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NO. 63808-4-I

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

REC'D
MAY 24 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

THOMAS RANDALL,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. ARGUMENT IN REPLY

1. BY INSTRUCTING THE JURY THAT “A PERSON KNOWS” THE COURT IMPLIED RANDALL MUST HAVE KNOWN HIS GRANDMOTHER COULD NOT GIVE HIM GIFTS, PRESUMPTIVELY NEGATING HIS DEFENSE.

The first sentence of the “knowledge” definition declares simply that “a person knows.” Such a declaration, particularly when followed by a disclaimer about what knowledge is *not* required (“It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful. . .”), implies that this element is always or nearly always satisfied. Just as in State v. Jackman, the instruction containing the victim’s birth dates “allowed the jury to infer that [the dates] had been proved by the State,” this instruction allowed the jury to infer Randall knew his grandmother was impaired and could not validly gift her property to him. See State v. Jackman, 156 Wn.2d 736,744, 132 P.3d 136 (2006). As discussed in the opening brief, lack of knowledge was an essential element of Randall’s defense that he used his grandmother’s property with her permission. See Brief of Appellant at 14; 11RP 68. The knowledge instruction appeared to negate that defense from the outset.

The State argues the instruction is not a comment on the evidence because it is merely incoherent. Brief of Respondent at 33. But courts do not presume the jury ignores instructions merely because they are difficult to

understand. See, e.g., State v. Bennett, 161 Wn.2d 303, 317, 165 P.3d 1241 (2007) (pattern instruction on reasonable doubt is not a model of clarity). The error resulted in an unconstitutional comment on the evidence because it implied or suggested Randall's knowledge was not really an issue. See Jackman, 156 Wn.2d at 744 (implied comment); State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) (suggestion that jury need not consider an element).

The State argues the error in the knowledge instruction is mitigated by the opening instruction in which the court instructed the jury to disregard any apparent comment on the evidence. Brief of Respondent at 34. This argument should be rejected because this boilerplate instruction does not render harmless a judicial comment on the evidence. The State meets its burden to prove a judicial comment harmless when, without the erroneous instruction, no one could doubt the fact was proven. State v. Boss, 167 Wn.2d 710, 721, 223 P.3d 506 (2009). The State cannot meet that burden in this case, and the judicial comment requires reversal.

2. THE FAULTY SPECIAL VERDICT FORM REQUIRES REVERSAL OF THE EXCEPTIONAL SENTENCE.

a. The Court May Not Look Behind The Special Verdict Form To Determine The Jury's Subjective Intent.

The State argues the special verdict form is a mere scrivener's error, and that this Court should interpret the jury's verdict in light of the

instructions. This, the Court cannot do. To do so would require changing or “impeaching” the jury’s verdict. State v. Rooth, 129 Wn. App. 761, 771, 121 P.3d 755 (2005). But the thought processes by which a jury arrived at a verdict “inhere in the verdict” and cannot be used to impeach that verdict. Id. at 771-72.

State v. Rooth illustrates an appellate court’s dilemma when there are errors in the verdict forms. Rooth was charged in count 1 with unlawful possession of a .9 millimeter handgun. Id. at 766. He was charged in count 2 with unlawful possession of a .22 caliber handgun. Id. During closing arguments, the State conceded there was insufficient evidence Rooth possessed the .22, and both counsel inadvertently switched which handgun pertained to which count. Id. at 769. The same error was continued in the jury instructions. Id. The jury found Rooth not guilty on count 1 “as charged in the information,” which actually referred to the .9 millimeter. Id. at 769-70. The jury found Rooth guilty on count 2, “as charged in the information,” which referred to the .22. Id. at 770.

The State urged the court to consider that the jury followed the instructions, which identified the counts as counsel had in closing argument. Id. at 771. But the Court stated that to accept the State’s argument, it would have to change or impeach the jury’s verdicts, which it could not do. Id. The Court declared the verdicts must “stand and be examined.” Id. at 772.

Thus, the jury's acquittal on count 1 remained, while the conviction on count 2 was reversed for insufficient evidence. Id.

The special verdict form in this case must also be examined as it was written. As the court explained in Rooth, “[I]nquiring into the jury’s intent is not permitted in Washington: The individual or collective thought processes leading to a verdict inhere in the verdict and cannot be used to impeach a jury verdict.” Id. at 771 (internal quotes omitted). The court explained that jurors’ intentions and beliefs inhere in the verdict and “any evidence that a juror misunderstood or failed to follow the court’s instructions inheres in the verdict and may not be considered.” Id. at 772 (citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 768-69, 818 P.2d 1337 (1991)).

Simply put, courts generally do not look behind a jury’s verdict to divine what the jury was thinking. Yet that is what the State would have the Court do in this case. The verdict form says what it says, and as written, it is insufficient to support an exceptional sentence.

b. Resentencing Is Required Because It Is Not Certain The Court Would Impose The Same Sentence Without The Particular Vulnerability Finding.

The boilerplate language included in the court’s findings, that “either of the aggravators found by the jury would justify an exceptional sentence” should play no role in this court’s analysis. CP 78; State v. Smith, 123 Wn.2d 51, 58 n.8, 864 P.2d 1371 (1993), overruled on other grounds, State

v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), overruled on other grounds, Washington v. Recuenco, 126 S. Ct. 2546, 165 L. Ed. 2d. 466, 476-77 (2006). In Smith, the court invalidated two of the four reasons given for the exceptional sentence. 123 Wn.2d at 58. The trial court's written findings in Smith included a recitation that "each of the above findings of fact is a substantial and compelling reason justifying an exceptional sentence." Id. at 58 n. 8. Nevertheless, the appellate court remanded for re-sentencing. Id.

Because of the large disparity between the standard range and the exceptional sentence actually imposed, the court found it could not conclude, with the requisite certainty, that the trial court would impose the same sentence on remand. Id. at 58 & n.8. In Smith, a burglary case, the exceptional sentence was six times the standard range. Id. A similarly large disparity is at issue here. Randall's offender score is zero. He has no prior criminal history. Thus, the presumptive sentence for first-degree theft is 0-90 days. Based on the two aggravators, the court imposed 25 months, more than eight times the top of the standard range. As in Smith, this Court should remand for re-sentencing because the particularly vulnerable victim aggravator is invalid.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Randall asks this Court to reverse his conviction or, in the alternative, remand for re-sentencing without the invalid aggravating factor.

DATED this 24th day of May, 2010.

Respectfully submitted,

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v.)	COA NO. 63808-4-I
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THOMAS RANDALL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS RANDALL
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K
2010 MAY 24 PM 1:19
COURT OF APPEALS
DIVISION ONE

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF MAY, 2010.

x Patrick Mayovsky