

60365-S

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NO. 60365-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SIMMS,

Appellant.

FILED
DIVISION ONE
COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The Information in Mr. Simms's case violated the essential-elements rule.

2. Mr. Simms's conviction of unlawful possession of a firearm and the imposition of firearm enhancement pursuant to the doubling provisions of RCW 9.94A.533(3)(d) violate the double jeopardy protections of the state and federal constitutions.

3. The trial court erred in refusing to admit evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The essential-elements rule requires an Information include all facts necessary to prove an offense including enhancements. The Information alleged Mr. Simms committed the present offense while armed with a firearm but did not allege he had previously received a firearm enhancement. Was the essential-elements rule violated when the court doubled the firearm enhancements in the present case pursuant to RCW 9.94A.533(3)(d) based upon the court's finding that Mr. Simms had previously received a firearm enhancement?

2. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense; offenses which are the same in

law and fact. Where as a matter of law and fact Mr. Simms could not be subject to the doubling provisions of RCW 9.94A.533(3)(d) with also being convicted of unlawful possession of a firearm in the first degree. Do the conviction and enhancement violate the Double Jeopardy Clause of the Fifth Amendment?

3. Evidence is not objectionable merely because it is “self-serving hearsay.” Moreover, evidence that might otherwise be inadmissible is admissible under the rule of completeness where it complete a declarant’s statement offered by a party’s opponent. Did the court err in excluding the remainder of Mr. Simms’s statement to police after the State elicited a portion of it?

C. STATEMENT OF THE CASE

Police were called to a house in North Seattle because of a fight involving a gun. When they arrived, they found two men standing over Mr. Simms and saw a large framing hammer on the floor next to Mr. Simms’s head. 6/27/06 RP 79-80. Mr. Simms had suffered injuries to his head and was taken by ambulance to Harborview. 6/27/06 RP 80; 6/27/06 RP 89, 93; EX 22 and 23.

Mr. Simms told the officers that those at the house had tried to rob him and had hit him repeatedly with a hammer. 6/26/06 RP 19, 21-22

The residents of the house testified, however, that Mr. Simms had arrived with an unidentified woman to visit John Jacobs. 6/28/06 RP 35. According to Mr. Jacobs, after 15 to 20 minutes of friendly conversation Mr. Simms inexplicably drew a gun and demanded Mr. Jacobs's money. Id. at 35-37. According to Mr. Jacobs he and a friend, Ronald Cogswell, wrestled the gun from Mr. Simms. Id. After they wrestled Mr. Simms to the ground, Mr. Jacobs struck Mr. Simms in the head repeatedly with a dumb bell. 6/27/06 RP 29, 6/28/06 RP 44.

The State charged Mr. Simms with one count of first-degree robbery, two counts of second-degree assault, and one count of first-degree unlawful possession of a firearm. CP 1-3.

Following a colloquy the court permitted Mr. Simms to waive his right to counsel and to represent himself at trial. 6/16/06 RP 2-8.

In addition to the above described testimony, the State submitted a certified copy of Mr. Simms's prior conviction of second degree assault, with a firearm enhancement. Ex. 27. A jury convicted him as charged. CP 56-62.

At sentencing the court determined that because Mr. Simms had previously been sentenced with a firearm enhancement, the

enhancement in this case doubled pursuant to RCW

9.94A.533(3)(d). CP 114, 7/27/06 RP 3.

D. ARGUMENT

1. THE STATE DID NOT ALLEGE ALL FACTS
NECESSARY TO SUPPORT THE FIREARM
ENHANCEMENTS IN THIS CASE

a. The “essential elements” rule requires the State include in the information all facts necessary to support each element of a crime and enhancement. The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III) (citing State v. Leach, 113 Wn.2d 678, 689, 782 P.2d 552 (1989)). The essential elements rule is based upon Article I, § 22 of the Washington Constitution. Auburn v. Brooke, 119 Wn.2d 623, 627-628, 836 P.2d 212 (1992). Article I, § 22 provides in relevant part: “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, to have a copy thereof . . .” The rule “requires the State to allege in the information the crime which it seeks to establish.

Appendi[v. New Jersey] makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the

practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165

L. Ed. 2d 466 (2006) (Recuenco II). Thus, the essential elements rule applies with equal force to sentencing enhancements.”

Recuenco III, 163 Wn.2d at 435.

b. The Information did not included all facts necessary to support the enhancements in this case. RCW

9.94A.533 provides in relevant part:

(3) The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender . . . was armed with a firearm as defined in RCW 9.41.010. . . .

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years . . . ;

(b) Three years for any felony defined under any law as a class B felony . . . ;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed

With respect to the robbery and assault charges against Mr. Simms, the Information alleged:

And I, Norm Maleng, the Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendant . . . at said time of being armed with a handgun, a firearm, as defined in RCW 9.41.010, under the authority of RCW 9.94A.510.

CP 2-3. The jury returned a special verdict on each count finding Mr. Simms was armed with a firearm in the commission of the crimes. CP 56-58. At sentencing the court determined Mr. Simms had previously been subject to a firearm enhancement and thus was subject to the doubling provisions of RCW 9.94A.533(3)(d).

Because the fact that Mr. Simms was previously subject to a firearm enhancement was not included in the Information, the State did not comply with the essential elements rule. Without question the State was required to include the fact that Mr. Simms was armed with a firearm. Recuenco III, 163 Wn.2d at 436-37.

Consistent with that requirement, the Information alleges Mr. Simms was armed with a firearm. CP 1-2. But that allegation supports only the base level enhancements of three, three and five years, not the enhancements imposed of six, six and ten years.. RCW 9.94A.533(3)(a). Mr. Simms received 11 additional years of

confinement based upon the court's finding that he had previously been sentenced to an enhancement. That fact was not alleged in the Information. CP 1-3.

As in Recuecno III the error in this case does not lie in the jury instructions as the jury was instructed on the charges consistent with manner in which the offenses were charged. 163 Wn.2d at 435-36. Further, as in Recuenco III Mr. Simms does not contend there is an error in the Information; the State alleged only that Mr. Simms was armed with a firearm when it could have alleged the additional fact that he had previously received such an enhancement, or it could have alleged no enhancement at all. Id. at 436.

That was the choice of the State at filing. No error occurred in the jury's findings. In fact, it was not until [he] was sentenced for an enhancement that was not charged nor found by the jury that an error occurred at all.

Id.

The State cannot contend the fact that Mr. Simms had a prior conviction with a firearm enhancement was not an element of the aggravated offenses, as it pleaded and proved the existence of the prior substantive offense for purposes of the unlawful

possession of a firearm charge. With respect to that offense, the

Information alleged :

“The defendant . . . previously having been convicted . . . of the crime of Assault in the Second Degree . . . did knowingly have in his possession, or have in his control, a handgun, a firearm.”

CP 3. But the Information makes no mention of the prior enhancement in its allegations supporting the three present firearm enhancements. The State can offer no rational explanation as to why it should be vested with the choice of when prior offenses will be considered an element and when it will not. There is certainly no rational explanation as to why in a single case the State should be permitted to make two divergent decisions on the very same prior offense.

c. The Court must reverse the enhancements and remand for entry of the lesser enhancements alleged in the Information. Because the Information did not allege the fact that Mr. Simms was previously sentenced to a firearm enhancement , the Information did not satisfy the essential elements rule. Recuenco III, 163 Wn.2d at 437. The remedy in such a case is remand for correction of the sentence. Recuenco III, 163 Wn.2d at 442. Importantly, Recuenco III did not remand the case to afford

the State the opportunity to amend the Information and retry the case. Similarly, the remedy in this case is to remand the matter for imposition of the enhancements charged and found by the jury.

2. MR. SIMMS'S CONVICTION OF UNLAWFUL POSSESSION AND THE INCREASE IN HIS FIREARM ENHANCEMENTS BASED UPON HIS PRIOR ENHANCEMENT VIOLATE DOUBLE JEOPARDY

Mr. Simms was charged and convicted of possessing a firearm after having previously been convicted of second degree assault with a firearm enhancement. CP 3, 62; Ex. 27. Mr. Simms was charged and found to have been armed with a firearm in the commission of the assault and the robbery. CP 1-2; 56-58. As a matter of law and fact, Mr. Simms could not be subject to the doubling of the firearm enhancement in the present case without being a felon in possession of a gun and thus guilty of unlawful possession of a firearm. Therefore, the Double Jeopardy provision of the Fifth Amendment, as incorporated by the Fourteenth Amendment was violated.

a. The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishment for the same offense. The double jeopardy clause of the federal constitution provides that no individual shall "be twice

put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. V; Const. Art. I, § 9. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Washington gives its double jeopardy provision the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); Gocken, 127 Wn.2d at 100.

The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Blockburger v. United States,

284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. In re the Personal Restraint Petition of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of an additional fact which the other does not*.

Blockburger, 284 U.S. at 304 (emphasis added). If two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

To withstand a double jeopardy challenge, the federal cases require an express statement of legislative intent for separate punishments. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).¹ The Blockburger test is simply

¹ An example of an express statement of intent for separate punishments may be found where the Legislature has authorized courts to punish a burglary

“a rule of statutory construction” which seeks to determine the legislative intent. Albernez v. United States, 450 U.S. 333, 340, 102 S.Ct. 1137, 67 L.Ed.2d 275 (1981). If there is doubt as to the legislative intent for multiple punishments, principals of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. Application of the Blockburger test leads to the conclusion that Mr. Simms’s possession conviction and enhancement placed him in Double Jeopardy. RCW 9.941.040(1) provides a person

. . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter

RCW 9.41.010(12) defines a “serious offense” as any offense involving a deadly weapon verdict pursuant to RCW 9.94A.602. A deadly weapon special verdict pursuant to RCW 9.94A.602 includes a firearm enhancement. Recuenco III, 163 Wn.2d at 439.

separately from any other crime committed incidentally to the burglary. RCW 9A.52.050. Another example can be found in RCW 9.41.042(6) which expressly permit’s convictions for both unlawful possession of a firearm and theft of the same firearm and requires consecutive sentences.

As set forth above, RCW 9.94A.533(3)(d) requires the doubling of Mr. Simms enhancement

If the offender is being sentenced for any firearm enhancements . . . and the offender has previously been sentenced for any deadly weapon enhancements

The application of this statute requires two things (1) a jury found he committed the present offense while in possession of a firearm (2) he was previously convicted of a felony involving firearm enhancement. There are no circumstance in which a person could be subject to the doubling provisions of RCW 9.94A.533(3)(d) without also being guilty of unlawfully possessing a firearm.

A person facing the doubling provision because of a prior firearm enhancement will by definition have a prior "serious offense" pursuant to RCW 9.41.010 and will necessarily have been found to be in possession of a gun at the time of the current offense. Thus, proof of the enhancement does not require proof of an additional fact and the imposition of both violates double jeopardy. Blockburger, 284 U.S. at 304.

3. THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY REGARDING MR. SIMMS'S WHOLE STATEMENT TO POLICE

a. After the State opened the door to its admission,

Mr. Simms properly sought to elicit the testimony of the complete statement he provided. The Seattle Police Officer Joseph Kowalchyk testified that Mr. Simms identified himself as "Terry Weeks" but was unable to provide any form of identification. 6/27/06 RP 87. Officer Kowalchyk testified that when later informed Mr. Simms he was unable to find any record of a person named "Terry Weeks" Mr. Simms explained that was because he was a sovereign citizen of Alaska and thus was not required to have identification. Id. at 94.

On cross-examination Mr. Simms asked the officer if he recalled what other statement Mr. Simms had made. 6/27/07 RP 99-100. When the officer replied that he recalled that statement, Mr. Simms asked "what was that?" Id. at 100. The court sustained the State's objection that the question called for "self-serving hearsay." Id. Mr. Simms replied "He gets to testify to the name, but he can't testify to the truth?" Id.

In a hearing pursuant to CrR 3.5 Officer Kowalchyk testified Mr. Simms told him "These guys robbed me, they hit me with a hammer." 6/26/06 RP 19.

b. The evidence Mr. Simms's sought to elicit was admissible. Hearsay statements are generally inadmissible. ER 802. Hearsay is defined as an out-of-court statement which is offered for the truth of the matter asserted. ER 801. "[T]here is no general independent rule that out-of-court statements are inadmissible if they are self-serving." K. Tegland, 5B Washington Practice, Evidence Law and Practice, p359 (2007). Thus, the deputy prosecutors failed to identify a proper basis to excluded the evidence, and the court erred in granting the objection

Beyond the State's failure to identify a proper basis for objection, the statement was admissible pursuant to the rule of completeness. Under the rule of completeness, once part of a statement has been introduced into evidence, a party is entitled to seek admission of the remainder of the statement. ER 106. While the terms of ER 106 limit the rule to recorded or written statements, it has been applied with equal force to oral statements. K. Tegland, 5 Washington Practice, Evidence Law and Practice, p150 (2007) (citing State v. West, 70 Wn.2d 751, 424 P.2d 1014 (1967)). Here

after the State was permitted to offer one portion Mr. Simms's statement to the officer, the rule of completeness permitted him to elicit the remainder.

The Court erred in excluding the evidence.

c. This Court should remand for a new trial. An evidentiary error which does not violate the constitution requires reversal if within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Hamlet, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). In the present case, the jury heard evidence that Mr. Simms was clutching money in his hand and a hammer was found lying near his head. 6/27/06 RP 80,. The jury heard evidence of Mr. Simms suffered substantial head injuries, 6/26/06 RP 80; EX 22 and 23, which were severe enough to require treatment at the hospital. 6/27/06 RP 89, 93. From that evidence a juror could have quite reasonably believed Mr. Simms's claim in the erroneously excluded statement and found the State had not met its burden of proof. Thus, the exclusion of the evidence merits reversal of the conviction.

E. CONCLUSION

For the reasons above, this court should remand for corrections of Mr. Simms's sentence to reflect the offenses charged

in the Information. Alternatively, this court should vacate either the doubled enhancements or the firearm possession charge.

Respectfully submitted this 29th day of August, 2008.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
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 DANIEL SIMMS,)
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 Appellant.)

NO. 60365-5-I

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STATE OF WASHINGTON
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CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 29TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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