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COA NO. 35374-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE PEDRO LINARES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Richard Bartheld, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support the second degree assault conviction.

2. The evidence is insufficient to support the deadly weapon enhancement.

3. The court erred in imposing a deadly weapon enhancement term that exceeds the one-year statutory maximum.

Issues Pertaining to Assignments of Error

1. Whether the State failed to prove the "deadly weapon" element of the second degree assault offense because the evidence did not show the unseen object used to cause a one half inch wide cut in the victim's back was readily capable of causing death or substantial bodily harm under the circumstances in which it is used?

2. Whether the State failed to prove the deadly weapon enhancement because the evidence did not show the instrument, whatever it was, had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it is used?

3. Where the controlling statute mandates a one-year term of confinement for a deadly weapon enhancement involving class B felonies such as second degree assault, whether the two-year term for the enhancement imposed by the court exceeds the term allowed by statute?

B. STATEMENT OF THE CASE

The State charged Jose Pedro Linares with second degree assault and third degree assault with a deadly weapon enhancement and gang aggravator. CP 58-59. The case proceeded to a jury trial, where the following evidence was produced.

On the afternoon of February 4, 2016, Eric Ruiz and his two children went to a laundromat in Sunnyside to wash clothes. 2RP¹ 377-78. Ruiz noticed two unknown males pacing back and forth. 2RP 384-85, 409. He felt uneasy because the two men were not doing laundry. 2RP 385-86. As he loaded up his clothes baskets, the two men went outside. 2RP 390. Ruiz walked to his car with his daughters in front. 2RP 390. When he pulled the keys out of his pocket to open his car door, one of the men, identified by Ruiz as Jose Pedro Linares, asked if he "gang banged." 2RP 391, 430, 433. Ruiz said he didn't. 2RP 391. 15-20 seconds later, Ruiz went to open the door and "got stuck in the back." 2RP 391, 425. He felt blood dripping down his back. 2RP 392. He described the force used as a "real quick, like medium-soft punch to the back." 2RP 392. Ruiz never saw a weapon of any type. 2RP 425-26. He did not see the person who

¹ This brief cites to the verbatim report of proceedings as follows: 1RP - one volume consisting of 5/16/16, 5/20/16, 6/6/16, 6/28/16, 7/22/16, 8/10/16, 8/23/16, 10/13/16, 10/28/16, 11/30/16, 2/9/17, 2/16/17, 2/24/17, 3/21/17, 3/31/17; 2RP - four consecutively paginated volumes consisting of 4/10/17, 4/11/17, 4/12/17, 4/13/17, 4/14/17, 4/17/17; 3RP 5/25/17.

stabbed him because he was stabbed from behind. 2RP 426. Ruiz turned around to see if the assailant was still there, but he wasn't. 2RP 392, 430. The "other" man, later identified as Jose Pedro's twin brother, Jose Ascension Linares, was 10-20 feet away. 2RP 392-93, 425, 432, 457-58, 464, 514-16, 545. Ruiz saw both men run off together behind the building. 2RP 393, 430. Ruiz told the laundromat employee that he'd been stabbed "by the guys that were in here." 2RP 392, 482-83.

Ruiz put his daughters in the car and left. 2RP 391-92. He did not wait for the police because he wanted to get his children out of harm's way. 2RP 392. The blood went through his shirt and onto the car seat. 2RP 396. He drove to his girlfriend's place of employment and described what happened. 2RP 393-94. Her boss called 911. 2RP 394. They applied pressure to the wound with a paper towel to try and stop the bleeding. 2RP 395. Ambulance personnel arrived and advised him to go to the hospital. 2RP 427. He didn't tell them that he did not want to go with them. 2RP 427. He went because his girlfriend and mother-in-law persisted. 2RP 399, 402. He would have driven his own vehicle to the hospital but police wanted to take photos of it, so his mother-in-law drove him. 2RP 428. He did not think he was going to die or faint. 2RP 428. He did not feel impaired. 2RP 428.

Photos were taken at the hospital. 2RP 402; Ex. 6A-D. Exhibit 6D is a close-up photo of the wound, with a measuring stick showing its diameter to be one half inch. 2RP 404. Whatever cut him left a tear in his shirt. 2RP 399; Ex. 8D. Hospital staff did not determine the depth of the wound. 2RP 403. Testing revealed no internal bleeding. 2RP 403-04. No vital organs were hit. 2RP 404. Ruiz stayed in the hospital for two to three hours. 2RP 415. He felt "sore," like "when you lift weights one day and the next day." 2RP 415. "It wasn't excruciating or nothing like that." 2RP 415. The soreness lasted three or four days. 2RP 415. Ruiz drove himself to the police station the next day. 2RP 415. He picked Jose Pedro Linares out of a photomontage as the person who stabbed him, saying he was 90 percent sure. 2RP 417-18. In court, Ruiz proclaimed he was 100 percent confident that this man stabbed him. 2RP 422.

Detective Berry testified that the depth of the wound could not be determined from the photo. 2RP 445; Ex. 6D. Berry related that vital organs are contained in the torso. 2RP 446. He had seen somebody die from a stab wound to the torso caused by internal bleeding or a severing an artery. 2RP 446. It's possible to die from one stab wound if a vital organ is hit. 2RP 447. The location of the Ruiz's wound caused him concern because it was an area where there are vital organs. 2RP 470, 474. The police did not recover a weapon. 2RP 373, 646.

Officer Ortiz testified Jose Pedro and his brother, Jose Ascension Linares, are associated with the Sureno (Bell Garden Loco) gang.² 2RP 627. According to Ortiz, gang members ask someone if they "bang" to determine whether that person is a rival gang member. 2RP 630-31. The Nortenos and Surenos are rival gangs in the area. 2RP 622. The Nortenos are associated with the color red and the San Francisco 49ers football team. 2RP 624-25. Ruiz had no gang affiliation. 2RP 407. But he drove a red car, had a gold and red 49ers trinket hanging in his car, wore a black, white and red shirt, and had tattoos consisting of stars and Old English-type script. 2RP 378, 397, 404-07. Ortiz believed Ruiz was mistakenly associated with the Norteno gang based on these signifiers and attacked for this reason. 2RP 638-40.

Before the case was submitted to the jury, defense counsel moved to dismiss the second degree assault conviction and the deadly weapon enhancement on the basis that the State did not prove a deadly weapon was used. 2RP 706-10, 712-13. The State opposed the motion. 2RP 710-12. The court denied it. 2RP 713-14. The jury found Linares guilty of second degree assault, found the gang aggravator, and returned a special

² Ortiz harbored an unconfirmed belief that Jose Ascension was not an active member. 2RP 647-48. It was possible that Jose Pedro could also be outside the gang. 2RP 648. He had tattoos associated with the Sureno (Bell Garden Loco) gang. 2RP 465, 596-99, 602-03, 607-08, 627-30.

verdict that he was armed with a deadly weapon.³ CP 103, 105-06. The court imposed an exceptional sentence of 120 months in confinement, which included a 24-month deadly weapon enhancement. CP 113. Linares appeals. CP 120.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEADLY WEAPON ELEMENT OF THE SECOND DEGREE ASSAULT CONVICTION AND THE DEADLY WEAPON ENHANCEMENT.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Under that standard, the State failed to prove the "deadly weapon" element of its case. The evidence does not show the unknown implement used to produce a half inch cut in Ruiz's back was readily

³ Consistent with the jury instructions treating the charged third degree assault as a lesser offense, the jury did not return a verdict on that count because it found Linares guilty of second degree assault. CP 97, 104.

capable of causing death or substantial bodily harm under the circumstances in which it was used. Alternatively, even if the evidence was sufficient to prove this element, it remains insufficient to prove the enhancement. The evidence does not show the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.

- a. **The State did not prove the "deadly weapon" element because the evidence does not show the cutting implement was readily capable of causing death or substantial bodily harm under the circumstances in which it was used.**

The "to convict" instruction required that the State prove Linares "intentionally assaulted Eric A. Ruiz with a deadly weapon." CP 89 (Instruction 13); see RCW 9A.36.021(1)(c). "Deadly weapon means any weapon, device, instrument, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP 86 (Instruction 10); see RCW 9A.04.110(6). "Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of

any bodily part or organ, or that causes a fracture of any bodily part." CP 87 (Instruction 11); see RCW 9A.04.110(4)(b).⁴

The definitional statute creates two categories of deadly weapons: deadly weapons per se, namely "any explosive or loaded or unloaded firearm," and deadly weapons in fact. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 365, 256 P.3d 277 (2011) (quoting RCW 9A.04.110(6)). The object used to against Ruiz was not seen by any witness and was never recovered by police. The instrument was not an explosive or a firearm, so its status as a deadly weapon "rests on the manner in which it is used, attempted to be used, or threatened to be use." Id. at 366.

An object cannot be deemed a deadly weapon on the sole basis of its dangerousness without regard to its actual, attempted or threatened use. Id. at 368 n.6. Linares used the cutting instrument on Ruiz. He did not threaten to use it or attempt to use it. He actually used it to inflict injury. Neither threatened use or attempted use is at issue here, so the relevant inquiry is whether the State presented sufficient evidence under the actual use prong of the definition of deadly weapon.

The inherent capacity and "the circumstances in which it is used" determine whether the weapon is deadly. State v. Shilling, 77 Wn. App.

⁴ "Bodily injury" means "physical pain or injury, illness, or an impairment of physical condition." RCW 9A.04.110(4)(a).

166, 171, 889 P.2d 948 (1995) (quoting RCW 9A.04.110(6)). "Circumstances' include 'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" Shilling, 77 Wn. App. at 171 (quoting State v. Sorenson, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

The trial court denied defense counsel's motion to dismiss the conviction and enhancement based on insufficient evidence, saying these were issues for the jury to decide without articulating why the evidence was sufficient. 2RP 713-14. The trial court's ruling receives no deference on appeal. The sufficiency of the evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Looked at the in the light most favorable to the State, Linares showed an intent to inflict injury on Ruiz and had the ability to do so. But considering all the circumstances, the evidence does not establish the object he used was "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Ruiz described the force used as a "real quick, like medium-soft punch to the back." 2RP 392. No one saw the implement and none was ever recovered. So there is no evidence about the length of the cutting instrument. The injury consisted of a cut, one half inch in diameter, to the back. Ex. 6D. Hospital staff did not determine

how deep the wound went. 2RP 403. No one did. The testifying officer could not be determine its depth from the photo. 2RP 445. Ruiz bled from the wound, leaving blood on the car seat and his shirt. 2RP 396. But medical testing revealed no internal bleeding. 2RP 403-04. There is no evidence that Ruiz needed stitches. There was no testimony that the cut left a scar. There was no testimony about how long the laceration persisted. The lasting effects of the injury were minimal: Ruiz felt "sore," like "when you lift weights one day and the next day." 2RP 415. "It wasn't excruciating or nothing like that." 2RP 415. The soreness lasted three or four days. 2RP 415. There was no evidence that any follow-up treatment was sought or needed. Ruiz did not feel impaired. 2RP 428.

Substantial bodily harm involves one of three things: (1) temporary but substantial disfigurement; (2) a temporary but substantial loss or impairment of the function of any bodily part or organ, or (3) a fracture of any bodily part." RCW 9A.04.110(4)(b). There was no fracture. 2RP 425. Ruiz did not lose consciousness, nor was there any testimony about loss of a body part or organ. The remaining alternative is "temporary but substantial disfigurement." There is no evidence that Ruiz needed stitches. There was no testimony that the laceration left a scar. There is no evidence of how long the laceration persisted before it healed. At trial, the State chose not to proceed on substantial bodily harm means of

committing second degree assault due to lack of testimony from a doctor to support it. 2RP 680.

Injury in fact does not equate to whether the instrument is readily capable of causing substantial bodily harm, but the injury that was in fact inflicted informs whether the instrument that caused the injury has the capability to do more damage in light of all the circumstances. Here, we do not even know what was used to make the cut. We know it was sharp enough to lacerate Ruiz's skin and cause him to bleed. But in the absence of more information, there is no basis to conclude the object, whatever it was, had the capability to inflict more damage than it did under the circumstances in which it was used.

At trial, a police officer testified that Ruiz was stabbed in an area where there are vital organs, and that people can die by being hit in a vital organ. 2RP 446-470, 470, 474. In opposing defense counsel's motion to dismiss, the State argued Linares had the intent to stab Ruiz in an area where vital organs exist and that the evidence showed "the area where he was stabbed could produce a fatal injury had Mr. Linares driven the object further into his side." 2RP 710-11. But without evidence about the length of the blade or sharp instrument, it is only speculation that it was long enough to reach a vital organ or major blood vessel. It is conjecture that Linares could have driven the object further into Ruiz's body because no

one knows how long the object was. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Under these circumstances, the evidence does not show the instrument was readily capable of causing death.

Sorenson is instructive. The evidence in that case showed a penknife with a one and a half inch blade was a deadly weapon. Sorenson, 6 Wn. App. at 273-74. The State presented testimony from the treating surgeon that "[t]he wound had penetrated through the superior muscle in the neck" down to the anterior vein. Id. at 273. The penetration was anterior to the carotid artery, which if lacerated, is generally fatal unless immediately treated. Id. "With a wound like this in the neck where there are many vital structures, including the esophagus and trachea, one has to consider this a potentially serious injury, especially with the venous blood, which could be from a large venous vein, namely, the jugular vein which is quite large. And if it has a hole in it, it can go to the patient's heart and cause instant death." Id.

What showed sufficient evidence in Sorenson is missing from Linares's case. Unlike in Sorenson, the State presented no medical testimony from a doctor or other medical expert about the wound and its

attendant dangers.⁵ The victim in Sorenson was stuck in the neck, not the back as in Linares's case. In Sorenson, the length of the blade was known as was the depth of the wound. From this, the danger to vital organs could be reasonably surmised. The State produced no such evidence in Linares's case.

In Shilling, the defendant hit the victim on the head with a bar glass, knocking off the victim's eye glasses, breaking the glass on impact, sending glass shards flying 15 feet through the air, and causing lacerations that required stitches. Shilling, 77 Wn. App. at 172. The defendant admitted that the glass was "pretty strong" and "could possibly cause substantial bodily harm or death," thus showing the glass had the inherent capacity to cause bodily injury. Id. The State put on an expert, who testified that "a blow to the head using the glass could fracture the nose and/or cause lacerations requiring stitches and producing permanent scarring." Id. This evidence was sufficient to support the deadly weapon element of second degree assault. Id.

The evidence in Linares's case does not rise to the same level. Again, there was no testimony from a medical expert about the capability of causing substantial bodily harm or death. There was no admission by

⁵ The State made the choice not to subpoena the treating physician to testify, leading it to charge Linares in the alternative with third degree assault. 2RP 8-9.

Linares about the capability of the object that was used. There was no testimony that the object that was used was capable of causing a laceration that required stitches or which could produce scarring. There was no evidence of the depth of the wound. No one saw the implement and none was ever recovered. There is no evidence about the length of the cutting instrument and what it was capable of doing beyond making a cut into the skin.

"[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Hundley, 126 Wn.2d at 421–22 (quoting Winship, 397 U.S. at 364). No reasonable trier of fact could reach subjective certitude on the fact at issue here. Linares's conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction).

b. The State did not prove the deadly weapon enhancement because the evidence does not show the implement had the capacity to inflict death and was likely to produce or may easily and readily produce death from the manner in which it was used.

"Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty." State v. Lua, 62 Wn.

App. 34, 42, 813 P.2d 588 (1991), disapproved on other grounds by State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992). Even if the evidence is sufficient to prove the "deadly weapon" element of second degree assault, the evidence is still insufficient to meet the heightened standard for the deadly weapon enhancement. For purposes of proving the "deadly weapon" element of the crime, the State need only prove "the weapon had the capacity to cause death *or serious bodily injury*. When seeking an enhanced sentence, however, the State must prove that the weapon had the capacity to cause death and death alone." State v. Cook, 69 Wn. App. 412, 417-18, 848 P.2d 1325 (1993) (footnote omitted).

The enhancement statute defines "deadly weapon" as follows: "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas." RCW 9.94A.825. The jury was instructed using this statutory language. CP 99 (Instruction 21).

Because there is no evidence demonstrating the length of the sharp instrument used to cut Ruiz, there is no basis beyond guesswork to conclude the instrument had the capacity to inflict death. More than that, there is no basis for a reasonable trier of fact to find the object was "likely to produce or may easily and readily produce death" based on "manner in which it is used." RCW 9.94A.825. The manner in which the instrument was used here consisted of a stab to the back. There are vital organs in the torso, as testified to by the police officer, but the gaps in the evidence do not permit a rational trier of fact to find that the object used to make the cut could reach the vital organs and thereby likely produce death or easily and readily produce it. There is no evidence showing the depth of the wound. And because there is no evidence of the length of the sharp edge used to make the cut, it is speculation that the sharp implement was long enough to reach a vital organ. The special verdict on the deadly weapon enhancement must therefore be vacated due to insufficient evidence.

2. THE TERM FOR THE DEADLY WEAPON ENHANCEMENT EXCEEDS THE ONE-YEAR STATUTORY MAXIMUM.

The court imposed a 24-month deadly weapon enhancement for the second degree assault conviction. CP 113. For class B felonies, the sentencing statute limits the term of confinement for a deadly weapon enhancement to 12 months. This portion of the sentence must be reversed.

Defense counsel did not object below, but sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.533(4)(b) limits the deadly weapon enhancement term to "[o]ne year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both." Second degree assault is a class B felony. RCW 9A.36.021(2)(a). Linares is therefore only subject to a one-year deadly weapon enhancement. See State v. Blade, 126 Wn. App. 174, 180-81, 107 P.3d 775, review denied, 155 Wn.2d 1019, 124 P.3d 659 (2005) (trial court erred when it used the longer deadly weapon enhancement for class A felonies instead of the shorter enhancement for class B felonies).

The statute authorizes the term to be doubled if "the offender has previously been sentenced for any deadly weapon enhancements." RCW 9.94A.533(4)(d). There is no showing, and no argument below, that Linares has previously been sentenced for a deadly weapon enhancement, so the doubling provision is inapplicable.

"A trial court's sentencing authority is limited to that expressly found in the statutes." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d

624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). The court here exceeded its statutory authority in imposing a 24-month deadly weapon enhancement. "When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Murray, 118 Wn. App. at 522. This Court should therefore reverse the unlawful deadly weapon enhancement term and remand for correction of the judgment and sentence to reflect a 12-month term.

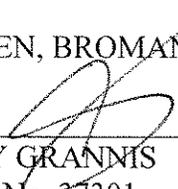
D. CONCLUSION

For the reasons stated, Linares requests that this Court (1) vacate the second degree assault conviction due to insufficient evidence; or (2) vacate the deadly weapon enhancement due to insufficient evidence; or (3) order reduction of the deadly weapon enhancement term.

DATED this 21st day of December 2017

Respectfully Submitted,

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