was taking care of her. (RP I, 71) Then the police called. (RP I, 72) The police asked if Webb was there. Bjorklund said yes. He tried twice to say quietly "get here now". (RP I, 73) Bjorklund was afraid Webb was going to leave with his daughter, and he feared for her safety. (RP I, 73)

Webb became suspicious and asked if it was the police. (RP I, 74) He decided to leave right away. (RP I, 74) He told Bjorklund he needed time to think. He said the DTs were bothering him, and he was sick. (RP I, 74) Webb

took Meadow and left. (RP I, 75) Bjorklund got in his car and tried to follow Webb while on the phone to the police, but ended up losing him. (RP I, 75-76)

Under cross examination, Bjorklund again said Webb was intoxicated. (RP II, 4-6) Bjorklund said he wasn't an expert, (RP II, 6) but that "if you knew how he feels about his daughter when he's not that way, and then saw how he was acting and the decisions he was making, it was beyond ludicrous." (RP II, 6) Bjorklund said Webb would interrupt him and would not even consider Bjorklund's reasonable proposals. (RP II, 8) He would make terrible decisions. (RP II, 8)

Webb had recently had a number of jobs but "for whatever reason he would move on to another job." (RP II, 9) Webb had also had a bad marriage for as long as Bjorklund had known him. (RP II, 9) In fact, Bjorklund also described Webb's back and forth on his marriage over time as "almost insanity." (RP II, 9)

Despite Bjorklund's description of Webb's intoxication level at his house, (RP II, 10-12) Bjorklund did describe Webb as able to make decisions. (RP II, 13) In fact, Bjorklund said Webb made a number of decisions and followed through with them. (RP II, 13)

There was some testimony about blackouts, and how people can go for

days and walk around and make decisions and act intentionally, but be intoxicated and not remember it. (RP II, 16-17) Bjorklund talked about how Webb told him in person he had pulled out a gun, told the man [referring to the clerk, Mr. Owens] he was taking care of his family, or something to that effect.(RP II, 19)

The first deputy on the scene described Mr. Owens as “panicked.” (RP II, 26) The deputy also told the jury that when he reviewed the store surveillance tape, the gun Mr. Webb showed looked real to him. (RP II, 27) Had he been in the store, he would have pulled his gun. (RP II, 28) He also said Mr. Owens thought it was a real gun at first and was scared. (RP II, 29, 30-31)

This detective said that when detectives spoke to Webb, Webb claimed to simply have no recollection of the robbery. (RP II, 39) He remembered a verbal disagreement in Everett beforehand, and he remembered being at Bjorklund’s house afterward, but he claimed he didn’t remember any of the middle. (RP II, 39) He claimed he was in an alcoholic blackout. He had seen a photo that showed him and his daughter at the store, with his daughter having a very scared look on her face. (RP II, 40) He just found \$150 in his pocket at Bjorklund’s house and claimed he had no memory of getting it. (RP II, 40)

The detective, in response to cross examination also confirmed Mr. Webb

said he had been drinking, and that when Webb got to Bjorklund's place he was intoxicated and then continued drinking and got more so as the day went on. (RP II, 40, 44) He said Webb appeared to be intoxicated but functioning on the video. (RP II, 45) People who are in blackouts can function. (RP II, 45)

The exact model air soft gun that Mr. Webb claimed to own, and which was used in the robbery was admitted, in both the original version as purchased at Wal-Mart, and the spray painted version where the orange tip and the gun were sprayed black so that it matched the one Webb had. (RP II, 48-49, 52)

Deputy Vraves of the Sheriff's Office testified about purchasing the two and modifying one of them. (RP II, 52-58) He also testified that they came with a warning that it was against Federal law to alter or remove the orange marking or paint over the transparent part of the product (as he had done with spray paint from Wal-Mart). (RP II, 56, 59) The model then looked like a real gun and looked like the one in the photos of the robbery. (RP II, 56)

Detective Higashiyama testified about how they had figured out that the suspect was Robert Daniel Webb, and also about how they got Mr. Bjorklund's name and called him about a quarter after 5 p.m. after the robbery 14 hours previously. (RP II, 64-65) He talked about the efforts to find Mr. Webb. (RP II,

67-69) Eventually Meadow was located in California when Mr. Webb fled from them again. (RP II, 69) Police never did find the actual gun used. (RP II, 69-70)

Eventually, when Webb was arrested, Detective Higashiyama also spoke to him. The detective talked about Mr. Webb's statement, in which Webb remembered leaving with Meadow and then going to Bjorklund's place, but not the drive in between. (RP II, 72) He remembered tossing the gun out the window and even gassing up in Yakima, where he discovered he had extra money in his pocket. (RP II, 72,73) He remembered all the other details of his journey but the robbery. (RP II, 74)

The detective said Mr. Webb's wife had moved and wouldn't let them speak with Meadow now. (RP II, 77) She didn't want the girl further disturbed. (RP II, 77) The detective also discussed how the airsoft gun (that was the model Mr. Webb said was with him in the car) was identical to a real Colt 1911 except for weight. (RP II, 78) He also mentioned that some real guns are actually plastic. (RP II, 79) His SWAT team trains with air soft guns because they're so realistic. (RP II, 79) If officers encountered someone with one of these guns in real life, officers would draw on him, and if it was leveled at someone would be forced to fire upon him. (RP II, 80) The detective said he was taking Mr. Webb's

and Meadow's word that the model in court was the type of model used. (RP II, 81) The gun used had been modified so it no longer had an orange tip. (RP II, 82)

The jury instructions proposed from the prosecutor and the defense were mostly the same. (RP II, 83ff) In fact, defense agreed that with the exception of the intoxication instruction, the defense proposals were in sync. (RP II, 85) The defense had not provided notice to the state of an intent to use a diminished capacity/voluntary intoxication defense until after all the evidence when there was a jury instruction conference. (RP II, 87) The court carefully on the record considered all the evidence presented around drinking, and concluded there was substantial evidence of drinking, though not necessarily drinking before Webb got to Thorp (where the robbery occurred), and no evidence that Mr. Webb could not form the intent to take property by force. (RP II, 95-97)

The defense made no objection to the enhancement instruction given other than to object to its inclusion with Robbery 2, if the jury were to go to Robbery 2. (RP II, 90)

The jury came back with a verdict of guilty of Robbery in the First Degree, and they found the presence of an aggravating factor, "The offense involved a

destructive and foreseeable impact on persons other than the victim” pursuant to RCW 9.94A.535(3)(r). (CP 61-62)

III. ARGUMENT

1. There was sufficient evidence to convict Mr. Webb of Robbery in the First Degree.

a. Robbery First Degree does not specifically require the victim to be positive that what appears to be a deadly weapon actually is a deadly weapon.

Mr. Webb was convicted of Robbery in the First Degree. (CP 61) The crime of Robbery in the First Degree states:

(1) A person is guilty of robbery in the first degree if: (a) in the commission of a robbery or of immediate flight therefrom, he or she: (i) Is armed

with a deadly weapon; or (ii) Displays what appears to be a firearm or other deadly weapon; or (iii) Inflicts bodily injury...” RCW 9A.56.200(1)(a).

What distinguishes this crime from Robbery in the Second Degree are the 3 alternatives presented here. Otherwise, a robbery (defined as taking property from someone in the person’s presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person) without one of those three circumstances (or section b, which is for financial institutions and not relevant here), is only a Robbery in the Second Degree. (RCW 9A.56.190 and RCW 9A 56.210) However it is worth noting that in either case, “The force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.” RCW 9A.56.190.

While it is clear in the statute and case law that a Robbery in the First Degree can be committed by display of a toy gun that is realistic in appearance, State v. Hentz, 32 Wn. App. 186 (1982), rev. on other grounds 99 Wn.2d 412, what is not actually spelled out in the Robbery First Degree statute is to whom the item in subsection (ii) needs to appear to be a firearm or other deadly weapon. Is it only to the victim? Is it to the defendant? Is it to anyone walking in? A case

can certainly be made that the victim's opinion alone does not control. Nor does the statute spell out to what degree of certainty the item has to appear to the victim or anyone to be a deadly weapon.

It is useful to the discussion to consider why the legislature made these three circumstances worth a higher punishment than other robberies. Since the degree of force actually used in any of the subsections (i), (ii), or (iii) is immaterial, the legislature obviously wished to give a harsher penalty to crimes with a greater potential for violent injury, regardless of whether such violent injury occurs. Thus, a Robbery 1 can theoretically be found if the defendant is armed with a deadly weapon during the crime, even if it is not displayed or deployed in any way, since the potential for violent injury is high. In such a situation, the victim might not even know the defendant had it, so it is not the fear of the victim that is motivating the legislature. And a Robbery 1 can be found if the defendant inflicts bodily injury, even though the injury is minor. So again, the victim did not have to fear for his life in order for the robbery to be first degree, and therefore, it is not the victim's fear that the legislature is getting at. Once some bodily injury is inflicted, the potential for violent injury is much higher, and this is what the legislature wants to avoid. And finally, as in this case, a Robbery

First Degree can be found if the defendant displays what appears to be a firearm or other deadly weapon, but the item is not a deadly weapon. This is obviously not because the defendant can actually seriously hurt someone with a toy gun. It must, by common sense, be because the presence of something that looks like a deadly weapon (despite being a toy) can trigger violence in others around. It is not because of the fear instilled, or else there would be a requirement under the first prong that a victim actually know the defendant is armed with a deadly weapon. Logically speaking, the victim's fear is not an element of Robbery 1. If it were, the legislature could have said so, as it has in Harassment statutes in Chapter 46, which require a victim to be placed in reasonable fear that the threats would be carried out. See RCW 9A .46.020.

What makes this sort of a robbery so dangerous is the possibility that the victim or anyone else present, whether it be a police officer coming in for coffee or a truck driver buying a candy bar, could pull out a gun of their own and start shooting. That is the sort of harm that the legislature obviously intended to discourage.

Did this toy appear to be a firearm? In this case, the clerk testified numerous times that the defendant pulled out what looked like a gun. (RP I, 10-

14, 22) In fact, at first, the clerk thought it was a gun and did have a fear that he would be shot. (RP I, 10, 22) That the clerk eventually came to the conclusion that it was probably a toy, because he was so close to it in the lighting of the store, does not mean the clerk did not believe the item *appeared to be a firearm* whether he finally concluded it was a firearm or not. The clerk said as much to the 911 operator in his call, when he said the only reason he believed it was a toy was because of the lighting of the store. (CP 99-100) He definitely thought it appeared to be a firearm. In any event, it also does not mean the item wouldn't appear to be a firearm to everyone else. In fact, the gun probably would have appeared to be a firearm to almost anyone. The jury was able to see for themselves from the video, from the photos (see exhibits 1 through 8), and from the actual model gun, exhibit 11, that the item appeared to be a firearm. Plus Detective Higashiyama testified that it looked exactly like a firearm in every respect. (RP II, 78). The only difference would be weight, which is irrelevant when the defendant kept it in his own possession. (RP II, 78). Any officer who chanced in at the moment when Mr. Webb pulled out a gun could easily have begun shooting, which obviously would have endangered the defendant, the clerk, and the defendant's daughter, as well as anyone else in the store.

Defense reliance on various Washington cases for the point that only the victim's perspective matters is misplaced. A quick review of State v. Scherz, 107 Wn. App. 427 (2001) shows the focus of the case was a display:

“Although argued otherwise in the briefing, a mere verbal statement that one is armed with a weapon does not constitute the display of a deadly weapon. Used in a statutory context, the term display requires some physical manifestation beyond a mere verbal threat of harm with a deadly weapon. In re Personal Restraint of Bratz, 101 Wn. App. 662, 674-76 Accordingly, the State had to present evidence that the alleged robber committed a menacing physical act beyond his verbal indication that he was armed, in order to fall within the parameter of the first degree robbery statute.”
Scherz at 435.

In this case, of course, there was a display. The question of to whom the item needs to appear to be a deadly weapon, simply never came up in Scherz.

Even if the Court determines the relevant point of view to be that only of the victim, the statute still only requires that the gun appear to be a firearm. Any reasonable clerk/victim who wasn't familiar with firearms, could have begun shooting. Or this clerk, Mr. Owens, could have pulled a gun out before he had stared at it long enough to decide it was probably a toy. Plus, since this clerk was not, by his own testimony, ever 100% sure the item was not a firearm, despite

what he told 911, he could well have decided to pull a gun out himself (despite store policy) even if he did think it might be a toy, just in case it wasn't a toy. When asked, "How positive were you when you were giving money over to this guy that this was absolutely a toy gun?," Mr. Owens answered, "I was not positive. I was not one-hundred percent positive." (RP I, 33) The legislature did not require that a victim be convinced to any certainty that the item was a firearm, it merely requires that the item appear to be a firearm.

It is worth noting that the defendant can hardly claim that he would be surprised the gun looked real. When purchased at the store, if this was, as detectives learned from Mr. Webb, the actual model he had, the gun was clear plastic with a bright orange tip. (RP II, 53-57), and Exhibit 16. However, detectives learned he had modified it. By the time it showed up in the video and photo exhibits 1 through 8, the gun was all black, with no orange tip, looking exactly like Exhibit 11. And this was done despite warnings on the package of the toy. (RP II, 56) The only conceivable reason to spray paint the toy all black is so it appears more realistic as a firearm. Also, the only reason Mr. Webb would pull it out as he was demanding cash from the drawer was because it appeared to be a real firearm. Common sense tells us that the item was meant to appear to be a

firearm. Mr. Webb obviously intended it to look like a real firearm. Thus we should not be skeptical when Mr. Owens said he thought initially it was one, and that he was never 100 percent positive it was a toy.

b. The Robbery First Degree Statute does not require that a weapon display be what causes the victim to turn over the property.

The legislature does not require that the deadly weapon be displayed during the actual robbery—it can be displayed in immediate flight therefrom. RCW 9A.56.200. Thus, the display of the weapon does not by the plain language of the statute have to be the force that is used to obtain or retain possession of any property. If the legislature had meant that result, they would have said it. Under this statute, robbers could wave a gun around as they were speeding out of the parking lot and the clerk was running after them on foot. In such an instance, the gun would not be the force used to obtain or retain the item's possession, but it would still be a Robbery in the First Degree. If the weapon can be displayed for the first time in immediate flight from the scene, then the actual taking need not have been with the weapon in order to be Robbery 1. It follows, then, that a robber who displays the gun and then puts it back in his pocket, as happened here,

can still be committing a Robbery 1, even if the force that makes the clerk hand over the money is a different threat.

c. Even under the Defense reading of the statute, there was sufficient evidence to convict Mr. Webb of Robbery in the First Degree

The standard for review when sufficiency of the evidence is questioned, is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the State. State v. Bergeron, 105 Wn. 2d (1985). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn. 2d 192 (1992).

In State v. Roth, 131 Wn. App. 556, the court further elucidated "The appellate court does not determine whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt. Rather, the pertinent question is whether any rational trier of fact could have found the essential elements after

viewing the evidence in the light most favorable to the State. “State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide disputed questions of fact. State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wash.2d 385, 622 P.2d 1240 (1980). This court must defer to the determinations of the trier of fact on such issues. State v. Fiser, 99 Wash.App. 714, 719, 995 P.2d 107 (2000). In reviewing the sufficiency of the evidence, circumstantial evidence is not considered any less reliable than direct evidence. State v. Delmarter, 94 Wash.2d 634, 638 (1980).”

In this case, there was substantial evidence from which the jury could decide that the gun appeared to the victim, Mr. Owen, to be a firearm. Mr. Owen’s testimony in court was very clear. Over and over he indicated that when Mr. Webb pulled out the gun, he was afraid he was going to be shot, and he thought it was a firearm. (RP I, 10-11, 13, 20, 22, 26, 27, 28, 29, 34) The jury, who is the judge of credibility, was entitled to believe him that the gun did appear to be real to him. In fact, that very night, even after the 911 call, in which he told

the operator he thought it was a toy, he still told police he initially thought it was real. (RP I, 26-27, RP II, 11) Mr. Owen has never changed. And Mr. Owen explained to the jury how he was frightened and wanted the gun not to be real, and that's probably why he told 911 that he thought it wasn't. (RP I, 22, 33-34) As pointed out above, even in the 911 call, he indicated that he thought the gun looked very realistic, and only the lighting in the store made him think it wasn't after a while. (RP 911 call, p.3) Plus, circumstantially, Mr. Owens looked "panicked" when the first deputy arrived on scene. (RP II, 26) He was so nervous about the defendant's threat to kill him if he called police, that he asked for the State Patrol to park a car there. (RP I, 25) The jury was entitled to believe Mr. Owen's actual in court testimony, however much Mr. Webb has argued that they shouldn't. And Mr. Owen testified in court that the gun appeared to be a real firearm. Since there was sufficient evidence for them to find him guilty, the Robbery in the First Degree should stand.

If the Court of Appeals does decide as a matter of law that this should not be a Robbery in the First Degree, then at the least it should be an Attempted Robbery in the First Degree, since Mr. Webb clearly had the intent to rob the store, and had the intent to flash an item that appeared real--flashing a gun

that had its orange tip painted over so that it would look to most people like a real firearm. He obviously meant the clerk to think it was real or he wouldn't have pointed it at the clerk when he asked for money. If it weren't a robbery in the first degree, it is only because the clerk, an air force veteran, eventually decided under the bright store lights that it was probably a toy gun, though he wasn't sure. But Mr. Webb's actions definitely constituted a substantial step toward Robbery in the First Degree. And, as the Court is aware, attempted crimes are always lesser included crimes of the greater crime, and can be found by a jury or trier of fact even when not specifically charged. State v. Gallegos, 65 Wn. App. 230 (1992), RCW 10.61.010.

2. There was sufficient evidence to find the aggravating factor that the robbery involved a destructive and foreseeable impact on persons other than the victim.

As the defense points out, the same standard for review of the sufficiency of the elements of a crime is used for evaluating the sufficiency of evidence of an aggravating factor. State v. Yarborough, 151 Wn.App. 66 (2009) Thus, the question is, as mentioned above, after evaluating all of the evidence, both

testimonial and from the exhibits, in the light most favorable to the State of Washington, could any conceivable rational trier of fact have found that aggravating factor. Under this standard, inferences are to be drawn in the light most favorable to the State. State v. Salinas, 119 Wn. 2d 192 (1992)

The aggravating factor that was found by the jury in this case is under RCW 9.94A.535(3)(r):

“The offense involved a destructive and foreseeable impact on persons other than the victim.”

Cases evaluating this aggravating factor have often involved children being present. State v. Cuevas-Diaz, 61 Wn. App. 902 (1991) , State v. Barnes, 58 Wn. App. 465 (1990).

In this particular instance, Mr. Webb brought his nine year old daughter to an armed robbery. (RP Entire Trial, Ex. 6,7,8, 9) But she was not the person being robbed; the victim was the AM/PM store, or more specifically, the store clerk, Mr. Owens. The question thus presented, is whether any rational jury could have found, as this jury did, that there was a destructive and foreseeable impact on Mr. Webb’s daughter, Meadow.

The evidence on that came in several different forms. Mr. Owens was

present right during the crime, and testified that the girl was absolutely stunned and afraid. (RP I, 39) Mr. Bjorklund testified about Meadow. He first knew she had been present at the scene when Mr. Webb actually passed the phone to her while he was trying to escape from police and the scene. (RP I, 64) Webb had just told Bjorklund "I've done something real big." He started to tell Bjorklund what it was, but then passed the phone to Meadow and said, "Meadow, tell him what we did." (RP I, 64) Bjorklund says Meadow started to talk to him but was kind of quiet, and Webb again said, "Tell him what we did." And Meadow said, "We robbed a store." (RP I, 64) Bjorklund was familiar with Meadow and had met her before with Mr. Webb. (RP I, 60,70) He said that he did have a chance to talk to her a little when Webb showed up with her after the robbery. He fed her and was trying to calm her down. (RP I, 70) He said he tried to talk about other things, and once she was calmed down, he described her as, stunned and measuring every word. (RP I, 70) He said that she was just not like he had seen her in the past. (RP I, 70)

Law enforcement had tried to interview Meadow later, but her mother did not allow that and did not want Meadow further disturbed. (RP II, 77) The clear inference to be drawn in favor of the state, pursuant to Salinas, was that the crime

had already had enough of a negative impact on her daughter that she shouldn't be further disturbed. It may be worth noting that nevertheless, the state had in fact subpoenaed the mother and daughter to testify, however they did not show, despite being served, and the state elected not to traumatize the girl farther by getting a material witness warrant for the nine year old or her mother. (RP II, 46-47)

The other even more compelling evidence of a destructive impact on Meadow can be seen in the video and photographs themselves, as captured in the video, Exhibit 9, and in the photographs, especially in Exhibit 7. Meadow's face is very clear, and it is obvious that watching her father rob the store was a terrifying and traumatic event. (Please see Ex. 7) It easily explains her demeanor at Bjorklund's. A child of Meadow's age is clearly and obviously old enough to be negatively impacted by her father's decision to bring her to an armed robbery. This is not the usual armed robbery, and the defendant deserved to be given an exceptional sentence for it. Considering all the testimony and the exhibits, there was sufficient evidence for a rational trier of fact to determine that this crime had a destructive and foreseeable impact on Mr. Webb's daughter.

3. The Court did not err by failing to give the defendant's proposed diminished capacity/voluntary intoxication instruction.

In State v. Gallegos, 65 Wn. App. 230 (1992), the Court of Appeals sets out the test for giving a voluntary intoxication instruction:

“Therefore, a criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state.” Gallegos at 238, and also cited in State v. Ager, 128 Wn. 2d 85 (1995) at 95.

In this case, the judge carefully considered all of these elements of the defense and found they were lacking.

The first was satisfied, since the crime charged does have an element of a particular mental state. The intent required to prove a Robbery in the First Degree, is intent to deprive the victim of property. State v. Decker, 127 Wn. App. 427 (2005), State v. Byers, 130 Wash. 620 (1925), or, as put succinctly in State v. Allert, 117 Wn.2d 156 (1991), “Intent to steal is the mental element necessary in a robbery.” Allert at 168. Thus the intent of Mr. Webb would have to be to steal the money from the AM/PM.

The court found that the second element was arguable. (RP II, 95) There was certainly substantial evidence of drinking while Mr. Webb was in the car on the way to Mr. Bjorklund's house, and substantial evidence of drinking in the hours Mr. Webb spent at Bjorklund's house. Mr. Bjorklund described Mr. Webb's drinking copious amounts of Red Bull and wine at his house and throwing up. (RP II, 5) But, as the judge pointed out, "Even though there is substantial evidence that he had been drinking to some extent, there is not much evidence, if any to show that he had been drinking prior to getting to Thorp [where the convenience store is], other than the comment, the testimony, of Mr. Owen's and perhaps the video that showed that he had some slight slurred speech." (RP II, 95) In fact, the judge went on to point out, "But there was no evidence that he was swaying or unsteady on his feet or anything like that." (RP II, 95). The intoxication level described at Bjorklund's is much higher than what is observable in the video. By the time Webb arrives, he is talking non-stop, angry, and seemed so drunk he could barely stand up. (RP I, 66-67) This is obviously not at all what he looked like in the video. (Compare the judge's remarks, RP II, 95 and the police officer's viewing of the video RP II, 45) It is worth noting that it took Webb some time to get to Bjorklund's, and Mr. Webb

was drinking all the way. There was a stop at a car wash at some point, (RP II, 73)

But the real problem with the voluntary intoxication instruction is the third element. There simply was no evidence presented that the drinking, whenever it occurred, affected the defendant's ability to acquire the mental state of intent to steal money. In State v. Gabryschak, 83 Wn. App. 249 (1996), the Court stated. "Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." Gabryschak at 252-253. The court in that case found that despite testimony elicited from state's witnesses through examination and cross examination that Gabryschak was very intoxicated, there was no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged. At best, the court said, the evidence showed that Gabryschak can become angry, physically violent, and threatening when he is intoxicated. Gabryschak at 254. Likewise, in this case, there is no evidence in the record from which a rational trier of fact could reasonably and logically infer that Mr. Webb could not form the

intent to steal money from the AM/PM. At best, the evidence showed that Webb can exercise remarkably bad judgment when intoxicated, by bringing his daughter with him and pointing a spray painted airsoft gun at a store clerk while demanding money, giving his correct first name, threatening to kill the clerk if the clerk calls the cops, and explaining how he was out of work and needed to provide for his daughter in some way. (RP I, 9-14) He was also able to drive 80+ miles per hour down the freeway with his daughter in the car, eluding police and eventually arriving at his friend's house. (RP I, 63-65) His ability to respond to comments by the clerk and to carry on a coherent, if self-serving, conversation at the store about why he was robbing it certainly belies any sort of claim that he was so intoxicated that he couldn't form the intent to rob the store.

In fact, the evidence in Allert was much more compelling than the evidence here, since experts testified that Allert was intoxicated and also suffered from alcoholism, depression and various mental illnesses, which in combination reduced his ability to appreciate the wrongfulness of his conduct. Yet the Court itself, in discussing whether the defendant could have availed himself of a diminished capacity defense, commented that the defendant committed the second robbery after counting the money from the first robbery and deciding it was

insufficient to solve his financial problems. The court specifically said, “there is nothing in the record which indicates that the defendant lacked the intent to steal.”

Allert at 168.

The present case shows even less connection between intoxication and an inability to form the intent to steal, since Mr. Webb told the clerk at the store at the time that he was stealing the money to provide for himself and his daughter, saying, “I’m just trying to survive.” (RP I, 14 and Exhibit 9) He said he was out of work and made excuses for why he was doing this. Defense counsel’s characterization of Mr. Webb’s speech during the robbery as “rambling” is not supported by the video or any evidence in the record. (See exhibit 9 and RP I, 9-14). Mr. Webb did have a conversation with the clerk, but it was threatening or making excuses. (RP I, 9-14) Plus Webb told Bjorklund on the phone that he was evading police, and he had his daughter tell Bjorklund that they had robbed a store. He asked Bjorklund not to call police. (RP I, 63-64) Webb also told Bjorklund when he got there that he had pulled out a gun and told the man he was taking care of his family or something to that effect. (RP II, 19) He obviously had the intent to steal, and his comments even while intoxicated prove it.

The State agrees that expert testimony would not have been necessary to

give the voluntary intoxication instruction. State v. Thomas, 123 Wn. App. 771 (2004) However what was necessary was for there to be some indication that the defendant actually couldn't form or didn't have the necessary mental state of intent to steal. In the present case, no matter how intoxicated and unlike himself the defendant seemed to Mr. Bjorklund, who was the only person to present serious evidence of intoxication, the testimony of Bjorklund on the exact point in question, as to whether Mr. Webb could form intent, was when he was asked on re-direct,

“Q – He did have the ability to make a decision, right?

A – He made a number of decisions when he was at my house.

Q – And including a decision to take the girl with him?

A – Yes.

Q – And was able to follow through with that, right?

A – Absolutely

Q – Even though you tried to talk him out of it?

A – Yes. I can't even count the number of times on the phone and in person that I did everything from ask him to beg him to threaten him. And honestly the only thing I regret is not physically stopping him.” (RP II, 13)

There was testimony about Mr. Webb's judgment, and a short discussion of blackout, which is a memory issue. (RP II, 6-7, 8, 16-17) In fact, when asked,

Q - “In that sort of decision [alcoholic blackout], they're making decisions and walking around and acting like they are able to intentionally do things, right?” Bjorklund said,

A - “Yes, beyond that—“

Q- “Just don't remember it later?”

A- Yeah....”

And Mr. Bjorklund went on to talk about successful lawyers and doctors who can work even though drunk and can disguise their problem from everyone.

But there was no testimony that would call into question his ability to form the intent to steal.

4. RCW 9.94A.535(3)(r) does not violate due process vagueness prohibitions.

a. Aggravating factors are not and should not be subject to Due Process vagueness analysis.

The issue of whether aggravating factors are subject to due process vagueness concerns has been dodged by the Washington Supreme Court recently in State v. Stubbs, slip op. 81650-6, filed October 7, 2010, when the court determined that the aggravating factor involved should not apply to the crime charged. However, the issue remains to be decided, both in general, and since now challenged, in particular with this aggravating factor. The position of the state remains the same on this issue as it was in Stubbs. The issue has not yet been determined.

Generally speaking, under the Due Process clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person

of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515 (2004) Under State v. Baldwin, 150 Wn.2d 448 (2003), this applied to laws that prohibit or require conduct. However the Supreme Court held that it did not apply to aggravating circumstances because they “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” Baldwin at 459. “A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.” Baldwin at 459. Since the aggravating factors do not specify any particular sentence or require a certain outcome, the Court found that the aggravating factors create no constitutionally protectable liberty interest. Baldwin at 461.

Though Mr. Webb wants the Court to find that Blakely v. Washington, 542 U.S.296, 124 S.Ct. 2531, 159 LEd. 2d 403 (2005) changed how this should be viewed, he fails to show exactly how the change from judge to jury as factfinder actually changes aggravating factors into anything besides potential factors for a court to consider in enhancing sentences. Aggravating factors under Washington’s sentencing scheme still do not define specific crimes with specific

punishments. A jury's finding of an aggravating circumstance does not mandate an exceptional sentence. Even when a jury finds an aggravating circumstance, the trial court has considerable discretion in deciding whether the aggravating circumstance is a substantial and compelling reason to impose an exceptional sentence. RCW 9.94A.535. Thus, they should not even be subject to Due Process vagueness challenges.

Moreover, Mr. Webb never objected to the giving of the Special Verdict form to decide the aggravating factor, and never once brought up any argument whatsoever about the factor's "vagueness." A criminal defendant who believes a jury instruction is unconstitutionally vague or unclear has a ready remedy—proposal of a clarifying instruction—and failure to propose some further definitions precludes review of this claim of error. State v. Fowler, 114 Wn.2d 59 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479 (1991).

b. This aggravating factor is not unconstitutionally vague.

The party challenging a statute under the "void for vagueness" doctrine bears the burden of overcoming a presumption of constitutionality, i.e. "a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt." State v. Halstien, 122 Wn. 2d 109, (1990) The defendant

cannot meet this burden on this statute.

Because Mr. Webb's challenge does not implicate the First Amendment, he must demonstrate that the aggravating circumstance is unconstitutionally vague as applied to his conduct. City of Spokane v. Douglass, 115 Wn.2d 171 (1990). The challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Douglass, at 182-183. In this particular case, Mr. Webb's conduct was specifically to bring his nine year old daughter to a violent crime, an armed robbery. The issue then, is whether a person of ordinary intelligence would understand that bringing his nine year old daughter to a violent crime would have a destructive and foreseeable impact on her. Common sense cries out "YES!" And in this case, Mr. Bjorklund testified that Mr. Webb certainly would not have done such a thing had he not been intoxicated and acting with remarkably bad judgment. Nor does Mr. Webb explain how this particular action shows arbitrary enforcement. As has been pointed out by the state, the idea that committing a crime in front of horrified children may be the subject of a sentencing enhancement is hardly a new one. See above, State v. Cuevas-Diaz and State v. Barnes. There is no arbitrary

enforcement here.

The defense argues that because the factor does not spell out exactly how destructive an impact must be to be an aggravating factor, that this factor is vague and a person of ordinary intelligence might not know that his conduct would constitute an aggravating factor for a crime, essentially making a bad situation worse. However it is beyond ridiculous to suggest that Mr. Webb or anyone else would not know it would make a violent crime seem worse to the people of the State of Washington to commit it in front of your nine year old daughter. As for the level of destructiveness required, once again, the aggravating factor is not a crime, it is simply potential grounds for sentence enhancement. A sentencing judge has discretion, once a jury finds the factor did occur, to decide what to make of it or whether to make anything of it at all. RCW 9.94A.535. Thus, the level of destructiveness can inspire a judge to greatly increase, slightly increase, or not increase a person's sentence. The jury is simply charged with deciding whether there was any destructive and foreseeable impact at all. If a level of destructiveness were to be added to the statute, it would likely lead to a much vaguer and less predictable result than to simply charge the jury with finding *any* destructive and foreseeable impact. Whether or not there has to be a long-term

destructive impact to be an aggravating factor is up to the legislature to set, and they have not chosen to require the destructive impact be long term. The jury was given a statute which is plain on its face and easily understandable. If the state could show beyond a reasonable doubt that there was a destructive and foreseeable impact on someone besides the victim, then the factor has been found.

5. The jury was instructed with the language of the statute in their special verdict form, and any failure to set that language out again in an additional separate instruction was no error, or at the worst, harmless error.

The jury was instructed that if they found the defendant guilty of Robbery in the First Degree or Robbery in the Second Degree, they should then answer the question in the special interrogatory/special verdict form. The text of this special verdict form was set out in appellant's brief, and instructed the jury to answer the following question:

We, the jury, having found the defendant guilty of
either ROBBERY IN THE FIRST DEGREE or the lesser
included crime of ROBBERY IN THE SECOND
DEGREE, return a special verdict by answering as follows:

Did the crime involve a destructive and foreseeable

impact on persons other than the victim?

Answer Yes

(CP 62)

This exactly followed the instructions in RCW 9.94A.537, which states in relevant part:

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory.

This aggravating factor was presented to the jury in the form of a special interrogatory, and was precisely in the language of the statute. RCW 9.94A.535(3)(r) . As has been discussed briefly before, there is no particular legal definition to any of the words in the statute, and the statute itself is simple and plainly understood. Therefore, it should not be error, or it must be at worst harmless error to fail to propose an instruction saying: "It is an aggravating factor if a crime involved a destructive and foreseeable impact on persons other than the victim."

Appellant cites State v. Gordon, 153 Wn.App. 516 (December 2009), in which Division I held that the statutory language for several aggravating factors in

that case did not properly include judicially created elements for those aggravating factors. In that case, the Court of Appeals in Division I discussed at some length, for example, a very specific definition of deliberate cruelty, which it said was neither in the plain words of the statute nor in the common sense meaning of the terms, but which has been interpreted by courts to be required in order to give an exceptional sentence for that aggravating circumstance.

The Gordon decision, which came out after this Webb trial, and so was not in effect at the time of trial, is not actually mandated by Blakely, and Division III would be well justified in coming to an entirely different conclusion as to whether there was error or whether this issue was of constitutional magnitude.

However, Gordon is distinguishable on the facts anyway, since none of the terms in the aggravating factor in Webb have been given special statutory meaning by the Supreme Court or by a court of appeals. Neither the Court in State v. Jackson, 150 Wn.2d 215 (2003) nor the Court in State v. Johnson, 124 Wn.2d 57 (1994) defined any of the terms in the statute as it currently reads. Therefore, those terms did not need to be defined for the jury.

What those cases did do was to indicate that the judge should not be able to use the impact on third parties as aggravating factors unless the destructive

impact on third parties was greater than what would be required in a typical offense. Since the current statute requires a judge to determine if the factor is substantial and compelling enough to justify an upward departure from the standard range, that can still be done and in fact was done by the judge in this case. That judicially imposed requirement need not be considered an element of the aggravating factor.

In any event, the error was harmless. In this case, the typical offense of convenience store robbery simply is not committed in front of a nine year old. The nature of the facts make this totally distinguishable from the rather specific requirements of the aggravating factors in the Gordon case. And as for foreseeability, which the defense claims must mean by case law, foreseeable to the defendant, the only evidence presented by everyone was that Webb would not have brought his daughter along if he had not been intoxicated, and therefore using very bad judgment. Mr. Webb himself said he had seen the photo with his daughter looking terribly scared. (RP II, 40) The overwhelming evidence is that Mr. Webb, like everyone else, would have foreseen that bringing his daughter to a hold-up was likely to result in a destructive impact on her. The jury surely would have so found, if they had been instructed that they had to find the result not

simply foreseeable, but foreseeable to Mr. Webb.

Aggravating factors are, by statute, a separate entity, with rules of their own. Those rules were followed here. Each and every element of the aggravating factor was indeed contained in the special interrogatory, which is the statutory method of presenting this factor. The factor should stand.

6. It was not error in this case to instruct the jury that unanimity was required for the jury to answer “No” to the special verdict.

Much has been made of the recent decision in State v. Bashaw, 169 Wn.2d 133 (2010), in which the Court held that it was error in the case of a school bus stop enhancement to instruct the jury that they had to be unanimous not only to find the sentencing enhancement existed, but to find it didn't exist. While it is true that in this case, the State relied upon the standard WPIC instruction involving the aggravating factor, and that that special interrogatory form/instruction told the jury that they needed to be unanimous to answer yes or no, the Bashaw result should not control.

Unanimity for verdicts in criminal cases is required by the Washington State Constitution. State v. Stegall, 124 Wn.2d 719 (1994), State v. Noyes, 69

Wn.2d 441 (1966). When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. And the fixing of legal punishments for criminal offenses is a legislative, not a judicial function. State v. Ammons, 105 Wn.2d 175 (1986). Therefore, the legislature would be the one to determine unanimity of sentencing enhancements.

In Bashaw the sentencing enhancement under RCW 69.50.435 (1)(c) provides for a larger sentence if the drug transaction takes place within 1000 feet of a school bus stop. But the legislature was silent as to whether the verdict of the jury had to be unanimous to answer "no." In the current case, however, the aggravating factor is found under RCW 9.94A.535, and that the statute implementing it, RCW 9.94A.537 expressly requires unanimity for **any** verdict. As quoted before, the legislature said,

"The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." RCW 9.94A.537(3) Thus, the plain language of the statute absolutely requires that *any* verdict be unanimous.

Furthermore, the Court in Bashaw held that the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in

imposing additional penalty on the defendant. This may well be true for school bus enhancements, but does not ring true for aggravating factors listed in 9.94A.535 of the Sentencing Reform Act. In that case, the legislature has actually indicated that the imposition of a appropriate exceptional sentence outweighs concern about judicial economy or cost. When an exceptional sentence is imposed and then reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstances alone. RCW 9.94A.537(2). Thus, the legislature has treated the aggravating circumstance in this case differently from the one in Bashaw.

Also, the Court in Bashaw made it clear that the ruling is not of constitutional magnitude. Bashaw at 146. Since that is the case, and since Mr. Webb made no objection to the giving of the Special Verdict Interrogatory form, he has waived his challenge to it now.

IV. CONCLUSION

Since Robbery in the First Degree merely requires the defendant to display what appears to be a firearm or deadly weapon in the course of the robbery, or in immediate flight therefrom, and since the victim testified that he initially thought the gun displayed was a firearm, and since the gun was deliberately modified to look just like a real gun, there was sufficient evidence for the jury to find Mr. Webb guilty of Robbery in the First Degree.

Since there was testimony about Mr. Webb committing the robbery in front of his nine year old daughter, and since she was obviously and foreseeably destructively impacted in the photos, the video, and according to the testimony of Mr. Owens (who was present), Mr. Bjorklund (who saw her after it happened), and to the detective (who tried to talk her mother into letting her daughter be further interviewed), there was sufficient evidence to conclude that Mr. Webb's robbery had a destructive and foreseeable impact on a person other than the victim.

Since there was no evidence at all tending to show that Mr. Webb's intoxication level affected his ability to form the intent to steal, the court

properly refused to give a diminished capacity/voluntary intoxication instruction.

Since aggravating factors need not be analyzed under Constitutional vagueness analysis, this factor is not void for vagueness. Since the plain language of the factor would be understood by a person of common intelligence, it wouldn't be considered void for vagueness anyway.

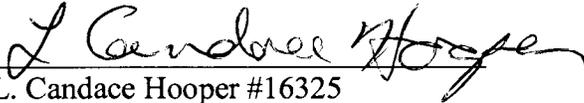
Since the jury was properly given the special interrogatory form for the aggravating factor, and since there are no specific terms of art that must be explained to the jury, any failure to give an additional instruction to the jury repeating the words of the statute was no worse than harmless error.

Since the legislature requires all special verdicts on the statutory aggravating factors of 9.94A.535 to be unanimous, it was not error to so instruct the jury. And since the issue is not of constitutional magnitude, it ought to be waived anyway, since the instruction was not objected to.

For the foregoing reasons the State respectfully requests that Defendant's appeal be denied, that the conviction be affirmed, and that the statutory aggravating factor be upheld.

In the alternative, if the court chooses to reduce the Robbery in the First Degree, the state requests it reduce it to Attempted Robbery in the First degree rather than Robbery in the Second Degree. Also, if the court chooses to find that the instructions were incorrect for the Aggravating Factor, the court should remand the case back for trial on that factor, rather than to simply dismiss it.

Respectfully submitted October 18, 2010.


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