

FILED
February 23, 2016
Court of Appeals
Division III
State of Washington
No. 32684-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

DENNIS WAYNE JUSSILA,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
Klickitat County, STATE OF WASHINGTON
Superior Court No. 14-1-00051-2

BRIEF OF RESPONDENT

DAVID R. QUESNEL
Klickitat County
Prosecuting Attorney

Erika George, WSBA No. 43871
Deputy Prosecuting Attorney

Klickitat County Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, WA 98620
(509) 773-5838

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT.....3

1. The State did not add elements to the “to-convict” jury instruction3

2. There was no violation of the defendant’s right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because there was sufficient evidence to convict the defendant.....6

3. The State presented sufficient evidence that the guns were firearms under RCW 9.41.010.....9

4. There was no violation of the defendant’s right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because the State presented sufficient evidence to prove the elements of the crime of second degree theft..... 10

5. The court failed to conduct any inquiry regarding the Defendant’s ability to pay as required by *Blazina*..... 12

D. CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Washington Supreme Court

<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999)	8
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680(2015)	12
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396(1995)	3
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7,8-9,11
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	3
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	8

Washington State Court of Appeals

<i>State v. Johnson</i> , 159 Wn.App.766, 247 P.3d 11(2011).....	6,8,9
<i>State v. McCreven</i> , 170 Wn.App.444, 284 P.3d 793(2012)	6,8
<i>State v. Walton</i> , 64 Wn.App.410, 824 P.2d. 533 (1992).....	8,9,11

United States Supreme Court

<i>Musacchio v. United States</i> , 577 U.S. _____ (2016).....	6,7
<i>Burks v. United States</i> , 437 U.S. 16 (1978)	6-7
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	7,8-9,10

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether or not the state added elements that needed to be proved beyond a reasonable doubt to the “to-convict instructions.”
2. Whether or not there was a violation of the defendant’s right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because there due to insufficient evidence.
3. Whether or not the State presented sufficient evidence that the guns were firearms under RCW 9.41.010.
4. Whether or not there was a violation of the defendant’s right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because the State presented sufficient evidence to prove the elements of the crime of second degree theft.
5. Whether or not the court failed to conduct any inquiry regarding the Defendant’s ability to pay as required by *Blazina*.

B. STATEMENT OF THE CASE

On March 21, 2014, Joseph Craven returned to his home to find that his home had been broken into and several items were missing from his home. (VRP 75). Items missing included a laptop computer, a .45 automatic pistol, seven rifles, a gold watch, a safe, a set of car keys, a knife sharpener, and a satchel of loose change. (VRP 75 – 84).

Fresh tennis shoe footprints led from Mr. Craven’s back patio to the house next door where the defendant lived with his father. (VRP 92-94). Police called the father, who arrived home and gave them permission to search his home and the garage. (VRP 94). In the defendant’s bedroom they

found shoes with a similar tread pattern to the footprints, and approximately 50 marijuana plants being grown inside a small tent. (VRP 95). In a spare room next to the defendant's bedroom, the police found a pried-open safe, later identified by Mr. Craven as the one missing from his home. (VRP 95-96). After further searching the property, Police recovered five rifles stashed in the rafters of the defendants father's garage. (VRP 122). Mr. Craven testified at trial that the guns were recovered in the garage were his. He identified the guns to police, and the police returned the guns to him after photographing them. Mr. Craven identified the photographs at trial as his missing rifles. (VRP 76-78).

The defendant was charged with one count of first degree burglary, one count of second degree theft other than a firearm, seven counts of theft of a firearm, seven counts of first degree unlawful possession of a firearm, and one count of manufacturing a controlled substance – marijuana. (CP 10-16).

The jury could not decide on the two theft of a firearm regarding the missing handguns that were not recovered, and the court declared a mistrial regarding those charges. (VRP 226-227). The jury returned non guilty verdicts on the corresponding unlawful possession of a firearm in regards to the handgun. The jury found the defendant guilty of the fifteen remaining counts: first degree burglary, second degree theft other than a firearm, five counts of theft of a firearm regarding the rifles, five counts of first degree

unlawful possession of a firearm regarding the rifles, and one count of manufacturing a controlled substance – marijuana. (CP 72-84).

The defendant was sentenced to 164 months. (VRP 271). The defendant filed this timely appeal.

C. ARGUMENT

1. The State did not add elements to the “to-convict” jury instructions.

“The State must prove every *essential element* of a crime beyond a reasonable doubt for a conviction to be upheld” *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396(1995)(emphasis added).

The appellant argues that the State added an element that needed to be proved beyond a reasonable doubt when the serial numbers of each stolen firearm were included in the individual “to convict” instructions. The State disagrees.

The State did not add an essential element that needed to be proved beyond a reasonable doubt; rather, the State included information that described the firearm, distinguishing each firearm from each other and other counts.

Appellant’s reliance on *State v. Hickman*, 135 Wn. 2d 97, 954 P.2d 900 (1998) is misplaced. *Hickman* is factually distinguishable from the case at hand. In *Hickman*, the defendant was convicted of insurance fraud. In the “to-convict” jury instructions in that case, the third element was at issue.

The “to-convict” instructions had three separate elements, each numbered. The third element was venue, and stated that the acts occurred in the county where the case was tried. For the charge of Insurance Fraud, venue was not a required element. The “to-convict” instructions erroneously added the third element, and numbered it separately.

That is not factually similar to the “to-convict” instructions here. In this case there were seven counts of Theft of a Firearm, (counts 3 – 9) and seven counts of Unlawful Possession of a Firearm in the First Degree (counts 10 – 16). (CP 10-16) Each count has its own “to-convict” instructions. In counts 3 – 9, each “to-convict” instruction included a different description of the firearm, including the make, model and serial number, under the element numbered (1). The descriptions were not separated into their own numbered elements, rather inserted directly after the word “firearm” – to distinguish which firearm was being referenced for each particular instruction.

For counts 10 – 16, each “to-convict” instruction corresponded with the same descriptions that were referenced in the “to-convict” instructions for counts 3 – 9, again listing the make, model, and serial numbers. Without any distinguishing identification, it would be very confusing with 14 counts involving firearms.

The distinguishing fact here is simply that it is not a separate element, but rather a description meant to identify the firearm in question.

Rather than creating an essential element, the State included language that distinguish the firearm charged in each particular count from firearms charged in other counts. Including the make, what type of firearm it is, and the serial number only creates a reference for the jury to distinguish the firearms from each other and from each count. Without such references it would be difficult for a jury to determine which firearm they were discussing. Giving these points of reference made it possible for the jury to have a discussion on each of the firearms. This is evident from the fact that the jury returned a not guilty verdict on the charges stemming from the handguns that were never recovered.

Including the make, model, and serial numbers of the firearms as identifying features would be akin to including the color of an item in an instruction on theft in the second degree. A serial number of a firearm is unique to a specific firearm, but a serial number is only unique within each brand. A Winchester rifle and a Colt revolver could have the same serial number. A serial number is only one identifying factor of a firearm, just like a color is only one identifying factor of a shirt.

The victim testified to the fact that his guns were stolen. He identified them from the photographs and described what kind of weapon it was. The victim also testified that law enforcement recovered the rifles, recorded the serial numbers, and he identified them as the ones that were stolen (VRP 76-78).

The convictions should be affirmed because no extra elements were added to the jury instructions that needed to be proven beyond a reasonable doubt.

2. There was no violation of the defendant's right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because there was sufficient evidence to convict the defendant.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the jury’s verdict, any rational jury could find the essential elements of a crime beyond a reasonable doubt.” *State v. McCreven*, 284 P.3d 793, 809, 170 Wn.App.444, (2012) (emphasis added) (citing *State v. Johnson*, 159 Wn.App. 766, 744, 247 P.3d 11(2011) (internal citations omitted).

The question at hand is how a court should analyze a sufficiency of the evidence challenge when a jury instruction includes an extra element. The US Supreme Court has held that, “when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction.” *Musacchio v. United States*, 577 U.S. _____ (2016).

This holding is based on the limited inquiry of a sufficiency of the evidence review. Specifically, a sufficiency review “addresses whether ‘the government’s case was so lacking that it should not have even been

submitted to the jury.’ *Id.* quoting *Burks v. United States*, 437 U.S. 1, 16 (1978). The Supreme Court also explains this holding by saying that on a sufficiency review, “a reviewing court makes a *limited* inquiry tailored to ensure that a defendant receives the minimum that due process requires: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt’” *Id.* (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979)). The Supreme Court goes on to state that a narrow sufficiency review does not override the jury’s role concerning how the jury weighs the evidence or what inferences they draw from evidence. *Id.*

The appellant cites to case law that stands for the premise that unnecessary facts included in jury instructions become the law of the case and the State assumes the burden of proving the added elements beyond a reasonable doubt. The U.S. Supreme Court disagrees. “The Government’s failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects.” *Id. Musacchio* also states that a “sufficiency challenge is for the court to make a ‘legal’ determination whether the evidence was strong enough to reach a jury at all” (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

This reasoning from which *Musacchio* stands on is supported in Washington case law. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) explains that the job of the court when conducting a sufficiency

review is not to “reweigh the evidence and substitute judgment” but rather “because [the jury] observed the witnesses testify first hand, we defer to the jury’s resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given to the evidence.”

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) explains that all reasonable inferences that could be made from the evidence “must be drawn in favor of the verdict and interpreted strongly against the defendant.” *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) states that the “jury is the sole and exclusive judge of the evidence.”

In the case at hand, there was enough evidence to send to the jury. While the guns themselves were not admitted into evidence, pictures of all the recovered firearms were. (VRP 78). The victim testified that he recognized all the guns in the photographs, and identified the guns as his. (VRP 76-77).

When conducting a sufficiency of the evidence review, the only question should be if there was enough evidence to send to the jury. That is clear here. Washington law clearly stands for the premise that it is not the job of the reviewing court to make determinations on the evidence. See *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012); *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11(2011); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832

(1999); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Walton*, 64 Wn.App.410, 824 P.2d 533 (1992); *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

Here, there was enough evidence to send to the jury, and the jury, after weighing all the testimony and evidence, returned a verdict of guilty, and that verdict should stand.

3. The State presented sufficient evidence that the guns were firearms under RCW 9.41.010.

The analysis for a sufficiency review is set forth in the preceding argument.

Again, a sufficiency review is narrowly tailored to review whether or not the State presented evidence that was strong enough to go to the jury. A sufficiency review is not intended to re-weigh the evidence, to resolve conflicting testimony, to evaluate credibility of witnesses, or to make decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d. 533 (1992). Rather, the jury is the “sole and exclusive judge of the evidence.” *State v. Johnson*, 159 Wn.App.766 at 774.

Again, while the actual guns were not admitted, photographs of the guns that were recovered were admitted (VRP 78). The victim testified on the stand that he recognized all of the guns in the photograph, and identified them as his. (VRP 76-79).

The appellant argues that the evidence must establish that the gun is a real gun and not a gun-like replica or toy. The photographs show the firearms, and show the firearms with clips and with ammunition, which the victim testified too. (VRP 76). This is evidence that shows the guns were operational. Again, it is not the reviewing court's job to weigh the credibility of the evidence. It is only the reviewing court's job to determine if there was enough evidence to be sent to the jury. *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979). The jury determined that they were firearms, based on their deliberations. It is not the role of a reviewing court on the sufficiency of the evidence to over rule how a jury interpreted the evidence.

The convictions should be affirmed.

4. There was no violation of the defendant's right to due Process under Washington Constitution, Article 1 § 3 and the United States Constitution, Fourteenth Amendment because the State presented sufficient evidence to prove the elements of the crime of second degree theft.

The analysis for a sufficiency review is set forth in the preceding arguments.

As previously stated, a sufficiency of the evidence review is only intended to insure that the State presented enough evidence that the case should reach a jury, not review the interpretation of evidence. A jury is still the sole judge of the evidence. It is not the role of the reviewing Court to determine if it was proven beyond a reasonable doubt.

Here, evidence was presented of a missing computer (VRP 75), a bag of coins valued at approximately \$300, a gold watch, a safe, a set of car keys, and a knife sharpener valued at \$50. (VRP 80-84).

The jury instructions properly instructed that the elements of Theft in the Second Degree that to-convict on this charge the State must prove that the defendant wrongfully obtained the property of another exceeding \$750 in value but not more than \$5,000 in value (CP 43, Instruction No. 18).

The appellant argues that because all the items were not listed in the Amended Information, only the laptop and the coins; therefore, any other items were not properly in front of the jury. The elements of Theft in the Second Degree do not require specific property to be listed. Here, no specific property was listed in the jury instructions. (CP 43, Instruction No. 18). The element that is necessary is the value of the stolen property is between \$750 and \$5,000.

Further, it is the jury's duty to interpret the evidence and determine if the value of the stolen property was more than \$750 in value and less than \$5000 in value.

Enough evidence was presented of items that were stolen to send to the jury to make a determination. It is not the reviewing Court's duty to reweigh the evidence and substitute any judgment for that of the jury. *State v. Green*, 94 Wn.2d 216 at 221, 616 P.2d 628 (1980). Rather, the jury

observed the witnesses testify first hand, viewed the evidence first hand, and it is up to the jury to resolve conflicting testimony, evaluate the credibility of the witnesses, and make decisions regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Walton*, 64 Wn.App. 410, at 415-16.

The conviction of Theft in the Second Degree should stand because there was enough evidence to send the case to the jury.

5. The court failed to conduct any inquiry regarding the Defendant's ability to pay as required by *Blazina*

The State concedes the issue that the Court should have conducted an inquiry regarding the Defendant's ability to pay. In light of *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) being retroactive, the issue should be remanded for the Court to conduct an inquiry as to the Defendant's future ability to pay.

D. CONCLUSION

The State did not add additional elements to the "to-convict" instructions by including the make, model, and serial number of the firearms.

The State presented sufficient evidence to convict the Defendant of Theft of a Firearm, Unlawful Possession of a Firearm, and Theft in the Second Degree. The State also presented sufficient evidence to prove that the guns were firearms as defined by RCW 9.41.010. A sufficiency of the

evidence review is a limited scope review, only intended to determine if the State had enough evidence to reach the jury at all.

The appellant is using a sufficiency argument to attempt to replace the jury's deliberation. Case law is clear that a sufficiency review is not intended to overrule the jury's interpretation of the evidence.

In light of *Blazina*, the Court should make an on the record inquiry regarding the ability to pay.

The convictions should be affirmed; however, the case should be remanded to examine the imposition of legal financial obligations and include an inquiry of the defendant's ability to pay.

Respectfully submitted this 23rd day of February, 2016.

KLICKITAT COUNTY
PROSECUTING ATTORNEY



ERIKA GEORGE
WSBA NO. 43871
Deputy Prosecuting Attorney