

FILED

AUG 12 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 28870-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROGELIO M. HERNANDEZ,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find Mr. Hernandez guilty of any of the charged crimes.

2. The evidence was insufficient to find Mr. Hernandez guilty of the crime of harassment.

3. The trial court erred in instructing the jury it had to be unanimous in its answer to the special verdict.

4. The trial court erred in imposing an exceptional sentence.

Issues Pertaining to Assignments of Error

1. Was Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to identify him as the perpetrator of the charged crimes?

2. Was Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove that the defendant's threat to kill Corporal Ball placed Corporal Ball in reasonable fear that the threat would be carried out?

3. Should the exceptional sentence and special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict?

B. STATEMENT OF THE CASE

Rogelio Hernandez was convicted by a jury of residential burglary, third degree assault, harassment, and attempting to harm a police dog. CP 43-46. The State’s case consisted of testimony from five law enforcement officers and the home owner. None of the officers identified the defendant in court as the person they captured and arrested on the day in question. RP 17-85. The home owner could not identify the person he partially saw inside his house. RP 42-43. The only item missing from the residence was a laptop computer that was never found. RP 45.

Officer Kohn arrived shortly after the homeowners called 911. With the help of a police dog and by following some footprints in the snow, he discovered a suspect hiding under some patio furniture at a nearby residence. RP 17-30. When Corporal Ball arrived as the first backup, Officer Kohn was on top of the suspect and the dog was firmly latched onto the suspect’s upper arm. RP 33-36, 79. Corporal Ball helped subdue the suspect by kneeling the suspect in the rib cage and upper torso

several times. When he did this, the suspect threatened to kill him by shooting him. RP 80. No weapons were found on the suspect. RP 66.

Corporal Ball testified that after the suspect had been handcuffed and was face down on the ground, the suspect tried to grab his service pistol out of its holster. RP 80, 83. Ball also testified that the holster is a “phase two holster,” which means the pistol may only be removed in a certain way by a “click and roll back” procedure. RP 83-84.

The jury was asked to find as an aggravating circumstance that the residence was occupied when the burglary occurred. CP 47. The jury was instructed in pertinent part regarding the special verdict for the aggravating factor:

If you find the defendant guilty of residential burglary, you will then use the special verdict form to fill in the blank with the answer yes or no according to the decision you reach. Because this is a criminal case, all twelve of you must agree on the answer to the special verdict form. In order to answer the special verdict form yes, you must unanimously be satisfied beyond a reasonable doubt that yes is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer no.

RP 103.

The jury answered “yes” to the special verdict. CP 47. Based on the aggravating circumstance, the court imposed an exceptional sentence of 60 months on the conviction for residential burglary. RP 127. This appeal followed. CP 60.

C. ARGUMENT

1. Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to identify him as the perpetrator of the charged crimes.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

The State has the burden of proving identity through relevant evidence:

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The function of an appellate court is to assess that there was substantial evidence from which the trier of fact could infer that the burden of proof had been met and that the defendant was the one who perpetrated the crime. State v. Johnson, 12 Wn. App. 40, 45, 527 P.2d 1324 (1974).

The identification of the defendant by the victim is substantial evidence that the defendant was the person who committed the crime.

State v. Lane, 4 Wn. App. 745, 484 P.2d 432 (1971). But here, the home owner could not identify the person he partially saw inside his house, and

the only item missing from the residence was a laptop computer that was never found. RP 42-43, 45.

While not "recommend[ing] the omission of specific in-court identification where feasible," the Hill court found the evidence sufficient due to "numerous references in the testimony to 'the defendant' and to 'Jimmy Hill.'" Hill, 83 Wn.2d at 560. Indeed, the arresting officer had testified in open court, with the defendant sitting before him, that "it was 'the defendant' whom he observed at the scene of the arrest." Id.

By contrast, in the present case, none of the officers identified the defendant in court as the person they captured and arrested on the day in question. Not one witness mentioned Mr. Hernandez by name or indicated in any way that he was the "suspect" or "defendant" to which they were referring in their testimony. Therefore, the present case is distinguished from Hill and Mr. Hernandez was not sufficiently identified as the perpetrator of the charged crimes.

Even if defense counsel introduced his client before jury selection started, it does not constitute evidence sufficient to show that the person referred to in the officers' testimony was the person on trial. State v. Huber, 129 Wn. App. 499, 503-04, 119 P.3d 388 (2005), (citing State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). The statements were

remarks by counsel, and such remarks are not evidence. Id. at 504 (citing State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993)). Here, the State failed to present substantial evidence from which the trier of fact could infer that the burden of proof had been met and that the defendant was the one who perpetrated the crime. Where the evidence is insufficient to support a finding that the person on trial is the person referred to by the State's witnesses as the perpetrator of the crime, the remedy is reversal and dismissal with prejudice. Huber, 129 Wn. App. at 504, 119 P.3d 388 (citing Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

2. Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove that his threat to kill Corporal Ball placed Corporal Ball in reasonable fear that the threat would be carried out.

The applicable law regarding a challenge to the sufficiency of the evidence is set forth in the previous issue.

RCW 9A.46.020 provides in pertinent part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . .and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Here, there was insufficient evidence to show the threat to kill by shooting him in the head placed Corporal Ball in reasonable fear that the threat would or could be carried out. When Corporal Ball arrived as the first backup, Officer Kohn was already on top of the suspect and the dog was firmly latched onto the suspect's upper arm. RP 33-36, 79. No weapons were found on the suspect. RP 66. When the suspect tried to grab Corporal Ball's service pistol out of its holster, he had already been handcuffed and was face down on the ground. RP 80, 83. Moreover, the holster was a "phase two holster," which means the pistol may only be removed in a certain way by a "click and roll back" procedure. RP 83-84.

The defendant did not have a weapon. He could not possibly gain access to Corporal Ball's pistol because he was handcuffed on his stomach and would not know how to get the pistol out of the special holster. There was simply no conceivable way he could carry out his threat to shoot Corporal Ball. Therefore, any fear that the threat could be carried out was unreasonable.

3. The exceptional sentence and special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.¹

Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

¹ Assignments of error 3 & 4.

More recently, in State v. Bashaw, Slip Op. No. 81633-6 (July 1, 2010), the Supreme Court reversed sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts identical to the one in this case except it involved a school bus stop enhancement rather than an aggravating factor for an exceptional sentence. Bashaw, Slip Op. pp 4, 13-18.

In this case as well as in Bashaw, the jury was incorrectly instructed, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Bashaw, Slip Op. p 4, RP 201. The jury herein was also specifically instructed, “If you *unanimously* have a reasonable doubt as to this question, you must answer no.” (emphasis added). Citing Goldberg, the Bashaw court held:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, Slip Op. p 16.

The instruction in the present case incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. Since this instruction misstates the law, the special

verdict must be stricken. Since the exceptional sentence was based on the aggravating factor in the special verdict, the exceptional sentence must be reversed.

D. CONCLUSION

For the reasons stated, the convictions should be reversed and the case dismissed with prejudice. In the alternative, the special verdict should be stricken, the exceptional sentence reversed, and the case remanded for resentencing within the standard range.

Respectfully submitted August 2, 2010.



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By _____

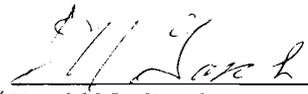
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DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 28870-6-III
)	
Plaintiff/Respondent,)	
)	
vs.)	
)	
ROGELIO MENDOZA-HERNANDEZ,)	PROOF OF SERVICE
)	
Defendant/Appellant.)	
_____)	

I, David N. Gasch, do hereby certify under penalty of perjury that on August 2, 2010, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Brief:

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David N. Gasch

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August 23, 2010

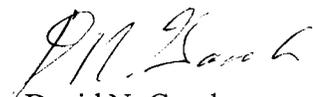
Renee S. Townsley, Clerk/Administrator
Court of Appeals, Division III
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Spokane, WA 99201

RE: State v. Rogelio Hernandez, No. 28870-6-III

Dear Ms. Townsley:

As permitted by RAP 10.8, Appellant cites as additional authority pertaining to Issue No. 2 in Appellant's Initial Brief: State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170, *Petition For Review: Granted* 165 Wn.2d 1015, 199 P.3d 411 (January 07, 2009), and State v. Johnston, 156 Wash.2d 355, 127 P.3d 707 (2006). I am enclosing 5 copies of this letter.

Sincerely,


David N. Gasch

Enclosures as stated

cc: Andrew Miller