

FILED

May 23, 2016

Court of Appeals

Division III

State of Washington

No. 33790-1-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RIGOBERTO IVAN VAZQUEZ,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The firearm enhancements added to appellant's sentences violate his Sixth Amendment right to a trial by jury.

Issue Pertaining to Assignment of Error

The sentencing court added 6 years to appellant's sentence for two firearm enhancements.¹ Special verdict forms 1, 2, and 3 inquired whether appellant was armed with a firearm. But jurors were instructed that "for purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime" in counts 1–3. Jurors were thus instructed they could answer "yes" to the special verdicts if they found appellant was armed with a deadly weapon, not a firearm. Does the court's imposition of the firearm enhancements violate appellant's Sixth Amendment right to trial by jury?

B. STATEMENT OF THE CASE

Following a jury trial in Grant County Superior Court, 26-year-old appellant Rigoberto Ivan Vazquez was convicted of two counts of second degree assault as lesser included offenses, one count of riot while armed

¹ Pursuant to *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), the trial court did not apply the firearm enhancement to count 3, the unranked felony of riot while armed. RP 527.

and one count of reckless endangerment. CP 327, 329–31; RP² 389. The charges arose out of a late evening skirmish on June 22, 2013, in Quincy, Washington, between young men with guns at two houses located across the street from each other. *See generally* CP 5–11. The households’ former or present occupants had some history of conflicts. RP 196–97, 26–17, 281, 350. There was no testimony Mr. Vazquez was involved in any of these past conflicts.

Earlier that evening, 17-year-old Alejandro Munoz and his father Juan Munoz left the family barbeque gathering to get supplies at the nearby Short Stop mini-mart. RP 175, 190, 203, 222. Behind the store Munoz intervened when 23-year-old Marcos Avalos-Barrera (aka “Froggy”) began talking disrespectfully to his father and Munoz punched Avalos-Barrera into unconsciousness. CP 6; RP 190–92, 204, 223, 225–26, 277, 294. A short time later, as Avalos-Barrera and some friends walked by in the alley behind the Munoz house, they continued yelling at each other and Avalos-Barrera said, “None of you guys are making it out of there tonight.” Munoz and his brother Jesse Munoz and their father felt

² The trial and sentencing proceedings, which were mostly reported by court reporter Tom Bartunek and are contained in volumes I through IV, will be cited to as “RP ____.” Citations to miscellaneous hearings transcribed by Ken Beck will reference the hearing date, e.g. “8/17/15 RP ____.”

threatened. After the young men and police left, Munoz and Jesse Munoz armed themselves with their guns and rejoined the family gathering. RP 192–94, 210, 227–28, 320–25.

Avalos-Barrera returned to 26-year-old Humberto Davalos' house across the street, where some friends had gathered to remember Davalos' deceased brother. CP 7; RP 228, 293–94, 304, 391–92, 397. Avalos-Barrera told some of the people present what had happened. Davalos and Mr. Vazquez said he was bleeding from his face and his lip was split open as if he'd gotten hit in the face with something, and they described him as mad and angry. RP 294–95, 392. Davalos heard Mr. Vazquez say he was going to go get those fools. RP 296. Avalos-Barrera was a childhood friend of Mr. Vazquez. RP 392. After encouragement, Avalos-Barrera went to the hospital. RP 392.

Around 11:00 that evening, Quincy Police arrived in response to a 9-1-1 call regarding a shooting and an in-patrol-car alert from the "Shot Spotter"³ system indicating multiple shots being fired in the area in front of the two houses. RP 164–65, 263. The jury heard conflicting testimony

³ "Shot Spotter is an acoustic monitoring device which uses sensors that are placed in multiple locations throughout Quincy. Through the use of triangulation, Shot Spotter is able to locate where gunshots are fired." CP 10 (Supplemental Probable Cause Statement).

regarding what happened to cause the shooting. RP 194–200, 210–15, 229–33, 296–303, 393–99.

Footage from an exterior video surveillance system maintained by the Davalos household showed Mr. Vazquez approaching the sidewalk and firing a handgun away from the front of the Davalos house. CP 11; 344, 376. Davalos fired his gun after being shot in the leg and had earlier passed off his second gun to Luis Quintero. RP 297–98; 302–04. Bullet and/or bullet holes were found in Davalos’ bathroom and on the exteriors of the Davalos and Munoz houses. RP 233, 246–47, 267–69, 313–315, 356–60, 371–75. The Shot Spotter system also provides an audio file. When synchronized with the surveillance footage, police determined the first shot was fired from the area of the Munoz house and Mr. Vazquez did not fire his gun until after five shots had been fired. RP 379, 382–83.

The jury was given lesser included instructions regarding second degree assault⁴, and self-defense⁵ and no duty to retreat⁶ and first aggressor⁷ instructions.

⁴ CP 300–04 (Instruction No. 13, 14, 15, 16, 17).

⁵ CP 317 (Instruction No. 30).

⁶ CP 319 (Instruction No. 32).

⁷ CP 21 (Instruction No. 34).

The state had charged Mr. Vazquez with first degree assault using a firearm or deadly weapon or other force or means likely to produce great bodily harm or death (counts 1 and 2), riot while armed with a deadly weapon (count 3), and reckless endangerment (count 4). CP 1–2, 12–13, 14–16, 154–57, 282–84. The third amended information added, and the fourth amended information re-alleged, a firearm sentencing enhancement on counts 1, 2 and 3. CP 154–57, 282–84.

The special verdicts relied upon for the firearm enhancements asked in relevant part whether Mr. Vazquez was armed with a firearm at the time of the commission of the crime. The jury answered, “yes.” CP 332–34. The verdict forms were proposed by the state. CP 273–75.

The jury was given the following instructions to guide them in answering the special verdict forms:

. . . You will also be given special verdict forms for the crimes charged in counts one, two and three. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of the crimes of assault in the first degree or the lesser included crimes of assault in the second degree[,] or riot while armed, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “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”. . . .

CP 323–24 (Instruction No. 35).

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in count[s one, two, and three] . . .

CP 313–15 (Instructions 26, 27, and 28). These instructions were also proposed by the state. CP 255–57.

Three post-conviction hearings were held to discuss various sentencing issues. 8/17/15 RP 98–124; 8/18/15 RP 125–45; RP 507–39. The court imposed concurrent low-end sentences of 12 months (counts 1 and 2) and 3 months (count 3). Accepting the state’s position that the instructional error briefed herein was harmless, the court imposed mandatory 36 month firearm enhancements on each of counts 1 and 2⁸. This yielded a total sentence of 84 months. The court imposed a 364-day sentence on count 4, suspended for two years and to run consecutive to counts 1, 2 and 3. CP 361, 366.

Mr. Vazquez timely appealed. CP 376–77.

⁸ See footnote one *infra* regarding count 3.

C. ARGUMENT

1: The firearm enhancements to Counts 1–3 violate Mr.

Vazquez' Sixth Amendment right to a jury trial.

Special verdict forms 1, 2, and 3 inquired whether the state proved beyond a reasonable doubt that “the defendant was armed with a firearm at the time of the commission of the crime [in counts 1–3].” CP 332–34. But jurors were instructed they could answer "yes" to the special verdicts if they found Mr. Vazquez was armed with a “deadly weapon” rather than a firearm. CP 313–15. Because the trial court did not require the jury to find Mr. Vazquez was armed with a firearm rather than another weapon, the court's imposition of the firearm enhancements violates Mr. Vazquez' Sixth Amendment right to trial by jury. CP 361.

Under the Sixth Amendment, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 556 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by

the defendant." *Blakely*, 542 U.S. at 303 (emphasis omitted). A sentencing court may not exceed the authority issued to the court by the jury's determination, such as by imposing a sentence in violation of the defendant's Sixth Amendment right to have a jury decide a sentencing enhancement. *State v. Bainard*, 148 Wn. App. 93, 101, 199 P.3d 460 (2009) (citing *Apprendi*, 530 U.S. at 490; *Blakely*, *supra*). This is a constitutional challenge subject to de novo review. *Id.* (citing *State v. Cubias*, 155 Wn.2d 549, 552, 120 P.3d 929 (2005)).

Under *Blakely* and *Apprendi*, the sentencing court may not impose a firearm enhancement where the jury verdict merely requires a finding the defendant was armed with a "deadly weapon." *State v. Recuenco*, 154 Wn.2d 156, 162, 110 P.3d 188 (2005) (*Recuenco I*); but see *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (*Recuenco II*) (*Blakely* error can be deemed harmless beyond a reasonable doubt).

The situation here, while not identical, is similar. Mr. Vazquez was sentenced to three-year enhancements on each of counts 1–2. CP 361. Pursuant to *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), the trial court did not apply the firearm enhancement to count 3, the unranked

felony of riot while armed. RP 527. Second degree assault is a class B

felony. RCW 9A.36.021(2)(a). Under RCW 9.94A.533(3):

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. . . .

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection

RCW 9.94A.533(4) provides for one-year enhancements to class B felonies "if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010."

But jurors were instructed that in order to answer "yes" on the special verdict forms for the firearm enhancements, they had to unanimously agree beyond a reasonable doubt Mr. Vazquez was armed with a deadly weapon. CP 313–15. The instruction that followed, which was proposed by the state, then defined the state's burden:

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in count[s one, two, and three)].

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection

between the weapon and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

CP 255–57, 313–15 (Instructions 26, 27, and 28). While this instruction told jurors that a firearm is a deadly weapon,⁹ it did not require them to base their deadly weapon finding on Mr. Vazquez' possession of a firearm. Nor was the jury instructed on the definition of a firearm under RCW 9.41.010(1) ("Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder"); see *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (*Recuenco III*) (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Supp. 2005) (WPIC)).

⁹ See also CP 305 (Instruction 20, stating “[a] firearm, whether loaded or unloaded, is a deadly weapon.” Based on its placement in the jury instructions, Instruction 20 appears to refer to the element of second degree assault “that the defendant or an accomplice assaulted [the victim] with a deadly weapon” (CP 303–04 (Instruction 16 and Instruction 17)) and the element of riot while armed “that the defendant was armed with a deadly weapon (CP 309 (Instruction 22)).

Similarly, the trial court did not require jurors to make an express firearm finding when considering the crimes of conviction. The to-convict instructions for second degree assault required jurors to find that Mr. Vazquez or an accomplice was armed with a deadly weapon. CP 303–04. And riot while armed required jurors to find Mr. Vazquez was armed with a deadly weapon. CP 309.

The facts distinguish Mr. Vazquez’ case from *State v. Pharr*, 131 Wn. App. 119, 124–25, 126 P.3d 66 (2006), *review denied*, 160 Wn.2d 1022 (2007). The *Pharr* court found no Sixth Amendment violation where the special verdict forms did not contain the word "firearm." But separate instructions expressly told the jurors "the State must prove beyond a reasonable doubt that the defendant was armed with a firearm" and instructed the jury on the definition of "firearm" under RCW 9.41.010(1). *Pharr*, 131 Wn. App. at 122. Unlike Pharr's jury, Mr. Vazquez’ jury was instructed it could answer "yes" on the special verdict forms if it found Mr. Vazquez was armed with a deadly weapon.

In sum, the firearm enhancements on Mr. Vazquez’ assault and riot while armed convictions must be reversed because the court’s instructions only defined “deadly weapon,” failed to define “firearm,” and could be

read as permitting the jury to return a “yes” verdict on the firearm enhancement if they found he was armed with a “deadly weapon.” *See Recuenco III*, 163 Wn.2d at 439 (jury must be given instruction defining “firearm” to properly evaluate whether the facts support a firearm enhancement); *State v. Williams*, 147 Wn. App. 479, 195 P.3d 578 (2008) (deadly weapon finding is not enough to justify a firearm sentencing enhancement).

Because the jury was instructed that it need only find Mr. Vazquez was armed with a deadly weapon, the proper enhancement terms are one year for each of counts 1 and 2. See RCW 9.94A.533(3)(b), (4)(b). This Court should remand for vacation of the firearm enhancements and imposition of reduced deadly weapon enhancements on the affected counts. And since the jury did not find a special verdict that “the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime,” as required by RCW 9.94A.825 and RCW 9.94A.533, the trial court’s finding that “the defendant used a firearm in the commission of the offense in Count[s] 1 and 2” must be stricken. CP 358 (Judgment and Sentence at paragraph 2.1).

2. Appeal costs should not be imposed.

Mr. Vazquez was sentenced to 84 months (seven years) of confinement inclusive of two consecutive firearm enhancements totaling 72 months. CP 361. If, as argued herein, the enhancements should instead be deemed deadly weapon enhancements, the total sentence would be reduced by 48 months, yielding a period of confinement of 36 months (three years).

The evidence showed 26-year-old Mr. Vasquez was both working seasonal orchard work at minimum wage and trying to maintain being a part of his two children's lives while he was out on bail during the two-year pendency of this proceeding, and had no prior criminal history. CP 17, 359; RP 389, 524–25. For purposes of defending against this prosecution, Mr. Vazquez had zero money, no assets, \$350 in monthly expenses, and a court-appointed attorney. CP 17–18. The trial court imposed only mandatory legal financial obligations totaling \$800. CP 386–87. The court also found Mr. Vazquez to be indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 401–03. If Mr. Vazquez does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See State v. Sinclair*, ___ P.3d ___, 2016 WL 393719 (filed

January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals ... may require an adult ... to pay appellate costs.” (Emphasis added) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the state’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *State v. Blazina*, 182 Wn.2d 127, 830, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case” analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* Accordingly, Mr. Vazquez’ ability to pay must be determined before discretionary costs of appeal are imposed. The trial court made no such finding. *See* CP 383–84 (Judgment and Sentence, paragraph 2.5). Without a basis to determine Mr. Vazquez has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the reasons stated, the firearm enhancements should be vacated. If Mr. Vazquez is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the state ask for them.

Respectfully submitted on May 21, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 21, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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