No. 42396-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS LEE FLOYD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-00019-6
The Honorable John McCarthy, Judge

OPENING BRIEF OF APPELLANT

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3. The trial court erred when it used Thomas Floyd's 1972 robbery conviction in its offender score calculation because the conviction is constitutionally invalid on its face.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court violate Thomas Floyd's constitutional right to represent himself when it terminated his pro se status even though he was not overly disruptive and was not purposefully trying to delay the trial? (Assignment of Error 1)

2. Where the State presented a copy of a signed no-contact order without any additional evidence or testimony regarding the signature or circumstances of the order's entry, did the State fail to present sufficient evidence to prove that Thomas Floyd had knowledge of the no-contact order he was charged with violating? (Assignment of Error 2)

3. Where the trial court found that Thomas Floyd's 1972 robbery conviction was constitutionally invalid on its face and therefore not a "strike" offense, did the trial court err when it nevertheless used the offense in calculating Floyd's offender score? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Thomas Lee Floyd by Amended Information with one count of second degree assault (RCW 9A.36.021(1)(a)) and six counts of violation of a no-contact order (RCW 26.50.110(1)). (CP 30-33)

Floyd's trial date was continued several times over Floyd's objection. (09/13/10AM RP 11-13; 12/02/10 RP 5-6; 12/29/10AM RP 5; 12/29/10PM RP 27-39; TRP1 4, 14)[1] Several of these continuances were granted in order to conduct mental health evaluations of Floyd to determine whether he was competent to stand trial. (12/29/10 RP 28-39; 09/13/10PM RP 12) Each evaluation resulted in a finding and order of competency. (CP 4-5,

[1] Citations to the transcripts in this case will be as follows. The volumes containing the trial proceedings, labeled Volumes 1 thru 7, will be referred to as "TRP#." The volume containing the sentencing hearing will be referred to as "SRP." The remaining volumes will be referred to by the date of the proceeding contained therein.

7-8, 28-29, 103-04)

Floyd also requested several times that he be allowed to waive his right to counsel and represent himself at trial. (09/13/10AM RP 5-6; 11/18/11 RP 15-25) After a lengthy colloquy, the trial court granted Floyd's request to act pro se but appointed stand-by counsel. (11/18/11 25-30; 12/02/10 RP 33)

In the middle of Floyd's closing arguments, the trial court called a recess and instructed his stand-by counsel to complete the trial on Floyd's behalf. (TRP6/7 739, 743-44, 747) The jury subsequently convicted Floyd as charged. (RP TRP6/7 785-86; CP 219-34)

The State asserted that the second degree assault conviction was Floyd's third "strike" offense, and that he was therefore a persistent offender subject to a sentence of life in prison. (CP 6, 235-36) But the court found that one of Floyd's purported strikes, a 1972 robbery conviction, was not valid on its face, and that neither it nor a 1972 assault conviction were comparable to current strike offenses. (SRP 104-06) The court found that Floyd was therefore not a persistent offender. (SRP 106)

Using an offender score of four points, the trial court

sentenced Floyd to a standard range sentence of 20 months for the assault conviction, and 365-day terms for each of the six NCO violation convictions (three of which are to be served consecutive to each other and to the 20-month assault sentence, and three of which are suspended). (CP 517, 520, 531, 533; SRP 118) This appeal timely follows. (CP 535)

B. SUBSTANTIVE FACTS

Annette Bertan and Thomas Floyd met in 2005 and married in 2007. (TRP2 149) In 2010 they lived together in an apartment in Lakewood, Washington. (TRP2 150, 206) On January 3, 2010, Floyd was away from home most of the day, and returned around 7:30 in the evening. (TRP 150-51) Bertan was upset because Floyd did not spend time with her the day before, which happened to be Bertan's birthday. (TRP2 150-51, 152) Bertan and Floyd argued. (TRP2 152) Floyd went to bed, but Bertan continued to argue with Floyd and made several cruel comments. (TRP2 152)

According to Bertan, Floyd became angry, jumped out of bed, and began slapping and punching her on her face and head. (TRP2 153) Bertan felt blood running down her face, so she went to the bathroom mirror and saw that blood was streaming from her left ear. (TRP2 153) Bertan testified that Floyd followed her into

the bathroom and began taking pictures of her, while saying "You want more b**ch? I've got more for you." (TRP2 154)

Bertan was concerned that she would get blood on the rug, so she moved to the toilet and then to the bathtub. (TRP2 154-55) Bertan testified that Floyd continued to yell at her, and pulled the shower curtain rod down onto her back. (TRP2 154, 155) Bertan begged Floyd to take her to the hospital, but he just handed her some towels and told her to "Get that f***ing blood off your face, b**ch." (TRP2 155-56)

Bertan ran outside and to the neighbors' apartment, sat on their front stoop and knocked on their door. (TRP2 156-57; TRP4 403-04, 405; TRP5 565-67) Margaret Griffin answered the door, and her husband, Grant Griffin, called 911. (TRP2 156; TRP4 406; TRP5 565) Bertan told the Griffins that Floyd hit her, but Floyd told them she had kicked him in the groin. (TRP3 406) The Griffins live directly below Bertan and Floyd, and neither heard any sounds of an argument before Bertan knocked on the door. (TRP3 413-14, 417; TRP5 564)

Lakewood Police Officer Dustin Carrell responded, and found Floyd walking in the apartment complex parking lot. (TRP3 291, 292) He contacted Floyd, who told him that he pushed Bertan

only because she had "kicked him in the balls." (TRP3 298) Carrell placed Floyd under arrest. As he placed handcuffs onto Floyd's wrists, he noticed swelling and blood on Floyd's hands. (TRP3 298, 299) Floyd told Carrell that he got blood on his hands when he tried to clean Bertan's face. (TRP3 299)

Carrell also contacted Bertan, who was distraught and crying. (TRP3 301) Bertan told Carrell that Floyd "tried to kill me." (TRP3 302) Carrell inspected the apartment, and noticed a great deal of blood on the carpet, walls and towels, and saw that the bathroom curtain and curtain rod were down. (TRP3 300)

Paramedic Trevor Christensen treated Bertan at the scene, and later transported her to the hospital. (TRP3 365, 373) He noted that Bertan had swelling and bruising around her eye and on the left side of her face, and a cut on her left ear that was bleeding profusely. (TRP3 369) He also noted bruising on the back of her hands, which he thought was consistent with an attempt to defend against or prevent blows to her head. (TRP3 370, 372)

Bertan testified that she was at the hospital for several hours because it took a long time for doctors to stop the bleeding and to stitch her wound. (TRP2 169, 179) She had bruising and pain for several weeks, and it took two to three months for her to fully heal.

(TRP2 194, 196, 197-98, 199, 200) She also believes that she suffered some loss of hearing in her left ear. (TRP2 198)

An order prohibiting Floyd from contacting Bertan was entered on January 4, 2010. (Exh. P70; TRP4 466, 468-69) In March and April of 2010, Bertan received several collect calls placed from the Pierce County Jail. (TRP2 201-02, 203; TRP5 528-31) A prerecorded voice that sounded like Floyd stated that the calls were from Thomas Floyd. (TRP2 201-02) Pierce County Jail records show calls made from the facility to Bertan's home and cellular phone, using Floyd's personal pin number. (TRP4 426-30) Bertan also received several voice mail messages from Floyd that originated from Western State Hospital at the time that he was a patient there. (TRP2 204; TRP4 419, 420, 464)

On cross examination, Bertan testified that she had a face lift about a year prior to the incident, which involved stitches behind both ears. (TRP3 245) Griffin confirmed that Bertan had a facelift, but testified that the procedure occurred just a few weeks before the incident. (TRP5 569) She also acknowledged that Floyd had suffered from several medical issues in the weeks and days prior to the alleged assault, and that these medical issues had been causing stress in their relationship. (TRP3 248-49, 254)

Floyd testified on his own behalf. He explained that, in the weeks leading up to the alleged assault, he had been suffering from an adverse reaction to a cortisone shot accompanied by extremely high blood sugar, vertigo, and sleep apnea. (TRP5 607, 613, 615) On the night of January 3, Bertan was angry because Floyd had been spending so much time in bed. (TRP5 619) He testified that Bertan jumped on him while he slept, placed her hand over his face, and kneed him in the groin. (TRP5 622) He pushed her off of him, and she went outside to have a cigarette. (TRP5 622-63)

Floyd testified that Bertan then got a razor blade and cut herself, and began spreading her blood around the bathroom. (TRP5 626, 627-28) Floyd took pictures because he wanted to have proof that she had injured herself. (TRP5 628-29) He testified that he did not hit Bertan in the face or cause her injuries. (TRP 658-59) He also told the jury that he did not call Bertan from the Pierce County Jail or from Western State Hospital. (TRP5 604)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT VIOLATED FLOYD'S CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHEN IT TERMINATED FLOYD'S PRO SE STATUS EVEN THOUGH HE WAS NOT OVERLY DISRUPTIVE AND WAS NOT PURPOSEFULLY TRYING TO DELAY THE TRIAL

Criminal defendants have an explicit right to self-

representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution. Wash. Const. art. I, § 22 ("the accused shall have the right to appear and defend in person"); Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice. Faretta, 422 U.S. at 834; State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002).

> Although the trial court's duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right [and the] value of respecting this right outweighs any resulting difficulty in the administration of justice.

State v. Madsen, 168 Wn.2d 496, 504, 229 P.3d 714 (2010).

In Madsen, the trial court denied the defendant's request to represent himself because, in the trial court's opinion, "Madsen had been 'extremely disruptive,' 'repeatedly addressed the court at inopportune times,' and 'consistently showed an inability to follow or respect the court's directions.'" Madsen, 168 Wn.2d at 502-03. Madsen appealed the denial of his motion to proceed pro se, and our Supreme Court reversed Madsen's conviction, stating:

> Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious. Courts must not sacrifice constitutional rights on the altar of efficiency.

Madsen, 168 Wn.2d at 509. Then, in a footnote, the Madsen Court stated:

> After pro se status is granted, the court retains power to impose sanctions for improper courtroom behavior. The court may also appoint standby counsel or allow hybrid representation and even terminate pro se status if a defendant is sufficiently disruptive or if delay becomes the chief motive.

Madsen, 168 Wn.2d at 509 fn. 4.

In this case, Floyd continually expressed his frustration with his former attorneys, the prosecutor and with the court for what he believed was mismanagement and delay of his case and discovery and due process violations, with the court's refusal to allow him to present evidence or witnesses he believed were relevant, and with the court's refusal to rule on motions he felt had merit. (9/13/10AM RP 5-23; 12/02/10 RP 3-20; 12/29/10AM RP 5-6; 3/28/11 4-8, 14-16; TRP5 542-62; TRP6/7 685-92, 701-02) But Floyd remained

largely silent during the State's presentation of its evidence and examination of its witnesses.

Problems arose during Floyd's cross-examination of the State's witnesses and during presentation of the defense case, when Floyd asked inappropriate questions or attempted to elicit irrelevant or inadmissible evidence. The trial court repeatedly admonished Floyd to follow court rules and proper courtroom procedures. Floyd often seemed confused and frustrated when he was unable to ask questions in the manner he wanted, or when he was told that he could not present evidence he felt was necessary to proving his innocence. But Floyd remained respectful and tried to follow the court's instructions, and the trial progressed to closing arguments. (TRP3 236-42 TRP3 237-38, 240-41, 246-47, 252, 257, 337-38, 334-35, 382, 384, 394 TRP4 412-13, 417, 435, 448-49, 453, 493; TRP5 538, 542-62, 571-76; 580-81, 584)

During Floyd's closing statement, he began to ramble and mentioned several facts that were not testified to at trial. (TRP6/7 732-39) The trial court admonished Floyd to argue facts in evidence and the proper law, and not to testify as to new facts. (TRP6/7 732-39) When Floyd expressed confusion and sought clarification, the trial court stopped the proceedings and excused

the jury. (TRP6/7 739) The court stated:

> So at this point in time, I think [Floyd] is intentionally doing what he can to scuttle the trial. He refuses to argue the facts that have been presented into evidence and the law. He insists to want to talk about everything but the evidence.
>
> At this point in time, I am either contemplating terminating his closing argument or, [standby-counsel], appointing you to . . . complete his closing argument.

(TRP6/7 740) The trial court expressed frustration that Floyd "has consistently showed an inability to follow or respect the Court's directions." (TRP6/7 743) Floyd explained that he was not trying to disrupt the proceedings, stating: "All I want to do is just show them what happened that night." (TRP6/7 745)

When asked whether he could complete closing arguments on Floyd's behalf, stand-by counsel stated that he could, but that his argument and theory of the case would be directly opposite from Floyd's and from what Floyd would argue. (TRP6/7 740-41)

The court then asked Floyd whether he wanted "one more chance," and Floyd stated that he did, and would discuss his closing with stand-by counsel to be sure that he did not violate the court's rules or say anything inappropriate. (TRP6/7) But the court decided instead to reappoint stand-by counsel to complete the trial. (TRP6/7 747)

The trial court showed a great deal of patience with Floyd throughout the trial. But a review of the record shows that Floyd was not purposefully trying to disrupt or delay the proceedings. He was eager to go to trial. He did not interrupt the State's presentation of its case, and the trial proceeded almost to conclusion with Floyd acting pro se. Like the defendant in Madsen, Floyd was trying to address issues and present evidence that he truly believed would result in his acquittal. But denial of pro se status is not warranted simply because Floyd was "unfamiliar with legal rules" or because he may have been "obnoxious" during the trial process. Madsen, 168 Wn.2d at 509.

The record does not show that Floyd was "sufficiently disruptive" or that delay was his "chief motive," such that reappointment of counsel was necessary or warranted. Madsen, 168 Wn.2d at 509 fn. 4. And Floyd's behavior during closing was not so disruptive that other, less drastic sanctions could not have cured the problem. Therefore, the trial court's decision to deny Floyd the right to complete his trial pro se was improper.

"The unjustified denial of this [pro se] right requires reversal." State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Therefore, Floyd's convictions should be reversed.

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THAT FLOYD HAD KNOWLEDGE OF THE NO-CONTACT ORDER, WHICH IS AN ESSENTIAL ELEMENT OF THE CRIME OF VIOLATING A NO-CONTACT ORDER

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

An individual commits a misdemeanor violation of a court order when a no-contact order has been granted and the person restrained by the order knows of its existence and has contact in violation of its provisions. RCW 26.50.110(1). An essential element of the crime is that the defendant "knew of the existence" of the order. WPIC 36.51; RCW 26.50.110(1).

Proof of this element has been found sufficient when, for example, the State presented a return of service showing personal service upon the defendant. State v. Phillips, 94 Wn. App. 829, 833, 974 P.2d 1245 (1999). Similarly, the court found sufficient evidence of knowledge where the protected party's attorney mailed copies of a proposed order and notice of the presentment hearing to the defendant, then mailed the defendant a copy of the signed order, neither of which were returned as undeliverable, and the defendant admitted knowing about the restraining order. State v. Van Tuyl, 132 Wn. App. 750, 757, 759, 133 P.3d 955 (2006).

In this case, the State presented a copy of a no-contact order entered in this cause number in open court on January 4, 2010. (Exh. P70) In closing arguments, the State pointed to a signature on the "Defendant" signature line at the end of the document, and told the jury that this proved Floyd received and signed the document, and that he had knowledge of its existence and its terms. (TRP6/7 722)

However, the prosecutor's assertions aside, there was no evidence presented to the jury that established that the signature was in fact Floyd's. There was no evidence presented that Floyd was present at the hearing when the order was entered, that

anyone saw him receive and/or sign the document, or that the signature on the document matched a signature known to be Floyd's signature. The mere existence of the order was all that the State presented. This is insufficient to prove that Floyd "knew of the existence" of the order, and therefore the State failed to establish all the essential elements of the crime of violating a no-contact order. Floyd's six misdemeanor convictions for this crime must be reversed and dismissed.

C. FLOYD'S 1972 ROBBERY CONVICTION SHOULD NOT BE USED FOR ANY SENTENCING PURPOSE BECAUSE IT IS CONSTITUTIONALLY INVALID ON ITS FACE

In order to establish Floyd's offender score, and in an attempt to establish that Floyd is a persistent offender, the State presented evidence of a 1972 Pierce County Superior Court robbery conviction. (CP 272-316) Floyd challenged the use of this conviction, arguing that it was constitutionally invalid on its face because the information and jury instructions did not properly list the elements of the crime. (SRP 62-65; CP 441-45)

In 1972, Robbery was defined in RCW 9.75.010 as follows: "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person

or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery."

The 1972 Information charging Floyd with robbery alleges the following:

> [That Floyd] unlawfully and feloniously, ~~while armed with a pistol,~~ [did] take personal property from the person or in the presence of John Edward Noland, the owner thereof, against his will or by means of force or violence or fear of immediate injury to his person.

(CP 272)[2] The information misstates the elements of robbery, and this misstatement is repeated in the jury instructions. (CP 279) By including an "or" between the phrases "against his will" and "by means of force," the information and instructions abandon the required element that the taking is done by "force or violence or fear of injury." As charged and instructed, Floyd's conviction only required proof that Floyd took the personal property against Noland's will.

Floyd argued that the defects in the information and jury instructions rendered the conviction constitutionally invalid. See State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000) (both State and Federal Constitutions are violated when the Information does

[2] The words "while armed with a pistol" appear to have been stricken out and initialed in the original document. (CP 272)

not contain all the elements of the offense). The trial court agreed that the prior robbery conviction was not valid when entered because of these defects, and it could therefore not be considered a "strike" offense. (SRP 105-06)

However, the trial court still included the robbery offense in Floyd's offender score calculation, stating: "So my constitutional analysis of the Robbery has application to the persistent offender provision alone but not for other purposes." (SRP 107-08) The court was incorrect.

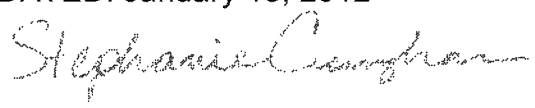
If a conviction is unconstitutional on its face, as the Court correctly found to be the case with Floyd's 1972 robbery conviction, then it cannot be used for *any* sentencing purpose. See State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986); State v. Morley, 134 Wn.2d 588, 614, 952 P.2d 167 (1998). Accordingly, the 1972 robbery conviction should not have been included in Floyd's offender score calculation. Floyd's case should be remanded for resentencing with a corrected offender score.

V. CONCLUSION

The trial court violated Floyd's fundamental right to represent himself when it terminated his pro se status simply because of frustration with Floyd's inept closing argument. The trial court's

frustration did not outweigh Floyd's right to represent himself, and the denial of this right requires reversal of Floyd's convictions. Additionally, the State failed to present any evidence to prove that Floyd had knowledge of the existence and terms of the no-contact order, and his misdemeanor convictions for violating that order must be vacated. Alternatively, the constitutionally invalid 1972 robbery conviction should not have been included in Floyd's offender score, and he must be resentenced.

DATED: January 13, 2012



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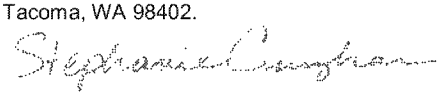

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