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SEP 03 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

NO. 31458-8-III

STATE OF WASHINGTON, Respondent

v.

JOHAN MARTIN FILLA, Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant's assertion that RCW 9.41.270 is unconstitutionally void for vagueness as applied to Appellant's testimony is contrary to law. Appellant's testimony that he never drew his gun is contradicted by the State's evidence. Naomi Rutherford testified that Appellant drew his gun and pointed it at her face. Johnny Martinez testified that he saw Appellant wave the gun around. The jury found Appellant guilty of unlawful display of a firearm.

RCW 9.41.270 has been upheld as valid; the statute is not void for vagueness. Lawful exercise of Appellant's Second Amendment rights does not include drawing a firearm to intimidate another and cause alarm for the safety of others. The self-defense exception was not argued and does not apply.

II. COUNTER STATEMENT TO ASSIGNMENTS OF ERROR

RCW 9.41.270 provides sufficiently ascertainable standards that an ordinary person can understand what conduct is prohibited and does so in a manner that does not encourage arbitrary and discriminatory enforcement. As applied to the facts of this case, the statute is not void for vagueness.

III. COUNTER STATEMENT OF THE CASE

On May 27, 2012, sometime after 10:00 p.m., Naomi Rutherford heard loud banging at her apartment while she was in the laundry room. (RP Volume A at page 25: 16-18 and 26:8-13). She came in through the back door of her apartment and answered the front door. (RP Volume A at page 26: 16-18). Appellant and Naomi's friend Dee Ann were at the door. (RP Volume A at page 27: 13-25). Appellant was ranting and raving and Naomi began to get loud as well. (RP Volume A at page 28: 6-12). Earlier that evening, Naomi had been receiving phone calls from her friend Dee Ann regarding \$60.00 that Dee Ann claimed to have loaned to Naomi. (RP Volume A at page 54: 15-23 and 70: 8-11).

When Naomi opened the door she saw that Appellant had something in his hand, the window screen to her son's bedroom, which Appellant had removed. (RP Volume A at page 45: 13-21).

Naomi asked Appellant to leave her porch. (RP Volume A at page 28: 13-14). Appellant refused. (RP Volume A at page 28: 14-15). The exchange began to escalate. (RP Volume A at page 28: 15-19). Appellant reached behind him and pulled out a gun, pointing it at Naomi. (RP Volume A at page 28: 20-22 and 29: 3-4). Appellant pointed the gun at Naomi's face. (RP Volume A at page 28:22 and 29: 3-4). Naomi stepped back to get her phone to call 911. (RP Volume A at page 29:7-9). Naomi

was scared and feared that she was going to be shot. (RP Volume A at page 29: 13-17).

Naomi's boyfriend, Johnny Martinez was at the apartment with their son. (RP Volume A at page 30: 14-21). Johnny heard the banging on the door when he was getting ready for bed. (RP Volume A at page 59: 16-25). He ignored the knocking at first because he thought Appellant was intoxicated. (RP Volume A at page 59: 18-20). Johnny got up when he heard the pounding move to his son's bedroom window. (RP Volume A at page 59: 23 through 60: 2). He saw Naomi and Appellant at the door having an argument. (RP Volume A at page 60: 6-9). After a minute or so, Naomi ran past Johnny saying "he's got a gun". (RP Volume A at page 60: 15-16). Johnny was surprised and moved closer to the door to see if there was a real gun. (RP Volume A at page 60:17-20). Johnny saw Appellant waving a gun around and was saying "Get her off the phone." (RP Volume A at page 60: 21-25). At one point Johnny saw Appellant cock the gun, while he was yelling at Johnny to get Naomi off the phone. (RP Volume A at page 66: 6-14). The 911 call was admitted into evidence at trial and was played for the jury. (RP Volume A at page 32:16 through page 44:19).

Dee Ann jumped in front of Johnny Martinez so that she was between Appellant and Johnny. (RP Volume A at page 61: 1-3). Johnny was in shock and couldn't believe it was happening. (RP Volume A at

page 60:6-8). Appellant said “let’s get the hell out of here”. (RP Volume A at page 126: 3-4). Appellant and Dee Ann then left; Appellant did not want to “get jumped by a bunch of police” (RP Volume A at page 126:16-17).

When interviewed by the investigating deputy, Appellant admitted that he took his firearm to confront Naomi and Johnny. (RP Volume A at page 85: 13-21). Appellant claimed that the gun stayed in his waistband the entire time. (RP Volume A at page 85: 17-18 and 24-25). Appellant testified that he was pushed by Johnny, his coat moving so that the gun in his waistband was visible to Naomi. (RP Volume A at page 125: 1-8).

At trial, Dee Ann testified that Appellant, her boyfriend, never drew his gun. (RP Volume A at page 105: 16-18 and 109: 23). Dee Ann provided a statement to law enforcement that Appellant has a short fuse and anger problems. (RP Volume A at page 109: 17-25).

Appellant was charged with Assault, Second Degree and with Unlawful Display of a Firearm. CP 10-11. Appellant was acquitted of the Assault Second Degree charge and convicted of Unlawful Display of a Firearm. (RP Volume B at page 179: 9-12).

IV. ARGUMENT

RCW 9.41.270 is not void for vagueness facially or as applied to the facts of this case. The statute provides clearly ascertainable standards as to what conduct is considered an unlawful display of a weapon. *State v. Maciolek*, 101 Wash. 2d 259, 263, 676 P.2d 996, 998 (1984). Appellant does not argue that the statute is facially void.

A statute is presumed constitutional and the party challenging the constitutionality of a legislative enactment has the burden of proving it is unconstitutionally vague. *State v. Rhodes*, 92 Wash.2d 755, 600 P.2d 1264 (1979); *Seattle v. Drew*, 70 Wash.2d 405, 423 P.2d 522 (1967).

A. RCW 9.41.270 Has Been Upheld As Constitutional

RCW 9.41.270 has been upheld as constitutional. *State v. Maciolek*, 101 Wash.2d 259, 676 P.2d 996 (1984).

A citizen's right to carry arms is not unlimited under the Second Amendment of the United States Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, e.g., *United States v. Williams*,

553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.

Dist. of Columbia v. Heller, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L. Ed. 2d 637 (2008).

The Washington State Supreme Court addressed the argument that RCW 9.41.270 was void for vagueness in *State v. Maciolek*, 101 Wash.2d 259, 676 P.2d 996 (1984).

The court explained that a statute can be facially void, which does not require review of the facts of the particular case, or a statute can be void for vagueness as applied to the particular facts of a case. *Id.*

Although the actual conduct of defendant is irrelevant when a statute is alleged to be unconstitutional on its face, the conduct of defendant is relevant when it is alleged that the statute is unconstitutional only in part, or the court, although not finding the statute to be unconstitutionally vague on its face, finds the statute to be potentially vague as to some conduct. In such cases, the court must look to defendant's conduct to determine whether the statute, as applied to that conduct, is unconstitutional. *Bellevue v. Miller*, 85 Wash.2d 539, 536 P.2d 603 (1975). This is because while a statute may be vague or potentially vague as to some conduct, the statute may be constitutionally applied to one whose conduct clearly falls within the constitutional "core" of the statute. *State v. Zuanich*, 92 Wash.2d 61, 593 P.2d 1314 (1979).

State v. Maciolek, 101 Wash. 2d 259, 262-63, 676 P.2d 996, 998 (1984).

Appellant's actual conduct is pertinent to whether the statute may be void for vagueness as applied to him. *Id.* However, Appellant's version of the events of that night is contradictory to the facts presented by the State. Thus the Appellate court would have to ignore all of the State's evidence and accept only Appellant's version of the events in order to consider whether RCW 9.41.270 is void as applied to Appellant. Appellant has cited no authority to support such an action. To do so, the Appellate court would be usurping the exclusive function of the trier of fact.

Appellant fails to make any argument that the statute is void as applied to his conduct to which Naomi Rutherford and Johnny Martinez testified; nor can he. If Appellant's conduct "clearly falls within the constitutional core of the statute", then the statute cannot be found void for vagueness as applied to Appellant. *Maciolek, Supra.*

The evidence presented by the State through witnesses Naomi Rutherford and Johnny Martinez falls within the core behavior the statute prohibits. Appellant has not and cannot argue that waving a gun around during an argument, cocking the weapon and pointing it directly in someone's face without the present threat of unlawful force by another is protected by the Second Amendment of the United States Constitution. Appellant's conduct is not protected. This appeal fails.

B. Appellate Court Should Not Act As Trier Of Fact

Appellant's argument requires that the facts as applied are the "facts" presented by Appellant and his witness at trial. By arguing that RCW 9.41.270 is void for vagueness under Appellant's version of events, Appellant is asking the appellate court to find that the jury should have weighed the credibility of all witnesses in favor of Appellant. An appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. *Washburn v. Beatt Equipment Company*, 120 Wash.2d 246, 262, 840 P.2d 860 (1992).

Appellant argues that RCW 9.41.270 is void for vagueness because it does not make clear that simply carrying a firearm would violate the statute. This argument ignores the evidence presented at trial. The evidence consisted of testimony Naomi Rutherford and Johnny Martinez that Appellant drew his weapon, waving it about and pointing it at Naomi Rutherford's face. (RP Volume A generally page 25-58 and 58-75, as cited above). This is more than just "simply carrying" a weapon.

The jury returned a verdict of guilty on the charge of Unlawful Display of a Weapon. (RP Volume B at page 179: 9-12). The only reasonable inference is that the jury weighed all the evidence and found the testimony of Naomi Rutherford and Johnny Martinez to be more credible than the testimony of Appellant and his girlfriend. An appellate

court leaves questions of credibility to the trier of fact and will not overturn them on appeal. *State v. Madarash*, 116 Wash.App. 500, 66 P.3d 682 (2003).

The jury is presumed to have followed the instruction setting out the elements necessary for conviction. *State v. Kirkman*, 159 Wash.2d 918, 155 P.3d 125 (2007). The constitutional role of the jury requires respect for the jury's deliberations. *Id.*

Appellant's argument requires the appellate court ignore all evidence presented by the State and accept as undisputed facts, the Appellant's version of events. Appellant asks the appellate court to be the trier of fact and substitute his story for the finding of the jury. Appellant's argument is contrary to law. This appeal fails.

**C. RCW 9A1.270 Cannot Be Found Void For
Vagueness, As Applied Under The Facts As Presented
By State's Witnesses**

Appellant's entire argument is based upon acceptance of Appellants story that he never pulled his weapon as the undisputed facts. (See Appellant's Brief; "Mere carrying of a firearm..." page 1; "...accidentally revealing it is not the type of conduct intended to be prohibited..." page 13;" ...but for Filla's coat coming open to reveal the

firearm...”, page 14; ...”statute does not clearly proscribe inadvertent and unintentional display of a weapon...”, page 15; “RCW 9.41.270 did not provide adequate notice to Filla that he could be convicted of a crime for carrying a gun in his waistband for self-protection if his coat accidentally came open and revealed the gun...”, page 15).

Appellant is asking the court to completely disregard all evidence presented by Naomi Rutherford, Johnny Martinez and Deputy Jeff Jenkins and determine that the undisputed facts are the version presented by Appellant and his girlfriend at trial, disregarding evidence presented by the State.

Appellant fails to address how the Statute would be void under the facts presented by the State, because he cannot. The conduct which is criminalized in RCW 9.41.270 is not the act of “simply carrying” a weapon. Circumstances surrounding the carrying are to be considered. The statute states in pertinent part:

(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

Wash. Rev. Code Ann. § 9.41.270 (West)

Naomi Rutherford and Johnny Martinez both testified that Appellant drew his gun, waved it about, pointed it at Naomi Rutherford's face and, at one point, cocked the weapon. The actions of Appellant were more than "simply carrying" the gun. The actions of Appellant clearly manifest an intent to intimidate others and warrant alarm for their safety.

The facts accepted by the jury as credible clearly fall under the conduct which the statute sets forth as criminal. Appellant was not convicted for "simply carrying" his gun in his waistband, but was convicted for pulling his gun, waving it about and pointing it in the face of Naomi Rutherford. This appeal fails.

The appellate court cannot substitute itself for the trier of fact. The appellate court cannot disregard the State's evidence and accept only Appellant's story of the events of that night to determine whether RCW 9.41.270 is void as applied to the facts of this matter. This appeal fails.

D. Appellant's Version Of Events Supports A Finding That RCW 9.41.270 Is Not Void For Vagueness

Appellant's version of the events also supports a constitutional application of RCW 9.41.270. The statute provides that it is unlawful to carry a firearm, in a manner, under circumstances and at a time and place that either manifests intent to intimidate another or that warrants alarm for

the safety of other persons. The circumstances surrounding the carrying of a firearm can support the finding of a crime.

A review of the Appellant's version of the events shows that the manner and circumstances of the carrying of the firearm warranted fair notice to Appellant that his conduct would violate the statute.

The following testimony is from Appellant's version:

a- Appellant carries his gun in his jacket pocket or in his waistband. (RP Volume A at page 119:8-12).

b- The encounter occurred late at night. (RP Volume A at page 120:1-2).

c- Appellant grabbed the phone from his girlfriend and began yelling at Naomi Rutherford. (RP Volume A at page 120:13-25).

d- Appellant "got pretty pissed off about it". (RP Volume A at page 121:9).

e- Appellant told his girlfriend that they would "go bang on the door...see if we can get the money from them". (RP Volume A at page 122:6-8).

f. When Appellant did not get a response from banging on the door he began banging on the windows and then went back to banging on the door. (RP Volume A at page 123:8-21).

g- When Naomi opened the door Appellant began “having words with her... cussing...I was upset...they knew I was upset...” (RP Volume A at page 124:2-7).

h- Appellant was in a shoving match with Mr. Martinez. (RP Volume A at page 127:14-16).

Even if the jury completely disregarded the testimony of Naomi Rutherford, Johnny Martinez and Deputy Jeff Jenkins, Appellant’s version of events places his conduct within the constitutional core of the statute. A jury could reasonably find that a person, with a gun, visible in his waistband, showing up late at night at a home, pounding on the door and windows, getting in to a yelling and shoving match, falls within the statute by manifesting an intent to intimidate or warrant alarm for the safety of others.

The statute can be violated by carrying a weapon in a way that manifests the intent to intimidate or that warrants alarm for the safety of others. An “angry, pissed off“ person who arrives at a home and begins pounding on windows and doors while wearing a gun in his waistband can reasonably be inferred to warrant alarm for the safety of others.

The court in *State v. Maciolek*, 101 Wash. 2d 259, 262-63, 676 P.2d 996, 998 (1984), specifically found that conduct not amounting to drawing a firearm was a violation of the statute and was not unconstitutionally void for vagueness.

Appellant, who had injured his hand, requested a prescription for Percodan from his physician. The doctor

had previously determined that the appellant was abusing prescription Percodan and refused to renew the prescription. Thereupon, the appellant became very angry and deliberately pulled back his jacket to reveal a handgun which was carried within an inside pocket of the jacket. The doctor, alarmed and intimidated by this display, immediately wrote out a prescription for Percodan. Based upon these facts, the appellant was found guilty of violating RCW 9.41.270 in Roxbury District Court but the court commissioner set aside the conviction and dismissed the charges after finding the statute unconstitutionally vague. The State appealed this ruling and the Superior Court reversed, finding the statute was neither vague on its face or as applied.

The conduct of defendant *Maciolek* involved simply pulling back his jacket. The Washington State Supreme Court found this action was enough based upon the circumstances surrounding the situation. The physician felt alarmed and intimidated; just as Naomi Rutherford was intimidated and feared being shot.

Appellant admitted that he usually kept his gun in his jacket pocket. (RP Volume A at page 130:16). Yet, in this instance he testified that the gun was in his waistband, in front where the handgun was easily visible. (RP Volume A at page 130:18-21). The reasonable inference is that the gun was purposely placed up front in easy view to intimidate. In addition to being angry, pounding on windows and doors, yelling, cussing and shoving; a reasonable jury could find Appellant guilty of violating RCW 9.41.270 even relying only upon Appellant's version of the events.

As such, RCW 9.41.270 is not void for vagueness based upon the Appellant's version of events. This appeal fails.

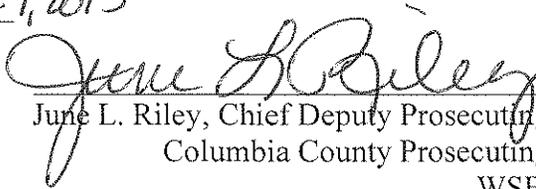
**E. Appellant Incorrectly Asserts That Manifest Error
Of Constitutional Magnitude Exists**

Appellant asserts that an error of constitutional magnitude exists, but fails to explain what error allegedly occurred. The constitutionality of a statute can be raised for the first time on appeal without the necessity of arguing error of constitutional magnitude. *In re J.R.* 156 Wash.App. 9, 18, 230 P.3d 1087 (2010).

V. CONCLUSION

For the foregoing reasons, it is respectfully requested that this Appeal be denied.

Date: August 29, 2013



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