

63327-9

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No. 63327-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAROEUN PHAI,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. WHERE A ROBBERY SERVES AS THE AGGRAVATING FACTOR MANDATING PUNISHMENT OF EITHER DEATH OR LIFE WITHOUT PAROLE, THE ROBBERY AT LEAST ACTUALLY OCCUR AND NOT MERELY HAVE BEEN INTENDED

A person may be convicted of aggravated first degree murder only upon the jury's unanimous findings that the accused person committed premeditated murder and also committed an aggravating circumstance. RCW 10.95.020. Unlike first degree murder, aggravated first degree murder allows for only two types of punishment, either the mandatory punishment of life imprisonment without the possibility of parole or death. RCW 10.95.030(1), (2). Because of the substantially elevated stakes arising from an aggravated first degree murder conviction, the added elements may not be treated as a de minimus additional factor. State v. Thomas, 150 Wn.2d 821, 848, 83 P.3d 970 (2004).

Here, the prosecution claimed Phai committed the murders during the course of or in furtherance of a second degree robbery, and sought a sentence of life without the possibility of parole based on this allegation. CP 80 (Instruction 25); CP 164 (Amended Information); RCW 10.95.020(11)(a) (aggravating factor of

robbery). But the State did not offer any evidence that Phai took any property either during or immediately after the shootings.

The prosecution cites State v. Brett, 126 Wn.2d 136, 162, 892 P.2d 29 (1995), for the proposition that the State offered sufficient proof by alleging that Phai embarked on the incident with the intent to steal property by force. But Brett disavows the claim that an attempted robbery may be an aggravating circumstance.

Absent from the prosecution's brief is any explanation of the holding in Brett that, "[p]remeditated murders committed during the course of an attempted robbery are not" within the scope of the aggravated murder statute, RCW 10.95.020. 126 Wn.2d at 163. Unlike felony murder, which expressly contemplates an attempted felony as a predicate offense, under the aggravated murder statute, "only premeditated murders committed during the course of robbery are within the scope of the statute." Id. (emphasis added).

Brett rested on the legal question of whether a robbery that had started but was not completed constituted a murder "in the course of robbery" to satisfy the aggravating factor. 126 Wn.2d at 162-63. In Brett, the defendants' plan was to tie up a rich elderly couple in the middle of the night and wait until the banks opened to withdraw their money. Id. at 136. When the defendants tried to

restrain an elderly couple, the couple resisted, the wife fled, and Brett shot and killed the husband. Id. He left without completing the intended robbery. The Brett Court addressed the legal issue that the crime of robbery need not be completed as long as the killing occurred during the actual robbery. The argument was not raised as a question of sufficiency.

Phai and Areewa Saray entered a home and immediately shot the people present, then fled when another person came to the door. 3/11/09RP 224-25; 3/13/09RP 546. Phai did not try to take any property or actually take any property, even though he had been hoping that there was money to steal inside the home.

Moreover, the aggravating factor for first degree aggravated murder must apply to the individual defendant's behavior. State v. Roberts, 142 Wn.2d 471, 501-02, 14 P.3d 713 (2000) (noting that statutory authority for aggravated first degree murder does not include accomplice liability). There was no evidence Phai stole any property or was engaging in efforts to do so when the shootings occurred, even if Saray may have started looking for something to steal.

If the distinction between "attempted" robbery and the "course of robbery" has meaning as held in Brett, then a person

may not be planning on engaging in a robbery but must actually be in the process of committing the robbery. In Brett, the planned robbery was to restrain people and then take money from their bank, and this plan was in process when the killing occurred. Phai intended to steal money but he had not tried to do so when the killing occurred. Thus, Phai's actions amount at most to an attempt and not an action in the course of a robbery, and his conviction may not rest on the notion of accomplice liability. "Premeditated murders committed during the course of an attempted robbery are not" within the scope of the aggravated murder statute, RCW 10.95.020. Brett, 126 Wn.2d at 163.

2. THE AGGRAVATING FACTORS COMMON SCHEME OR SINGLE ACT WERE NOT SUFFICIENTLY PROVEN OR EXPLAINED TO THE JURY

The State relies on In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988) to address the question of whether the court adequately instructed the jury as to the law and the necessary unanimity for the aggravating factor set forth in RCW 10.95.020(10), "[t]here was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person."

As mentioned in Appellant's Opening Brief, the Jeffries Court had found there was sufficient evidence to support each aggravating circumstance, which is not true of the case at bar. 110 Wn.2d at 337.¹ Also, in Jeffries, the court found that the disjunctive aggravating circumstance of more than one killing with either a "common scheme" or "single act" are not alternative means per se, but "means within a means" that need not be separately instructed in a jury verdict. Id. at 339-40. The prosecution relies on Jeffries to avoid the requirement that the prosecution must prove an aggravating circumstance. The State did not present sufficient evidence supporting the "single act" alternative but the neither the State nor court took measures to ensure that the verdict was unanimous, so the reviewing court knows the basis of the jury's verdict. Additionally, as explained in Appellant's Opening Brief, Phai was denied due process of law and his right to trial by jury where the Court did not accurately and adequately instruct the jury on the findings essential to its verdict. See State v. Williams-Walker, 167 Wn.2d 889, 916-19, 225 P.3d 913 (2010); U.S. Const. amend. 14; Wash. Const. art. I, §§ 21, 22.

¹ The Opening Brief inadvertently provided the wrong page number for this citation, listing it as 347.

3. DOUBLE JEOPARDY VIOLATIONS REQUIRE VACATION OF THE OFFENDING CONVICTIONS

The Supreme Court has repeatedly held that when two offenses merge because they are the same offense for purposes of double jeopardy, simply imposing a sentence on one offense is an inadequate remedy. State v. League, 167 Wn.2d 671, 672, 223 P.3d 493 (2009); State v. Womac, 160 Wn.2d 643, 658, 160 P.3d 40 (2007); State v. Knight, 162 Wn.2d 806, 812, 174 P.3d 1167 (2008) (“proper remedy for double jeopardy violations, including the one here, is vacating the offending convictions.”); U.S. Const. amends. 5, 14; Wash. Const. art. I, § 9.

When convictions for two offenses violate double jeopardy, “the proper remedy is to vacate the lesser conviction.” League, 167 Wn.2d at 672. Courts offend double jeopardy by entering multiple convictions for the same offense. Womac, 160 Wn.2d at 658.

The prosecution ignores League and insists that by repeatedly insisting Phai was convicted of four offenses and yet only received sentences for two of those offenses, there is no double jeopardy violation. This argument is directly contrary to League and Womac. Phai’s offending convictions were repeatedly

mentioned in his Judgment and Sentence as convictions obtained against him. These convictions for first degree murder must be vacated because they violate double jeopardy.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Phai respectfully requests this Court reverse the aggravating factors that are unsupported by the evidence and imposed in violation of due process, and strike the convictions that violate double jeopardy.

DATED this 27th day of April 2010.

Respectfully submitted,



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DIVISION ONE**

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)	
Respondent,)	NO. 63327-9-I
)	
)	
SAROEUN PHAI,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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