

65847-6

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NO. 65847-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

TERR MacMILLAN,

Appellant.

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

The Honorable John M. Meyer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in instructing the jury it must be unanimous to answer the deadly weapon special verdict form.

2. The sentencing court erred when it prohibited the appellant from possessing alcohol and frequenting establishments chiefly selling alcohol.

3. Defense counsel was ineffective for failing to object to the illegal sentencing conditions.

Issues Pertaining to Assignments of Error

1. Where the court wrongly instructed the jury it needed to unanimously agree whether or not the appellant was armed with a deadly weapon, must the special verdict be vacated?

2. Where there was no evidence showing appellant's crime involved his use of alcohol, must the court's alcohol-related conditions – other than the one prohibiting alcohol consumption – be stricken?

3. Was defense counsel ineffective for failing to object to the illegal community custody conditions?

B. STATEMENT OF THE CASE¹

1. The charges and verdicts

The State charged Terr MacMillan with first degree robbery, second degree assault, felony harassment, and witness tampering. The State alleged MacMillan committed the robbery and assault while armed with a deadly weapon. The complainant was MacMillan's former girlfriend, Tracie Elliott. CP 1-2, 6-8.

MacMillan argued the charges arose from his attempts to defend his property from theft by Elliott. 1RP 178-82. The jury acquitted MacMillan of robbery and could not reach agreement on the harassment charge, which the court ultimately dismissed with prejudice. CP 74, 85. The jury found MacMillan guilty of second degree assault and witness tampering. CP 75-76. It answered "yes" to a special verdict form asking if MacMillan was armed with a deadly weapon while committing the assault. CP 77.

2. Trial testimony

Elliott and MacMillan began dating in the fall of 2009. 1RP 31-32. They lived together until Elliott was incarcerated for first degree possession of

¹ This brief refers to the verbatim report of proceedings as follows: 1RP -7/26 and 7/27/2010 and 2RP - 7/28, 7/29, and 8/4/2010.

stolen property (PSP) in March 2010.² 1RP 32-33, 63. MacMillan agreed to store some of Elliott's property while she was incarcerated. 1RP 33, 85.

The relationship ended in April 2010 because MacMillan was seeing another woman. 1RP 66, 175. After her release that month, Elliott learned MacMillan was storing her property at the residence of Max and Marie Shelman, the elderly parents of MacMillan's roommate. 1RP 34-35.

Elliott contacted the Shelmans, who confirmed MacMillan was storing some items on their property. 1RP 35. Elliott enlisted Brandon Gasho, the son of a friend, and the two went to the Shelman property on April 29. 1RP 36, 135. Elliott towed away a trailer full of her belongings that day. 1RP 67-68. She knew the trailer belonged to MacMillan but took it anyway. 1RP 36, 68.

Elliott and Gasho returned to the Shelmans' the next day to retrieve items located in a steel shipping container alongside items belonging to MacMillan. 1RP 36-37. Gasho moved some items out of the container while Elliott positioned their vehicle for easier loading. 1RP 37-38.

As she did so, MacMillan drove up, ran toward Elliott's SUV, and shattered Elliott's passenger-side window with a large sword.³ 1RP 38-40. As Elliott tried to open her door to escape, MacMillan dove through the

² Elliott also acknowledged a 2008 theft conviction. 1RP 63.

³ Gasho testified the implement appeared to be a pipe. 1RP 139.

window opening, grabbed Elliott's keys, and struck her in the face. 1RP 41. After Elliott escaped, MacMillan ran after her and struck her on the hip with the flat of the sword. 1RP 42. When Elliott fell, MacMillan struck her left thigh in the same manner. 1RP 43. As he did so, he yelled, "I'm going to kill you. I should have taken care of you on Alger Mountain that day."⁴ 1RP 43.

A fearful Elliott ran toward Mr. Shelman, who was nearby on his tractor. 1RP 44. MacMillan ran after Elliott and grabbed her arm. 1RP 74. Mr. Shelman told MacMillan to let Elliott go. 1RP 45. After MacMillan complied, Elliott stumbled toward the Shelmans' house. 1RP 46. When Elliott looked back, MacMillan was standing near the cars holding her purse and the sword. 1RP 46-47, 76.

Gasho saw MacMillan enter the nearby woods on foot but did not see anything in MacMillan's hands. 1RP 147-48.

After MacMillan fled, the police searched the Shelmans' property and adjoining woods but never found Elliott's purse or keys. 1RP 64, 167. Police found what appeared to be a sword sheath inside MacMillan's car, but not a sword. 1RP 120-23, 132.

⁴ The court admitted the "Alger Mountain" statement to show Elliott reasonably feared MacMillan. It prohibited the State from introducing the details of the incident. 1RP 8-11.

Once inside the Shelmans' house, Elliott claimed she overheard a phone conversation between Ms. Shelman and MacMillan. 1RP 47-48. Elliott recognized MacMillan's voice because he was yelling loudly on the other end. 1RP 78-79.

Ms. Shelman, on the other hand, testified Elliott was outside speaking to the police when MacMillan called. 1RP 89, 93. MacMillan politely requested that Ms. Shelman tell Elliott she had to "change her story." 1RP 89, 92. Ms. Shelman declined to pass on the message. 1RP 89. She also recalled tripping over Elliott's purse when offering Elliott a cup of coffee. 1RP 91.

Mr. Shelman knew Elliott and MacMillan disputed ownership of the items stored on his property but did not want to get involved. 1RP 107, 113. He was nearby hauling dirt with his tractor when he saw MacMillan break Elliott's window with a stick. 1RP 99-100, 107. Later, he saw MacMillan trying to pull Elliott toward the storage container. 1RP 100. When Elliott yelled for help, Mr. Shelman told MacMillan to "knock it off." 1RP 102. MacMillan complained Elliott was taking his property but let her go. 1RP 102, 113-14.

MacMillan testified that Ms. Shelman called to alert him that Elliott was towing away his trailer with her SUV. The trailer contained MacMillan's tools but none of Elliott's belongings. 1RP 178-80. When

MacMillan learned Elliott had returned, he hurried to the Shelmans' to prevent another theft. 1RP 181, 198.

When he arrived, the storage container was open and many of his belongings were piled on the ground outside. 1RP 183. Acting to defend his property, MacMillan broke Elliott's window with a stick and jumped into her truck to prevent her from driving off. 1RP 183, 194.

When MacMillan asked Elliott why she was taking his belongings, she remained mute. 1RP 183. MacMillan attempted to strike Elliott on the buttocks with the stick, but she moved, and MacMillan accidentally struck her hip. 1RP 183-84, 194. MacMillan denied threatening to kill Elliott and taking her purse or keys. 1RP 185-87.

MacMillan acknowledged theft and PSP convictions. 1RP 187-88. He fled because he feared police would arrest him on a misdemeanor warrant. 1RP 183; CP 36.

3. Jury instructions

The court gave the following special verdict instruction:

For purposes of a 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 [second degree assault].

For purposes of the special verdict form, a person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was

a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, the type of weapon.

....

A deadly weapon is an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

CP 67 (Instruction 21).

The court also instructed jurors their decision had to be unanimous:

You will also be given [a special verdict form]. If you find the defendant guilty. . . , you will then use the special verdict form[] and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 72 (Instruction 24) (emphasis added).

The jury answered the special verdict form "yes." CP 77.

4. Sentencing

The sentencing court commented that MacMillan's criminal history was consistent with someone who struggled with substance abuse. 2RP 77-78. As for the current convictions, the court said MacMillan's actions were impulsive, but reasoned the jury appeared to have given "short shrift" to MacMillan's defense of property claim. 2RP 78-79.

The court imposed a low-end standard range sentence and voiced its hope that MacMillan would take advantage of his incarceration to address any substance abuse problems. 2RP 79-80. As a condition of community custody, the court ordered a substance abuse evaluation. CP 87. It also ordered MacMillan not to possess alcohol and to "not frequent establishments where alcohol is the chief commodity for sale." CP 93 (Condition 1).

C. ARGUMENT

1. BECAUSE THE COURT GAVE A FLAWED UNANIMITY INSTRUCTION FOR THE DEADLY WEAPON SPECIAL VERDICT, THIS COURT SHOULD VACATE THE SENTENCE ENHANCEMENT.

Instruction 24 incorrectly required the jury to unanimously determine whether or not MacMillan was armed with a deadly weapon at the time of the offense. CP 72. The sentencing enhancement should be vacated.

A unanimous decision is not required to find the State has failed to prove an allegation that would increase the defendant's maximum allowable sentence. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010) (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)). Instruction 24, which stated all 12 jurors must agree on an answer to the special verdict, was therefore an incorrect statement of the law. Bashaw, 169 Wn.2d at 147.

The State proposed the erroneous instruction. Supp. CP __ (sub no. 31, State's Proposed Instructions to the Jury). Defense counsel did not object, but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3); Bashaw, 169 Wn.2d at 147-48.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). To find a jury instruction error harmless, the reviewing court must conclude beyond a reasonable doubt that the verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). As in Bashaw, "[t]he error . . . was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. Moreover, "[t]he result of the flawed deliberative process tells [a reviewing court] little

about what result the jury would have reached had it been given a correct instruction." Id.

The State may argue the error was harmless beyond a reasonable doubt because the jury had to find MacMillan was armed with a deadly weapon to find him guilty of second degree assault. CP 58, 75. As required by law, the jury was instructed it had to be unanimous in order to return the guilty verdict. CP 70-71; see Bashaw, 169 Wn.2d at 145 n.5 (general verdicts in criminal cases must be unanimous to convict or acquit (citing Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980))).

The general verdict here does not, however, render the error harmless beyond a reasonable doubt, because the deliberative process is different when the jury is given the option of returning a non-unanimous verdict. Given a proper special verdict instruction, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. As articulated by the Bashaw Court,

We can only speculate as to why this might be For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48.

The same holds true here. A knife with a blade longer than three inches is a deadly weapon as a matter of law, but given the conflicting evidence it was debatable what implement MacMillan used to strike Elliott. See 1RP 38-40, 99, 107, 139 (divergent testimony of Elliott, Gasho, and Max Shelman). MacMillan testified he struck Elliott with a stick, which Mr. Shelman confirmed. 1RP 99, 107, 183. And while a stick may be considered a deadly weapon depending on how it is used, under the circumstances here, a stick would not meet the criteria set forth in the special verdict instruction: Striking an individual on the buttocks with a stick is unlikely to produce death.

Indeed, Elliott was the only witness to identify the weapon as a sword. But the jury must have doubted Elliott's credibility; it found MacMillan not guilty of robbery and could not agree whether he committed harassment, which were the two charges that relied solely on her testimony. In contrast, multiple witnesses saw MacMillan assault Elliott, and Ms. Schelman was the primary witness on the tampering charge.

"[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result." Bashaw, 169 Wn.2d at 147-48. Jurors may not

have reached unanimity on MacMillan's special verdict had they not been required to do so. The sentencing enhancement should, therefore, be vacated. Id. at 148.

2. THE COURT ERRED IN IMPOSING UNLAWFUL ALCOHOL-RELATED COMMUNITY CUSTODY CONDITIONS.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Under RCW 9.94A.703, some community custody conditions are mandatory, while the trial court has discretion in imposing others. Under RCW 9.94A.703(3)(d), the sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under RCW 9.94A.703(3)(f), the trial court may also order the defendant to “comply with any crime-related prohibitions.”

The court ordered MacMillan to refrain from consuming and possessing alcohol and from frequenting establishments where alcohol is the chief commodity for sale. CP 93 (Condition 1). While RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to

consume alcohol, the court here went further and required that MacMillan not possess alcohol or go to liquor stores or bars.

There was no evidence, and the court did not find, that MacMillan consumed alcohol or that alcohol contributed to the offense. While the court did discuss MacMillan's apparent history of substance abuse, alcohol was not discussed. The court therefore wrongly imposed the challenged alcohol-related conditions. See State v. Jones, 118 Wn. App. 199, 208, 212, 76 P.3d 258 (2003) (alcohol-related conditions impermissible even where defendant admitted substance abuse contributed to the crime).

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ILLEGAL CONDITIONS.

Finally, MacMillan's counsel rendered ineffective assistance in failing to object to the trial court's imposition of the illegal conditions. 2RP 70-84.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d

512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

MacMillan satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to object to the illegal sentence conditions. Counsel is presumed to know applicable statutes favorable to his or her client. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (effective assistance includes knowledge of relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel presumed to know court rules).

There is a reasonable likelihood that counsel's deficient performance affected the outcome of sentencing. The conditions were

illegal under the controlling law, and it is unlikely the sentencing court would have imposed them had it known they were illegal.

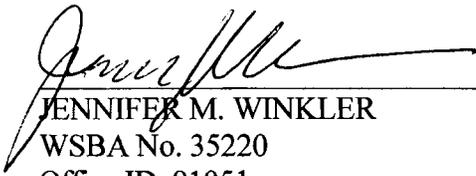
D. CONCLUSION

MacMillan respectfully requests that this Court vacate the deadly weapon enhancement and remand for correction of the challenged alcohol-related community custody conditions.

DATED this 22nd day of December, 2010.

Respectfully submitted,

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