



29543-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHAUN L. ROCKSTROM, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT5

 1. ASSURING THE JURY THAT, AS A MATTER
 OF LAW, THE SHOPKEEPER’S ACTIONS WERE
 LEGAL WAS PROSECUTORIAL MISCONDUCT5

 2. THE EXCEPTIONAL SENTENCE IS NOT JUSTIFIED
 BY THE LAW OR THE FACTS9

E. CONCLUSION.....12

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BROWN, 35 Wn.2d 379, 213 P.2d 305 (1950).....	5
STATE V. BRYANT, 89 Wn. App. 857, 950 P.2d 1004 (1998).....	7
STATE V. CURTIS, 110 Wn. App. 6, 37 P.3d 1274 (2002).....	6
STATE V. DAVENPORT, 100 Wn.2d 757, 675 P.2d 1213 (1984).....	6
STATE V. EVANS, 96 Wn.2d 1, 633 P.2d 83 (1981).....	6
STATE V. GASSMAN, 160 Wn. App. 600, 248 P.3d 155 (2011).....	9
STATE V. HUGHES, 154 Wn.2d 118, 110 P.3d 192 (2005).....	12
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6
STATE V. MILLER, 103 Wn.2d 792, 698 P.2d 554 (1985).....	7, 8
STATE V. PEREZ-CERVANTES, 141 Wn.2d 468, 6 P.3d 1160 (2000).....	5, 7
STATE V. RUSSELL, 125 Wn.2d 24, 882 P.2d 747 (1994).....	6
STATE V. SALTZ, 137 Wn. App. 576, 154 P.3d 282 (2007).....	12

STATUTES

RCW 4.24.220 7

RCW 9.94A.525..... 10

RCW 9.94A.525(2)(b) 10

RCW 9.94A.525(2)(c) 10

RCW 9.94A.535(1)..... 9

RCW 9.94A.535(2)(c) 11

RCW 9.94A.535(2)(d) 10, 11

RCW 9.94A.537(1)..... 10

RCW 9A.16.080..... 7

RCW 9A.56.050..... 7

COURT RULES

RAP 2.5(a) 6

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violated due process.
2. The trial court erred in imposing an exceptional sentence.

B. ISSUES

1. The shopkeeper accosted a suspected shoplifter, repeatedly reaching inside the suspect's pants to retrieve stolen video recordings. The suspect resisted and was charged with robbery. In closing argument the prosecutor told the jury the shopkeeper had a right to do this, as a matter of law. No jury instruction regarding the legality of the shopkeeper's conduct was requested or given. Did the argument violate the suspect's right to due process?
2. In imposing an exceptional sentence the court made a factual determination that the presumptive sentence was clearly too lenient. Did this procedure violate the defendant's right to a jury trial?
3. The state gave notice of intent to seek an exceptional sentence citing the aggravating factor based on omission of prior convictions under the washout provisions of RCW 9.94A.535. The court imposed an exceptional sentence

which, if authorized by statute, can only be imposed on individuals who have been convicted of multiple offenses. Did the exceptional sentence violate the defendant's rights under the due process clause and RCW 9.94A.537(1)?

C. STATEMENT OF THE CASE

Shaun Rockstrom is thirty-eight years old. (CP 83) He has a twenty-year history of adult felony convictions related to property theft or burglary, of which none was a violent offense, plus a controlled substance conviction in 2001. (CP 85)

Mr. Rockstrom visited a Blockbuster Video store in April, 2010. (RP 61-62) The store manager saw him behaving suspiciously so she instructed Jason Haynes, the shift manager, to keep an eye on him. (RP 63-64) Mr. Haynes saw Mr. Rockstrom leaving the store and followed him outside. (RP 75)

Mr. Haynes told Mr. Rockstrom he thought Mr. Rockstrom had taken movies from the store. (RP 76, 123) Mr. Rockstrom responded with an expletive and made a gesture that Mr. Haynes later concluded was a threatening gesture. (RP 76-77) As Mr. Rockstrom tried to walk past Mr. Haynes, Mr. Haynes blocked him with his shoulder and began pulling Blu-Rays out of Mr. Rockstrom's pants. (RP 76, 123) As he was doing

this, Mr. Rockstrom kept nudging him and walking towards his truck. (RP 77) Mr. Haynes followed Mr. Rockstrom, still pulling video recordings out of Mr. Rockstrom's pants. (RP 78, 124) Mr. Rockstrom drove away in his truck, and Mr. Haynes went inside and called the police. (RP 80, 83)

Mr. Haynes claimed Mr. Rockstrom had struck him in the face, damaging his glasses and inflicting pain. (RP 78-79) The State charged Mr. Rockstrom with first degree robbery. (CP 1) The State also alleged that the current offense was aggravated by the following circumstance:

the failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A525 results in a presumptive sentence that is clearly too lenient, as provided by 9.94A535(2)(d).

(CP 1)

Mr. Rockstrom admitted stealing the videos but denied striking Mr. Haynes. (RP 121, 125, 127) The court instructed the jury that second degree robbery includes, *inter alia*, two elements:

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;

(RP 165) The jury found Mr. Rockstrom guilty of second degree robbery. (CP 1, 83)

At the outset of closing argument, the prosecuting attorney assured the jury that “Jason Haynes followed him out, as he has a legal right to do if he sees someone stealing his property from the store” (RP 172)

The prosecutor told the jury that “it was converted into a robbery outside when Jason Haynes began to approach him. The defendant didn’t stop. The employee went up to Mr. Rockstrom and started grabbing DVDs off his person, which he has a right to do.” (RP 173)

He then instructed the jury that “[w]hen Jason Haynes went outside, he had a legal right to take that property back.” (RP 178) “[Mr. Rockstrom] used that force to overcome Jason Haynes’ legal resistance to the defendant’s taking of that property.” (RP 179)

In rebuttal, the State again asserted the lawfulness of Mr. Haynes’s conduct:

Another point of law is Jason Haynes may have violated Blockbuster policy, but he didn't violate the law. There is a big difference. Do you think it would be good for a company to have a policy to go after and tackle shoplifters? How much liability do you think they would have if they have instructed employees to do that? Policies are made by corporations so they don't get sued by employees or anyone else. It is to save them money; it is not to say, We have a set policy. Jason Hayes did what the law entitled him to do. If you are a store employee and someone is stealing in your presence, you have a right to physically stop them and detain them and take back your property. That is your right. That is lawful. So Jason Haynes was acting lawfully.

(RP 193-94)

At sentencing the court imposed an exceptional sentence of 120 months, the statutory maximum sentence for second-degree robbery.

(Sent. RP 24) The court stated:

So, accordingly, the court will adopt the reasoning which is advanced by the state in this case that a standard range sentence is, clearly, too lenient, based upon the disproportionately low effect of the standard range, based on a finding that he has eighteen points or more.

(Sent. RP 124)

D. ARGUMENT

1. ASSURING THE JURY THAT, AS A MATTER OF LAW, THE SHOPKEEPER'S ACTIONS WERE LEGAL WAS PROSECUTORIAL MISCONDUCT.

Statements of law made during closing arguments must be confined to the statements of law set forth in the jury instructions. *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000) “The practice of arguing questions of law to the jury, other than to read instructions which have been given by the court, is not favored, and the trial court may refuse to permit such argument.” *State v. Brown*, 35 Wn.2d 379, 384-385, 213 P.2d 305 (1950) (citations omitted) Counsel must confine their arguments to the law actually set forth in the court’s

instructions to jury. See *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

When a defendant claiming prosecutorial misconduct fails to object at trial, the error is generally waived on appeal. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); RAP 2.5(a). The court will only grant review if the comments rose to the level of a manifest constitutional error, namely if they were so “flagrant and ill intentioned that [they] cause[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury” and thereby deprived the defendant of a fair trial. *Russell*, 125 Wn.2d at 86; RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981).

Claims of manifest constitutional error are reviewed *de novo*. *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). A prosecutor commits a manifest constitutional error when he makes improper statements of law during closing arguments that, in light of the evidence, create a high probability that the defendant’s conviction is based on statements of law not contained in the jury instructions. *State v. Davenport*, 100 Wn.2d at 760-65.

Such assignments of error are reviewed in the context of the prosecutor’s entire argument, the issues in the case, the evidence

addressed in the argument, and the instructions given to the jury. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998).

The court did not instruct Mr. Rockstrom's jury on the law respecting the circumstances under which a storekeeper may lawfully detain a suspected shoplifter. In repeatedly arguing that Mr. Haynes acted with lawful authority, and stating that this was established as a matter of law, the prosecutor violated the rule that argument must be confined to the law set forth in the court's instructions. *See State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000).

More significantly, the prosecutor misstated the law. *See State v. Miller*, 103 Wn.2d 792, 795, 698 P.2d 554 (1985).

The legislature has authorized shopkeepers to detain suspected shoplifters. RCW 9A.16.080 and RCW 4.24.220. "However, no statutory authority to use force at the initial detention is granted unless a felony has been committed. See RCW 9A.16.020(2)." 103 Wn. 2d at 795. The alleged offense for which Mr. Rockstrom was detained in this case was the theft of video recordings. The theft of property valued at less than \$750 is third-degree theft, a gross misdemeanor. RCW 9A.56.050. Although the record is silent as to the value of the property Mr. Rockstrom had taken, there is no evidence that he could have carried \$750 worth of videos in his pants while walking out of the store.

The common law supplies limited authority to use force, depending on the facts of the case:

[T]he authority to make the arrest, whether it be with or without a warrant, must necessarily carry with it the privilege of using all reasonable force to effect it. Whether the force used is reasonable is a question of fact, to be determined in the light of the circumstances of each particular case.” W. Prosser, Torts § 26, at 137 (3d ed. 1964). Accord, R. Perkins & R. Boyce, Criminal Law 1156 (3d ed. 1982); W. LaFave & A. Scott, Criminal Law 399–400 (1972).

State v. Miller, 103 Wn.2d at 795.

In short, whether Mr. Haynes was privileged to repeatedly grab at Mr. Rockstrom’s clothing and remove items of personal property from his pants presented a factual issue, namely whether these actions were reasonable in light of the circumstances.

In finding Mr. Rockstrom not guilty of first degree robbery, the jury necessarily found that Mr. Haynes’s testimony was at least somewhat inaccurate in that he claimed to have suffered bodily injury in the course of the alleged robbery. The dispositive issue for the jury in this case was thus whether Mr. Rockstrom used force or fear for the purpose of retaining possession of the videos or overcoming Mr. Haynes’s resistance to the taking of the videos.

Absent the prosecutor’s repeated assurance that Mr. Haynes was fully authorized, as a matter of law, to take the actions he took, the jury

might well have given consideration to whether any apparent threat or use of force on Mr. Rockstrom's part was in order to avoid or avert Mr. Haynes's unreasonable and inappropriate conduct in repeatedly reaching inside Mr. Rockstrom's clothing.

2. THE EXCEPTIONAL SENTENCE IS NOT JUSTIFIED BY THE LAW OR THE FACTS

The court's reasons for imposing a sentence greater than the standard range sentence must be supported by the record, and sufficient to satisfy statutory requirements:

A trial court may impose a sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535. In reviewing an exceptional sentence, we may reverse if we find, "(a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4). We review the trial court's findings of fact made in support of an exceptional sentence under the clearly erroneous standard. *State v. Nordby*, 106 Wash.2d 514, 517-18, 723 P.2d 1117 (1986).

State v. Gassman, 160 Wn. App. 600, 248 P.3d 155, 161 (2011).

In addition, "[f]acts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537." RCW 9.94A.535(1) Before trial, the

State must, if it intends to seek a sentence above the standard range, give notice of its intent and of the aggravating circumstance upon which it relies. RCW 9.94A.537(1)¹.

Here, the court found “a standard range sentence is, clearly, too lenient, based upon the disproportionately low effect of the standard range, based on a finding that he has eighteen points or more.” (Sent. RP 24)

The aggravating factor alleged in the State’s information, RCW 9.94A.535(2)(d)², required a determination that some of the offender’s prior criminal history has been omitted pursuant to RCW 9.94A.525. The relevant portions of RCW 9.94A.525, relating to the omission of prior criminal history, involve offenses that have “washed out” after the offender spent a period of time in the community without committing a crime. RCW 9.94A.525(2)(b-d) .

¹ RCW 9.94A.537(1) provides:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

² RCW 9.94A.535(2)(d) provides:

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

The court's reason for imposing an exceptional sentence does not identify any prior convictions that have been omitted and thus does not support an exceptional sentence under RCW 9.94A.535(2)(d). Moreover, the record does not disclose any prior convictions that washed out under this provision. The aggravating factor alleged by the State does not support an exceptional sentence in this case.

The court's finding that Mr. Rockstrom has an offender score of 18 points or more might be read as suggesting that an exceptional sentence is justified under RCW 9.94A.535(2)(c): "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Mr. Rockstrom was not, however, convicted of multiple offenses and thus, even if it had been alleged by the State, this provision does not apply here.

Finally, the aggravating factors relied upon by the State in charging Mr. Rockstrom, and by the court in imposing the exceptional sentence, both required a factual determination that the presumptive sentence was clearly too lenient. This is a factual determination that must be made by a jury: "[T]his court has outlined specific factual findings a court must show to support a too lenient conclusion—it is not merely a legal conclusion, nor does it entail solely the existence of prior convictions. Blakely did not authorize such additional judicial fact

finding.”

State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005); *see State v. Saltz*, 137 Wn. App. 576, 583, 154 P.3d 282 (2007) (“Unless a defendant consents to judicial fact-finding, a sentencing court’s finding that a presumptive sentence is ‘too lenient’ taints an exceptional sentence based on this factor.”)

E. CONCLUSION

Mr. Rockstrom’s trial was fatally marred by the prosecutor’s repeated assertion of an incorrect statement of the law. The resulting prejudice requires a new trial. Alternatively, the reasons for an exceptional sentence are factually and legally flawed; the matter should be remanded for resentencing within the standard range.

Dated this 23rd day of May, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

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STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29543-5-III
)	
vs.)	CERTIFICATE
)	OF MAILING
SHAUN L. ROCKSTROM,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 23, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on May 23, 2011, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on May 23, 2011.



Robert Canwell
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