

NO. 74964-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RECUENCO,

Petitioner.

STATE OF WASHINGTON
SUPREME COURT
CLERK
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**RESPONDENT'S ADDITIONAL SUPPLEMENTAL BRIEF
ON NEW CLAIMS:
DOUBLE JEOPARDY AND
WA CONST. ARTICLE 1 § 21**

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A. ARGUMENT ON NEW CONSTITUTIONAL CLAIMS

1. THE DOUBLE JEOPARDY CLAUSE IS INAPPOSITE TO A CASE WHERE THERE ARE NO MULTIPLE PROSECUTIONS OR MULTIPLE PUNISHMENTS.

The double jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. The clause has been construed to encompass three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

State v. Gocken, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (citations omitted).

Recuenco's case does not fall into *any* of the three double jeopardy categories. First, he has not been acquitted of any charge, so there is no prosecution after acquittal. Second, Recuenco has only been prosecuted once, so he has not been subject to a second prosecution for the same offense after conviction. Third, he has not suffered multiple punishments for the same offense. For these reasons, the double jeopardy clause simply does not apply to Recuenco's claim of error.

Recuenco's reliance on Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S. Ct. 732, 154 L. Ed.2d 588 (2003) is misplaced. Sattazahn involved a death sentence imposed in a second trial where the jury in the first trial had deadlocked on the death penalty. The United States Supreme Court held that the State could pursue a death sentence even though such sentence had not been imposed in the original proceeding. The Court's analysis turned on whether the first jury's deadlock was an acquittal on the death penalty. The Court held it was not and, thus, double jeopardy did not bar a second trial on the issue. 537 U.S. at 113. There is, however, no second trial, and no acquittal, at issue in Recuenco's case, so Sattazahn is inapposite.

2. THERE IS NO REASONED BASIS FOR CONCLUDING THAT ERROR IN CRAFTING A SPECIAL VERDICT FORM IS MATERIALLY DIFFERENT FROM ERROR OMITTING AN ELEMENT OF THE CRIME FROM A TO CONVICT INSTRUCTION; NEITHER ERROR IS REVERSIBLE PER SE UNDER THE STATE CONSTITUTION.

Recuenco argues that the Washington State Constitution requires reversal of a judgment whenever the right to jury is impinged. This argument should be rejected. Many constitutional violations occurring in a jury trial can be said to impact the

constitutional right to a jury trial. But it does not follow that all such errors are per se reversible, and Recuenco cites no authority in his supplemental brief that supports a rule of per se reversible error.

Washington Const. art. I, §§ 21 and 22 unequivocally establish a right to jury in criminal trials. Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). That right includes the right to have every element of the offense presented to the jury for its consideration. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Indeed, the same right exists under the federal constitution. Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). But the existence or scope of the right to jury trial is not at issue here. Rather, the issue presented is whether a case must be automatically reversed where that right is impacted by a deficient special verdict form.

Recuenco relies primarily on State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910) to support his argument that violations of the right to jury trial are per se reversible and not subject to harmless error analysis, but Strasburg does not support his argument. In Strasburg, the court held unconstitutional a statute that purported to wholly eliminate the insanity defense. Strasburg, 60 Wash. at 123-24. The unconstitutional statute eviscerated

Strasburg's defense and totally prevented him from submitting insanity issues to a jury. Thus, the Court in Strasburg had no occasion to discuss harmless error, so it does not support Recuenco's assertions.

Moreover, Recuenco cites to no other Washington case that holds that all errors that implicate Art. 1 § 21 are per se reversible.

Reduced to its essence, Recuenco's argument is that the right to jury trial is so clearly articulated in our constitution, any error that affects that right cannot be harmless. Sup. Br. of Pet. at 20-26. This argument is easily rebutted. Countless constitutional errors that occur during a jury trial will impinge on the right to a jury trial. Still, this Court has repeatedly applied harmless error analysis to such errors, as cases from 1894 to the present illustrate.

First, in the time period immediately following adoption of Washington's constitution, harmless error analysis was commonplace, even regarding errors on fundamental matters affecting one's right to a jury trial. For example, five years after ratification of the Washington State constitution, the Washington Supreme Court found harmless error where an erroneous jury instruction placed the burden on the defendant to prove he acted in self-defense. State v. Conahan, 10 Wash. 268, 38 P. 996 (1894).

It cannot be denied that improperly shifting the burden of proof impacts one's right to a jury trial as to all elements of the crime. Nonetheless, the Supreme Court affirmed because, in light of the prosecution's case and the defendant's testimony, the error was not prejudicial. Conahan, 10 Wash. at 270. An error in shifting the burden of proof is no less harmful to the right to a jury trial than a faulty special verdict form on a firearm enhancement.

Likewise, in State v. Courtemarch, 11 Wash. 446, 39 P. 955 (1895), this Court found two errors to be harmless. First, the trial court failed to instruct on a lesser offense. Courtemarch, 11 Wash. at 448-49. This error was deemed harmless in light of other instructions that were submitted. Second, the trial court erred in submitting an instruction to the jury that stated, "the law presumes that a person intends the natural, probable consequences of his act." Such an instruction appears to be a comment on the evidence¹ and removes an issue from the jury's consideration. Nonetheless, this Court affirmed because the error was harmless in view of other instructions that were given. Courtemarch, at 450.

¹ Washington Const. art. I, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

Similarly, in State v. Manderville, 37 Wash. 365, 79 P. 977 (1905), the trial judge commented on the evidence by reminding the jury of a certain witness' testimony. Again, the judge's comment arguably removed this issue from the jury's consideration, but the error was harmless in view of the defendant's testimony and the State's case. Manderville, 37 Wash. at 369-71.

This practice of applying harmless error analysis to important constitutional errors continued into the latter part of the 20th century. In State v. Hartley, 25 Wn.2d 211, 224-25, 170 P.2d 333 (1946), this Court held that the omission of the words "unless it is excusable or justifiable" from the "to convict" instruction in a murder case was harmless error because there was no evidence to support a defense of excusable or justifiable homicide. In State v. Thompson, 38 Wn.2d 774, 779, 232 P.2d 87 (1951), this Court applied harmless error analysis to an error in the jury instructions that omitted the element of force from the definition of burglary. In finding the error prejudicial, the court that "[i]f all the evidence had been consistent with the theory of a use of force or a breaking, instruction No. 5 might not have constituted prejudicial error." In State v. Martin, 73 Wn.2d 616, 623-27, 440 P.2d 429 (1968), this Court held that an error in the jury instructions that relieved the

State of proving knowledge was harmless. Significantly, this Court stated, "[t]he rule is now definitely established in this state that the verdict of the jury in a criminal case will be set aside and a new trial granted to the defendant, only when such error may be designated as prejudicial." Martin, 73 Wn.2d at 627. In State v. Bailey, 114 Wn.2d 340, 349, 787 P.2d 1378 (1990), this court noted that even if constitutional error had occurred in setting forth the elements of the crime, the error was harmless beyond a reasonable doubt. In State v. Deal, 128 Wn.2d 693, 699, 703, 911 P.2d 996 (1996), this Court held that an instruction that constituted a mandatory presumption, which operated to relieve the State of its burden of proving all of the elements of the crime, was harmless. Finally, in State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002), this court held that error in defining the knowledge element of accomplice liability could be harmless.

These cases indicate a long history in Washington of applying harmless error analysis to constitutional errors even when the error relieves the State of the burden of proving every element of the crime to a jury. Such errors necessarily impinge the jury trial right, but have been held harmless if it can be said, beyond a reasonable doubt, that the error did not affect the verdict. It would

be incongruous, to say the least, to depart from this long line of authority to hold, as Recuenco suggests, that error in a special verdict form regarding a firearm enhancement is not subject to harmless error analysis, whereas all the errors enumerated above are subject to such analysis.

Finally, Recuenco analyzes the six Gunwall² factors and argues that Washington's constitution is more protective than the federal constitution vis-a-vis the right to jury trial. His argument is misdirected. The fact that criminal defendants have a right to trial by jury, which includes the right to have the jury determine every element of the charged crime, is undisputed. It is also undisputed that Blakely v. Washington³ requires that the “firearm” determination be submitted to a jury.

The question presented by this case is what **remedy** should follow where that right is violated. Neither the Washington nor the Federal constitutions expressly address the consequences for violation of their respective provisions, i.e. harmless error analysis. Thus, it makes little sense to argue that the State constitution requires a more stringent rule than the federal constitution,

² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

³ ___ U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

especially in light of this Court's past and present harmless error jurisprudence.

B. CONCLUSION

Neither the Double Jeopardy Clause of the U.S. Constitution nor jury trial provisions of the Washington State Constitution preclude harmless error analysis where a special verdict form fails to precisely identify an issue that is before the jury. Recuenco's own special verdict form asked the jury to determine whether he was armed with a deadly weapon because no weapon other than a firearm was at issue in his trial. Even if this error was not invited, it can be said beyond a reasonable doubt that the error did not affect the jury's verdict. Recuenco's sentence should be affirmed.

DATED this 21st day of October, 2004.

Respectfully submitted,

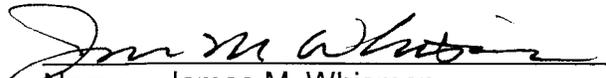
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Certificate of Service by Mail

Today I sent by electronic mail, and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Additional Supplemental Brief of Respondent, in STATE V. RECUENCO, Cause No. 74964-7 in the Supreme Court for the State of Washington.

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


Name James M. Whisman
Done in Seattle, Washington

10/22/04
Date 10/21/04