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NO. 78876-6
NO. 79074-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS E. GRAHAM,

MATTHEW R. RUTH,

Petitioners.

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STATE OF WASHINGTON
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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUPPLEMENTAL ISSUE

Does the Washington Constitution prohibit a harmless error analysis of an erroneous or ambiguous jury special verdict form or an erroneous jury instruction where this Court has already ruled that such errors may be harmless, and harmless error was the standard of review at the time the Washington Constitution was adopted?

II. STATEMENT OF THE CASE

The facts of these cases are adequately set out in the State's previous Supplemental Brief with the following additions:

In the supplemental briefing of both petitioners, the issue of whether the Washington Constitution precluded a harmless error analysis of the asserted errors was raised. The State moved to strike that argument. The motion was denied, but the State was permitted to file additional briefing.

III. SUPPLEMENTAL ARGUMENT

A. INTRODUCTION.

This Court has already held that it will apply the same harmless error analysis of an instruction that is omitted or incorrect as would be applied under the federal constitution. A review of the

criteria for determining whether the Washington Constitution has a different standard shows that this Court's holding was correct.

This Court has also determined that an erroneous or ambiguous verdict form is subject to a harmless error analysis.

The jury trial right protected by the Washington Constitution is the right that existed at the time the Constitution was adopted. By statute and common law, an incorrect or missing jury instruction was reviewed for harmless error. Verdict form errors that were not objected to were waived. There is no basis for determining that the Washington jury trial right precludes a harmless error analysis of an incorrect jury instruction or special verdict form.

B. THIS COURT HAS ALREADY DETERMINED THAT APPELLATE COURTS APPLY A HARMLESS ERROR ANALYSIS TO MOST CONSTITUTIONAL ERRORS, INCLUDING INSTRUCTIONAL ERRORS AND ERRORS IN SPECIAL VERDICT FORMS.

Petitioners were charged with first degree assault with a firearm while armed with a firearm. Under the law as it existed in August, 2004, when Petitioner Graham was tried, the court instructed the jury that for the purposes of the 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 assault." 1 GCP 73. Consistent with that instruction, the

special verdict form asked if Petitioner Graham was armed with a deadly weapon at the time of the assault. 1 GCP 47. Subsequently, this Court determined that giving a “deadly weapon” instruction and asking whether the defendant was armed with a “deadly weapon” was error if the State intended to ask the court to impose a firearm enhancement at sentencing. State v. Recuenco, 154 Wn.2d 156, 162 n. 2, 110 P.3d 188 (2005) (Recuenco I), reversed in part, Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II), affirmed, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III).

In Petitioner Ruth’s trial in December, 2004, the jury was instructed that for the purposes of the special verdicts, “the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count [I] [II].” 1 RCP 68, 70. Despite this instruction, the special verdict forms asked whether Petitioner Ruth was armed with a deadly weapon at the time of the assaults. 1 RCP 49, 51. As in Petitioner Graham’s case, using this verdict form when the State intended to request a firearm enhancement was error.

The question for this Court is whether these errors in the instruction and the special verdict forms may be harmless.

In Recuenco I, this Court held that the sentencing court violated the defendant's right to have a jury determine whether he was armed with a firearm by giving a "deadly weapon" instruction and asking the jury whether the defendant was armed with a deadly weapon. Recuenco I, 154 Wn.2d at 162-63. It further held that under its prior decision in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part, Recuenco II, 548 U.S. at 221 n. 4, this violation of the jury trial right could never be harmless. Recuenco I, 154 Wn.2d at 164. In reaching this conclusion, this Court relied the jury rights "as defined by Apprendi¹ and Blakely²["] Recuenco I, 154 Wn.2d at 162.

The United States Supreme Court reversed in part, holding that a jury instruction error was subject to a harmless error analysis under Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Recuenco II, 548 U.S. at 222.

Before deciding Recuenco I, this Court had adopted the holding in Neder that omitting an element in the "to convict" instruction was subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) ("We find no compelling

¹ Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

² Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

reason why this Court should not follow the United States Supreme Court's holding in Neder."). In Brown, the jury was given an accomplice liability instruction that was an incorrect statement of the law. This Court applied the test set out in Neder that an omitted or misstated element in a jury instruction was harmless "if that element is supported by uncontroverted evidence." Brown, 147 Wn.2d at 341.

After deciding Recuenco I, this Court examined the impact of an erroneous special verdict form that was a comment on the evidence in State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006). There, the jury was instructed that to convict the defendant of first degree burglary and first degree robbery, it had to find the defendant or accomplice "was armed with a deadly weapon, to-wit: a .38 revolver or a crowbar[.]" 156 Wn.2d at 716. This Court found that the "deadly weapon, to-wit: a crowbar" was a judicial comment on the evidence. 156 Wn.2d at 723. This Court found that Neder did not apply to judicial comments, but was properly applied to errors "in other criminal contexts." 156 Wn.2d at 725. Since there was no comment on the evidence here, Neder and Brown set out the proper test for the erroneous special verdict forms. See Capers v. Bon Marche, 91 Wn. App. 138, 142, 955 P.2d 822 (1996), review

denied, 137 Wn.2d 1002 (1999) (special verdict forms are reviewed under the same standard as instructions).

Accordingly, if the error in the Recuenco case had been an erroneous verdict form, or a missing or misstated instruction, this Court would have applied the harmless error test from Neder and Brown.

This Court carefully examined the facts and case history. It determined that there was no charging error. The State elected to only charge Mr. Recuenco with a deadly weapon enhancement. Recuenco III, 163 Wn.2d at 435. Further, there was no instructional or verdict form error.

[C]onsistent with the specific charge brought, the jury was instructed on the deadly weapon enhancement and specifically found Recuenco guilty of second degree assault while armed with a deadly weapon.

Recuenco III, 163 Wn.2d at 436.

This Court then held that “it was not until Recuenco was sentenced for an enhancement that was not charged nor found by the jury that any error had occurred at all.” Recuenco III, 163 Wn.2d at 436. Accordingly, this Court held that “No harmless error analysis can apply[.]” Recuenco III, 163 Wn.2d at 441. While this holding was entered after noting the more expansive jury trial right

under the Washington constitution, the holding would have been the same under the federal jury trial right. Apprendi v. New Jersey, 530 U.S. at 490 (“Other 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.”). This Court did not hold that the Washington constitution’s jury trial right precluded a harmless error analysis.

In light of this Court’s precedent, any instructional or special verdict form error is subject to a harmless error analysis. State v. Devlin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (precedent must be shown to clearly be incorrect and harmful before it will be abandoned).

C. UNDER GUNWALL³, AN INSTRUCTIONAL ERROR IS SUBJECT TO A HARMLESS ERROR ANALYSIS.

Should this Court wish to re-examine its holding in Brown -- that instructional and verdict form errors were subject to a harmless error analysis -- it should re-affirm Brown. Devlin, 158 Wn.2d at 168.

This Court has set out “six nonexclusive criteria . . . relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader

rights to its citizens than does the United States Constitution.”

Gunwall, 106 Wn.2d at 61.

1. Textual Language Of The State Constitution.

Two provisions of the Washington Constitution define the right to trial by jury:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged[.]

Const., art. 1 §22.

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than 12 in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving the jury in civil cases where the consent of the parties interested is given thereto.

Const., art. 1, § 21.

2. Significant Differences In The Texts Of Parallel Provisions.

Article 1, § 22, is the only provision that deals exclusively with criminal cases. The relevant language is substantially identical to language in the Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . .

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

This similarity in language suggests that the two provisions are co-extensive.

Article 1, § 21, corresponds most closely to the Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

There are significant differences between these two provisions, which can lead to different results. One difference is that Article 1, § 21, specifically refers to juries in courts not of record. This Court relied on this language in extending the jury trial right to misdemeanors, which are often tried in courts not of record. City of Pasco v. Mace, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). This distinction, however, sheds no light on the issue in the present case.

A second difference between the Seventh Amendment and Article 1, § 21, is that the Federal provision covers only civil cases, while the state provision contains no such limitation. This difference does not support the creation of special attributes for juries in criminal cases. Logically, such special attributes would be

placed in Article 1, § 22, which deals specifically with criminal cases, rather than § 21, which does not. As already pointed out, the jury trial provisions of § 22 are substantially identical with those of the Sixth Amendment. This supports the conclusion that the Constitution was not intended to create jury trial rights that specifically apply in criminal cases, beyond those created by the Federal constitution.

3. State Constitutional And Common Law History.

Article 1, § 21, has been construed as preserving the right to trial by jury as it existed at common law in Washington Territory at the time the Constitution was adopted. Mace, 98 Wn.2d at 96, State v. Smith, 150 Wn.2d 135, 153, 75 P.3d 934 (2003).

In Washington Territory, the common law contemplated using a harmless error analysis for asserted errors in jury instructions. See Yelm Jim v. Washington Territory, 1 Wash. Terr. 63, 68 (1859) (instructions not given or excepted to that had no bearing on the case do not require reversal); Brown v. Forest, 1 Wash. Terr. 201, 203 (1867) (“This court will not reverse a case merely because of an erroneous ruling; but only because of an erroneous ruling which works prejudice.”).

This standard of review in the Territory was set out in the Code of 1881, § 1147:

On hearing all writs of error, the supreme court shall examine all errors assigned, and on the hearing of appeals shall examine all errors and mistakes excepted to at the time, whether waived by the strict rules of law or not; but the court shall consider all amendments which could have been made, as made, and shall give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the defendant.

Thus, in Washington Territory, errors committed at a criminal trial did not result in automatic reversal. The appellate court was required to determine whether the error was “technical” and whether it affected “the substantial rights of the defendant.”

a. Pre-existing state law.

Historically, errors in verdict forms that were not objected to at the time the verdict entered were not considered on appeal. See State v. Grier, 11 Wash. 244, 247, 39 P. 874 (1895) (if no objection to the form of the verdict when it is accepted by the court, the defendant “cannot successfully assign error on account thereof.”); accord, State v. McVeigh, 35 Wn.2d 493, 502-03, 214 P.2d 165 (1950). Now, they may be considered if they are manifest errors affecting a constitutional right. State v. Becker, 132 Wn.2d 54, 67, 935 P.2d 1321 (1997) (Alexander, J, concurring).

Washington courts have long held that if an element was not in genuine dispute, the omission of an instruction on that element was harmless error. This principle was first expressly recognized in State v. Witherow, 15 Wash. 562, 46 P. 1035 (1896). That case was a prosecution for grand larceny. The only evidence was presented by the State, and “there was no substantial conflict in the testimony on the part of the state, either in the direct or cross examination[.]” This Court held “there was but one verdict that the jury could have rendered, and that was to find the defendants guilty; and if there was any error in the instructions, it was clearly error without prejudice.” Witherow, 15 Wash. At 563.

This principle was stated again in State v. Hartley, 25 Wn.2d 211, 170 P.2d 333 (1946). That case was a murder prosecution, in which the “to convict” instruction omitted the requirement that the murder not be excusable or justifiable. Under the then-existing statute, this was an element of the crime. The court held that any error in this regard was harmless, because “there was no evidence whatever to support a defense, or even claim of excusable or justifiable homicide.” Hartley, 25 Wn.2d at 225.

This Court more recently applied this analysis where an erroneous knowledge instruction was given in a possession of an

unlawful firearm prosecution. The instruction was ambiguous on whether the defendant had to know that the weapon he possessed was a short-barreled shotgun and had the potential to confuse the jury. This Court held:

We think the jury was more than justified in finding that [the defendant] knew or should have known that the barrel of his shotgun was less than 18 inches (5 inches shorter than the law permits) and thus met the legal definition of a short-barreled shotgun.

State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006).

Petitioner Ruth asserts, "Washington's constitutional, statutory and common law history mandate jury fact-finding, including for sentencing enhancement purposes." Petitioner Ruth's Supplemental Brief 11. The State agrees with this assertion, but it has no bearing on the pre-existing state law principle that verdict form and instructional errors are subject to a harmless error analysis.

b. Differences in structure between the federal and state constitutions.

This factor "may support the notion that our constitution is more protective in a general sense." It does not shed any light on the analysis of a particular constitutional provision. See State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

c. Matters of particular state interest or local concern.

Generally, law enforcement is a local matter. Again, however, this factor does not always aid the analysis of a particular issue. See Ortiz, 119 Wn.2d at 303. This state has a strong local concern in the efficient use of judicial resources. It is not efficient to re-sentence cases based on errors that beyond a doubt could not have made any difference.

Likewise, the state has a strong local concern that felons who arm themselves with firearms before they commit their crimes be punished more severely than those who either do not arm themselves at all, or only arm themselves with a weapon other than a firearm. Laws 1995, Ch. 129, § 1.

In short, the use of harmless error analysis is supported by Territorial common law and statute. The bulk of subsequent judicial decisions also used a harmless error analysis. The other Gunwall factors do not support any contrary conclusion. A harmless instructional error or special verdict form error does not deprive a defendant of his right to have a jury determine the facts of his case under either the state or federal constitution.

Petitioners have not identified any authority for their proposition that a harmless error analysis of an instructional error

would violate the state jury trial right. Petitioner Ruth “acknowledges that this Court applied harmless error analysis to erroneous jury instructions at the time of the adoption of the state constitution.” He argues that the errors in those cases were “qualitatively different.” Petitioner Ruth’s Supplemental Brief 12 n. 3. This is an argument that the errors here were not harmless, not that a harmless error analysis violates the state jury trial right.

Petitioner Ruth also asserts that a harmless error analysis would “sanction a trial court’s disregard for the jury’s verdict, as did the Court of Appeals in Ruth’s case.” Petitioner Ruth’s Supplemental Brief 12 n. 3. As argued in the State’s Supplemental Brief, the jury’s general verdicts of guilty required jury findings that the petitioners were armed with firearms. In Petitioner Ruth’s case, the special verdict instructions required the jury to find he was armed with a firearm. Applying a harmless error analysis to petitioners’ cases would not “sanction a trial court’s disregard for the jury’s verdict.” Rather, it would affirm what the jury would have found in the special verdict had that form been properly worded. See State v. Mason, 160 Wn.2d 910, 937, 162 P.3d 396 (2007) (“Apprendi and its progeny do not require a specific format for the jury to conclude the existence of facts raising a punishment beyond

its statutory maximum; it requires a jury make the decision based on the reasonable doubt standard.”).

As the Gunwall analysis shows, the standard of review for an erroneous verdict form or for omitted or incorrect jury instructions is harmless error. The jury trial right is the same under the state and federal constitutions, insofar as harmless error is applied to verdict form or instructional error.

IV. CONCLUSION

The opinions of the Court of Appeals should be affirmed.

Respectfully submitted on December 17, 2008.

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