

71204-7

71204-7

No. 71204-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

FILED
NOV 21 11:20 AM '09
CLERK OF COURT
APPELLATE DIVISION
1000 4TH AVENUE
SEATTLE, WA 98101

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT..... 6

The State did not prove beyond a reasonable doubt that Mr. Gelin was armed with a “deadly weapon” during commission of the crimes..... 6

1. The State was required to prove beyond a reasonable doubt that the assailant was armed with a deadly weapon 6

2. The State did not prove beyond a reasonable doubt that Mr. Gelin was armed with a hammer 9

E. CONCLUSION..... 10

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3	6
U.S. Const. amend. XIV	6

Cases

<u>Alabama v. Smith</u> , 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).....	10
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	6
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .	6
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	6, 7
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	10
<u>State v. Colquitt</u> , 133 Wn. App. 789, 137 P.3d 892 (2006)	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7, 10
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	6

Statutes

RCW 9.94A.533(4)	5, 6, 8
RCW 9.94A.825	6
RCW 9A.04.110(6)	8
RCW 9A.36.011(1)(a)	7
RCW 9A.52.020	4, 7

A. ASSIGNMENT OF ERROR

The State did not prove beyond a reasonable doubt that a deadly weapon was used to commit the offenses.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

When the use of a deadly weapon is an element of the crime charged, or when the State seeks to impose a deadly weapon enhancement at sentencing, the State must prove beyond a reasonable doubt the defendant was armed with a “deadly weapon” during commission of the crime. Here, the State alleged Milord Gelin was armed with a hammer during a burglary and an assault. But the police never found a hammer, and the complaining witness did not clearly see a hammer during the incident. Did the State fail to prove beyond a reasonable doubt that Mr. Gelin was armed with a hammer?

C. STATEMENT OF THE CASE

Milord Gelin and Laurie Williams had a romantic relationship and lived together for about a year and nine months. 7/22/10RP 317-18. Then the couple broke up and Ms. Williams moved to a townhouse in Kirkland with her 14-year-old daughter Taylor Williams. 7/21/10RP 249; 7/22/10RP 318, 324-25.

On October 12, 2009, at around 3 a.m., Mr. Gelin entered Ms. Williams's home to retrieve some of his tools, papers and other personal effects that Ms. Williams was keeping at her townhouse. 7/28/10RP 814, 817. He had asked her earlier if he could come by to collect his things but she refused. 7/28/10RP 817. That is why he entered the home in the middle of the night. 7/28/10RP 817. First he entered the garage by opening the garage door with the door opener, and then he pulled back a piece of sheetrock from the wall and entered the house through the hole he created. 7/28/10RP 819-20, 832-33. He did not use a hammer to create the hole in the wall and did not have a hammer in his hands when he entered the house. 7/28/10RP 835.

Mr. Gelin found some of his things in the garage but he did not find all of his papers and the other things that he needed. 7/28/10RP 822-24, 833. He knew Ms. Williams kept important papers in a box under the bed and he thought his papers might be there. 7/28/14RP 842-43. He entered her bedroom, where she was sleeping. 7/28/10RP 847-49. He did not have a hammer in his hands. 7/28/10RP 848.

Mr. Gelin saw the box under the bed and was about to cross to the other side of the room to retrieve it when Ms. Williams woke up. 7/28/10RP 849. She jumped up, then fell down. 7/28/10RP 849. Ms.

Williams fought with Mr. Gelin and he pushed her, trying to get away. 7/28/10RP 850-51. She fell into a table, injuring herself. 7/28/10RP 855. Mr. Gelin did not strike her with a hammer. 7/28/10RP 855.

Ms. Williams said she woke up to find a man sitting on her bed. 7/22/10RP 338. His face seemed distorted as if he were wearing a stocking and she did not recognize him. 7/22/10RP 338-39. She shot up out of bed and screamed. 7/22/10RP 339-40. She said the man hit her with some kind of object on the head, and then continued to hit her with the object on other parts of her body. 7/22/10RP 340-45.

Ms. Williams did not clearly see the object she said the man hit her with. 7/22/10RP 341. There was only a dim light in her room. 7/22/10RP 374. She said she saw “the shadow of [a] hammer” and believed she was being hit with both the head and the claw portion of a hammer. 7/22/10RP 341, 375-76. A hand surgeon who later treated Ms. Williams said her injuries could have been caused by a hammer but also could have been caused by other things. 7/26/10RP 470, 488, 493.

Taylor’s bedroom was down the hall from her mother’s. 7/21/10RP 259. She awoke to hear her mother screaming. 7/21/10RP 258. She opened her door and saw Mr. Gelin run out of her mother’s bedroom. He ran down the hall and then down the stairs. 7/21/10RP

259-60. She did not see anything in his hands. 7/22/10RP 288. She went into her mother's room and saw that her mother was bleeding and had a torn shirt. 7/21/10RP 260.

The police searched the home but did not find a hammer. 7/21/10RP 222; 7/22/10RP 419-20. The police never found a hammer or other deadly weapon.

The State charged Mr. Gelin with one count of first degree burglary, alleging he unlawfully entered a building with intent to commit a crime, and that in entering or while in the building he was armed with a deadly weapon and assaulted Ms. Williams. CP 15-17 (citing RCW 9A.52.020). The State also charged Mr. Gelin with one count of first degree assault, alleging that, with intent to inflict great bodily harm, he assaulted Ms. Williams with a deadly weapon and with the force and means likely to produce great bodily harm or death.¹ CP 15-17 (citing RCW 9A.35021(1)(a)). For both counts, the State specifically alleged that the "deadly weapon" used was a hammer. CP 15-17. The State also alleged deadly weapon enhancements for both

¹ The State also charged Mr. Gelin with one count of attempted murder but the jury acquitted him of that charge. CP 15-17, 19-26. In addition, the State charged Mr. Gelin with one count of theft of a motor vehicle, for allegedly stealing Ms. Williams's vehicle as he was fleeing the home, but that conviction is not at issue in this appeal. CP 15-17.

counts, as well as the statutory aggravating factor that the crime was committed within the sight or sound of the victim's or the offender's minor child. CP 15-17 (citing RCW 9.94A.535(3)(h)(ii)).

Following a jury trial, Mr. Gelin was convicted of first degree burglary and first degree assault as charged. CP 19-26. At sentencing, the court imposed deadly weapon enhancements for both counts. CP 20. The court also imposed an exceptional sentence range based on the jury's finding of the aggravating circumstance. CP 20, 22.

Mr. Gelin appealed, arguing that the jury was incorrectly instructed regarding the unanimity requirement for the statutory aggravating factor. This Court affirmed. CP 31-38. A mandate was issued, with direct review terminated on June 7, 2013. CP 30.

A resentencing hearing was held on October 2, 2013, with Mr. Gelin present represented by counsel. 10/02/13RP 5-6. The purpose of the hearing was to correct errors in the sentence. 10/02/13RP 6. The court had imposed an erroneous sentence by not ordering the two deadly-weapon enhancements to be served consecutively to each other and consecutively to the base sentence.² CP 19-26. An amended judgment and sentence was filed on October 2, 2013. CP 39-45.

² See RCW 9.94A.533(4) ("If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements

Mr. Gelin filed a notice of appeal from the amended judgment and sentence. CP 46.

D. ARGUMENT

The State did not prove beyond a reasonable doubt that Mr. Gelin was armed with a “deadly weapon” during commission of the crimes

1. *The State was required to prove beyond a reasonable doubt that the assailant was armed with a deadly weapon*

Constitutional due process requires that the State bear the burden to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. In addition, when the State alleges a deadly weapon sentencing enhancement, it bears the burden to prove the enhancement beyond a reasonable doubt. See State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); RCW 9.94A.825.

must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement.”); RCW 9.94A.533(4)(e) (“all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter”).

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In order to find a defendant guilty beyond a reasonable doubt, the trier of fact must “reach a subjective state of near certitude of the guilt of the accused.” Jackson, 443 U.S. at 315. On review, the Court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

To prove the charged crimes of first degree burglary and first degree assault, the State was required to prove beyond a reasonable doubt that Mr. Gelin was “armed with a deadly weapon” while committing the crimes. RCW 9A.52.020; RCW 9A.36.011(1)(a); Sub #87³ at 12, 33. Similarly, to prove the deadly weapon sentencing enhancements, the State was required to prove Mr. Gelin was “armed

³ Sub #87 is the court’s jury instructions. A supplemental designation of clerk’s papers has been filed for this document.

with a deadly weapon at the time of the commission of the crime.”

RCW 9.94A.533(4); Sub #87 at 55.

For purposes of the substantive offenses, “deadly weapon” was defined as “any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” Sub #87 at 16; RCW 9A.04.110(6).

For purposes of the sentencing enhancements, “deadly weapon” was defined as:

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 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.

Sub #87 at 55; RCW 9.94A.825.

In this case, the State specifically alleged, and the deputy prosecutor argued at trial, that the “deadly weapon” used was a hammer. CP 15-17; 7/29/10RP 1002-04, 1007, 1013-14.

2. *The State did not prove beyond a reasonable doubt that Mr. Gelin was armed with a hammer*

The police searched Ms. Williams's home but never found a hammer. 7/21/10RP 222; 7/22/10RP 419-20. Mr. Gelin did not have a hammer at the time of his arrest. 7/27/10RP 714-17. The police never recovered a hammer or any other deadly weapon and no deadly weapon was presented at trial.

Ms. Williams's injuries could have been caused by a hammer but they could have been caused by something else. 7/26/10RP 470, 488, 493. Mr. Gelin said he was not carrying a hammer at any time during the incident and did not strike Ms. Williams with a hammer. 7/28/10RP 835, 848, 855. He thought Ms. Williams might have been injured during their scuffle in the bedroom, perhaps when she fell against a table. 7/28/10RP 849, 855.

Ms. Williams did not clearly see a hammer. 7/22/10RP 341. Her room was dimly lit. 7/22/10RP 374. She said she saw only the "shadow of [a] hammer." 7/22/10RP 341, 375-76. Taylor did not see anything in Mr. Gelin's hand when he passed her room in the hallway. 7/22/10RP 288.

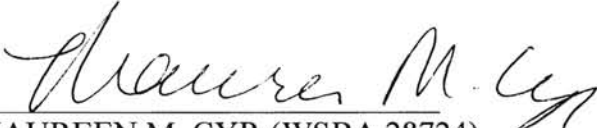
Because the State never produced a hammer, and Ms. Williams did not clearly see a hammer, the State did not prove beyond a

reasonable doubt that Mr. Gelin was armed with a hammer. The absence of proof beyond a reasonable doubt of an element of the crime requires reversal and dismissal. Jackson, 443 U.S. at 319; North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); Green, 94 Wn.2d at 221. Reversal and dismissal are required here.

F. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Mr. Gelin was armed with a “deadly weapon” during commission of the crimes, the convictions for first degree burglary and first degree assault must be reversed and the charges dismissed, and the deadly weapon enhancements must be vacated.

Respectfully submitted this 20th day of November, 2014.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71204-7-I
v.)	
)	
MILORD GELIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING 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:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] MILORD GELIN 343765 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584-0974</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF NOVEMBER, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710