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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30720-4-III

STATE OF WASHINGTON, Respondent,

v.

DION TARIES JORDAN BAKER, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. INTRODUCTION

Dion Taries Jordan Baker was adjudicated in the juvenile court as having committed reckless endangerment, a gross misdemeanor, following a bench trial. The charging document was misleading in that it did not accurately advise Baker of the maximum sentence he faced upon conviction, such that he lacked the ability to knowingly evaluate whether to proceed to trial or waive his rights. Furthermore, substantial evidence does not support the trial court's findings that Baker's conduct created a substantial risk of bodily injury or death or that he acted recklessly. The adjudication should be reversed and vacated and the matter remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The charging instrument was inaccurate and misleading, and prevented Baker from making a knowing and voluntary decision whether to proceed to trial.

ASSIGNMENT OF ERROR 2: Insufficient evidence supported the elements of the reckless endangerment adjudication.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When a charging document inaccurately advises a juvenile that the maximum penalty for the crime is a year in jail and a five thousand dollar fine, when in reality the maximum penalty for the crime is local sanctions, is the charging document so misleading as to preclude an intelligent decision whether to exercise the right to trial? YES.

ISSUE 2: When the evidence adduced at trial shows that the 12-year-old defendant threw a plastic bag of garbage at a vehicle driving down the road in light traffic, causing the vehicle to slightly cross the centerline before continuing a short distance down the roadway, slowing, and pulling over to the shoulder, is the evidence sufficient to support a reckless endangerment conviction? NO.

IV. STATEMENT OF THE CASE

Dion Taries Jordan Baker was 12 years old when he was charged with reckless endangerment or, in the alternative, disorderly conduct, for throwing an object at a passing vehicle. CP 21. The information advised him that the maximum penalty for reckless endangerment was 364 days' imprisonment and/or a fine of \$5,000.00. CP 21. Similarly, the information advised him that the maximum penalty for disorderly conduct was 90 days' imprisonment and/or a fine of \$1,000.00. CP 21. Neither

statement was true; as a juvenile, the maximum penalty Baker faced was local sanctions.

The matter proceeded to bench trial. The driver, Robin Myers, testified that he was driving down Ahtanum Road in Yakima, at or around the posted speed limit of 50 miles per hour, when he saw Baker rapidly approach the road. RP 9-10, 17. Myers was afraid he was going to run into the road, so he applied his brakes and moved toward the centerline of the road. RP 11. An approaching vehicle honked at him, so he moved back off the centerline into his own lane. RP 11. As he moved back into the lane, something hit the canopy of the vehicle behind the passenger window. RP 12, 19. The object left a sticky juice stain on the side of the vehicle. RP 14.

Myers continued down the road a short distance to slow down and pull over to the shoulder. RP 12, 17-18. The road conditions were clear, it was light outside, and no other vehicles were forced to stop or swerve. RP 17, 18.

The vehicle passenger, Jack Phelps, also testified that about 3:15 p.m. on the date in question, they were driving down Ahtanum road when he saw Baker approaching from the right. RP 20. Baker had a grocery bag in his hands, and as the truck passed, he threw the bag at the truck

with a sideways motion. RP 21. When the bag hit the truck, they crossed the centerline a little bit, the braked and pulled over. RP 22. Phelps also confirmed that the conditions were clear, no other cars had to stop or swerve, and they drove a few hundred feet further down the road until they found a spot to pull over. RP 23-24.

The trial court found that Baker's behavior created a substantial risk of death or serious physical injury to Myers and Phelps, and convicted Baker of reckless endangerment. RP 33-34. The trial court sentenced Baker to two days' detention, a penalty of \$100, and attorney fees of \$25. RP 36, CP 10-13. Baker timely appeals. CP 5.

V. ARGUMENT

I. The information erroneously misled Baker as to the potential consequences of conviction, such that he was unable to exercise a knowing decision whether to proceed to trial.

The information filed in this case and presented to Baker at his first appearance erroneously informed him that the maximum penalties he could face on conviction were, respectively, 364 or 90 days in jail, and a fine of \$5,000.00 or \$1,000.00. CP 21. The trial court further advised him of these maximum consequences at his first appearance. RP 2.

This advisement was plainly erroneous. As a 12-year-old juvenile, the maximum penalty Baker faced if found guilty was local sanctions. RCW 13.40.0357. Under the juvenile offender sentencing standards, reckless endangerment is ranked as a D+, for which the standard sentence is local sanctions. *Id.* Local sanctions permits one or more of the following consequences: (a) 0-30 days of confinement; (b) 0-12 months of community supervision; (c) 0-150 hours of community restitution; or (d) \$0-\$500 fine. RCW 13.40.020(17).

Without a finding of a manifest injustice, the sentencing standards are mandatory. RCW 13.40.0357 (“This schedule must be used for juvenile offenders.”). Moreover, as a 12-year-old child, Baker could not have been sentenced to jail time by the juvenile court. Consequently, the information plainly misstated the consequences Baker could face if he were found guilty.

It is well established in Washington that all of the elements of a crime must appear in the charging document, in order to afford notice and opportunity to a defendant to defend the charges against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Facts which may affect the maximum sentence are also considered “elements” that must be

included in the information. *State v. Goodman*, 150 Wn.2d 774, 778, 83 P.3d 410 (2004).

Notice of the potential consequences of conviction is a critical component of a criminal defendant's due process rights. Misinformation about the potential consequences of conviction can be grounds to withdraw a guilty plea. *State v. Weyrich*, 163 Wn.2d 554, 556-57, 182 P.3d 965 (2008) (maximum sentence); *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010) (immigration consequences). Certainly, Baker did not enter a guilty plea in this case. But this does not mean his ability to knowingly and intelligently participate in the legal processes affecting his liberty and property was not affected by the misleading information in the information. To the contrary, knowledge of the maximum penalties if convicted is critical information to be able to engage in plea bargaining.

In *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1407-08, 182 L.Ed.2d 379 (2012), the U.S. Supreme Court discussed the increasing importance of plea bargaining to a functional justice system. Observing that approximately 97% of cases resolve through plea bargaining rather than trial, the Court stated,

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” [Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial. In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

Frye, 132 S. Ct. at 1407 (internal citations omitted).

Consequently, as acknowledged in *Frye* in the context of the Sixth Amendment's guarantee of effective assistance of counsel, proper functioning of the plea bargaining system is an integral component of the workings of justice. Yet, the plea bargaining process is distorted when the defendant is misled in his expectations. If the defendant does not have an accurate picture of his bargaining position, he cannot competently negotiate a compromise.

Here, Baker lacked the necessary information needed to rationally evaluate his position and determine whether to exercise his right to a trial. The charging document failed to adequately apprise him of the potential outcome such that he could negotiate the possibility of improving it. This prejudiced his ability to utilize the plea bargaining system. Even under the liberal construction afforded charging documents challenged only after trial, the conviction should be reversed so that Baker can have a meaningful opportunity to consider whether and how to execute his constitutional rights. *Kjorsvik*, 117 Wn.2d at 105.

II. Insufficient evidence supports the reckless endangerment conviction.

Following a bench trial, the reviewing court evaluates whether sufficient evidence supports the trial court's factual findings. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). In reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the State. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). Reckless endangerment requires evidence that the accused "recklessly engage[d] in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person." RCW 9A.36.050(1). Whether conduct

creates a substantial risk of death or injury sufficient to justify a reckless endangerment conviction is a question of fact. *State v. Austin*, 65 Wn. App. 759, 762, 831 P.2d 747 (1992).

In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979), is instructive. In *Wilson*, some children were playing with a rope tied to a tree by pulling it tight across a road as cars approached. 91 Wn.2d at 489-90. They dropped the rope before cars reached it, but it appeared to onlookers that their actions could cause an accident. *Id.* In *Wilson*, the trial court did not reach the question of whether the evidence was sufficient to support the conviction, as it reversed the conviction due to insufficient evidence of complicity. However, the court plainly viewed the case dubiously, stating, “Based on the record presented, we are somewhat skeptical that the State established the underlying crime of reckless endangerment.” *Id.* at 490.

By contrast, in *State v. Graham*, 153 Wn.2d 400, 103 P.3d 1238 (2005), the court found sufficient evidence to support the reckless endangerment conviction. In *Graham*, the defendant drove 80 miles per hour down a road with a posted speed limit of 40 miles per hour, swerving the steering wheel back and forth to make the car swerve, with more passengers than seat belts in the car. 153 Wn.2d at 402-03. She lost

control of the vehicle and rolled it, ejecting the passengers, one of whom died instantly. *Id.* at 403. The *Graham* court upheld the sufficiency of the evidence, ruling that there was sufficient evidence in the record to conclude that the defendant was aware of the risk that her actions could cause an accident and knowingly disregarded the risk. *Id.* at 409.

The present case is far more analogous to *Wilson* than to *Graham*. As in *Wilson*, Baker is young, barely more than a child at play. At 12 years old, he is unlikely to have ever driven a car or know what it would be like to be driving a car when it is struck by a thrown object. Recklessness requires proof that the defendant “knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” RCW 9A.08.010(1)(c). There is simply no evidence that Baker had knowledge of the risks associated with throwing a soft object at a moving vehicle, let alone how “substantial” the risk might have been that an accident could result.

Moreover, there is insufficient evidence that his conduct created a *substantial* risk of death or physical injury. Ordinary drivers anticipate encountering some hazards in the roadway, whether debris, wildlife, slow-moving vehicles, or other unexpected intrusions. Roads are not required

to be made absolutely safe; thus, prudent drivers remain attentive and proceed with some caution so as to adapt to changing circumstances. *See Ruff v. County of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (observing that a County does not have a duty to construct a roadway in such a manner as to protect against all imaginable negligent acts of drivers).

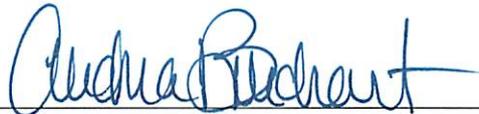
Baker did not shoot at the car. He did not throw a rock at it. He struck the canopy of the vehicle, behind the windows, with what appeared to be a bag of garbage. While undoubtedly his behavior was obnoxious, there is simply no indication that it created a *substantial* risk of a serious automobile accident. The minimal risk is borne out by what actually happened, namely, the truck swerved slightly, without impacting other vehicles on the road, and continued driving until reaching a place to pull over and stop. This is no more dangerous than swerving slightly to avoid a piece of garbage in the road, or to avoid another vehicle entering the roadway. There was not a substantial risk that anybody would be injured.

Considering the totality of the circumstances, the quantum of evidence is insufficient to support the reckless endangerment conviction and it should be reversed.

VI. CONCLUSION

Baker's convictions should be reversed and his case remanded because he was incorrectly advised of the consequences of conviction and because the evidence presented at trial did not establish that he acted recklessly or that his conduct created a substantial risk of death or physical injury to anybody. This was the thoughtless behavior of a child at play who does not fully understand the consequences that may follow from his choices, not a criminal act.

RESPECTFULLY SUBMITTED this 7th day of June, 2012.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

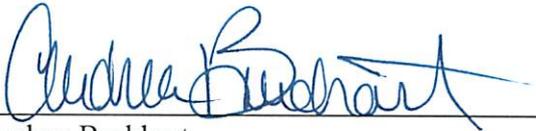
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Kevin Eilmes, Deputy
Yakima County Prosecutor's Office
Appellate Division
128 N. Second St, Rm 211
Yakima, WA 98901

Dion Taries Jordan Baker
4803 Ahtanum Road, Apt. 16
Yakima, WA 98903

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 7th day of June, 2012, in Walla Walla, Washington.


Andrea Burkhart