

FILED
January 7, 2016
Court of Appeals
Division I
State of Washington NO. 73163-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LORENZO STEWART,

Appellant.

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

The Honorable Monica Benton, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT'S INSTRUCTIONS GUARANTEED STEWART WAS CONVICTED OF AN UNCHARGED ALTERNATE MEANS AND REVERSAL IS THEREFORE REQUIRED.

Lorenzo Stewart was charged with first degree robbery on grounds he *displayed* what appeared to be a deadly weapon during the commission of the robbery. However, the state proposed and the court gave instructions that directed the jury to convict if it found Stewart was *armed* with a deadly weapon during the commission of the robbery. Due to this discrepancy, Stewart argued his constitutional right to notice was violated and required reversal of his conviction and accompanying sentencing enhancement. Brief of Appellant (BOR) at 11-15; U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; In re Personal Restraint of Brockie, 178 Wn.2d 532, 537, 309 P.3d 498 (2013) (right to notice violated where Brockie charged with display of what appeared to be a firearm but was jury instructed on additional means of being armed).

In response, the state "acknowledges the authorities that hold it is error to instruct a jury on an uncharged alternative means

of committing an offense.” Brief of Respondent (BOR) at 12.

Nonetheless, the state argues that:

Under the unusual circumstances of this case, the fact that Stewart was charged with the sentencing enhancement of being armed with a deadly weapon put him on notice that he must defend against the allegation of being armed with a deadly weapon at the time he committed the crime, and therefore, the jury instruction at issue, if error, was not reversible error.

BOR at 11.

The state’s argument should be rejected because a sentencing enhancement allegation is not a separate charge unto itself. It only comes into play if the jury first finds the underlying offense proven beyond a reasonable doubt. As the jury was instructed:

You will also be given a special verdict form for the crime of Robbery in the First Degree. If you find the defendant not guilty of Robbery in the First Degree do not use the special verdict form. If you find the defendant guilty of Robbery in the First Degree, 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.

CP 43.

Thus, depending on the circumstances of the case, it could be a reasonable defense strategy to work on creating reasonable doubt as to the underlying element of *displaying* what appeared to

be a deadly weapon. If there is no conviction on the underlying offense, the enhancement is a non-issue.

In fact that was a reasonable strategy in this case, based on the testimony. After his arrest, deputy McNaughton asked Stewart why he pulled a knife on Miller. 3RP 27. Stewart denied pulling a knife on Miller but acknowledged he had a knife in his possession:

I carry a knife every day, it is my God given right to carry a knife. That man had no right to put his hands on me. If I would have slashed a knife at that man, you wouldn't have been able to talk to him.

3RP 28.

This testimony supports an argument there was no “display” of a weapon. However, because Stewart admittedly carried a knife, it would be less likely to create reasonable doubt as to the alternate means of committing robbery by being armed. Brockie, at 538 (“Similarly, a person may be armed with, but not display, a deadly weapon (such as a gun hidden in a person’s pocket).” Thus, while Stewart had notice of the enhancement, this Court should reject the state’s argument that it somehow provided him with notice the state would be relying on the alternative means of being armed for purposes of the underlying offense – without which there could be no enhancement.

The state concedes that instructing the jury on an uncharged alternate means is presumed prejudicial unless the state can show that the error was harmless. BOR at 17 (citing Brockie, at 538-39; State v. Bray, 52 Wn. App. 30, 34-36, 756 P.2d 1332 (1988)). The state recognizes that “[u]nder this approach, to show that the error was harmless the State would have to establish that the conviction could only have been based on the charged offense, not the uncharged alternative means.” BOR at 17. Most importantly, the state concedes Stewart was found guilty based on the only means on which the jury was instructed – that Stewart was armed with a deadly weapon. BOR at 17. That should put an end to any harmless error argument.

Yet, the state urges that because Stewart was charged with a sentencing enhancement which mirrors the language of the uncharged alternate means for which Stewart was convicted in this case, this Court should find the error harmless. Not only is there no support for the state’s argument, but it should be rejected for the reasons stated above. It would have been a reasonable defense strategy, based on the means charged, to focus the defense case on creating reasonable doubt of the “display” element of the underlying charge.

2. THE INSTRUCTIONS RELIEVING THE STATE OF ITS BURDEN TO PROVE ALL ELEMENTS OF THE DEADLY WEAPON ENHANCEMENT CONSTITUTE MANIFEST CONSTITUTIONAL ERROR AND REQUIRE REVERSAL.

(i) The Deadly Weapon Enhancement Instructions Eased the State's Burden of Proof and Constitute Manifest Constitutional Error.

For purposes of the deadly weapon enhancement, the state was required to prove Stewart possessed a deadly weapon, which is defined as:

[A] deadly weapon is an implement or instrument which 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 included in the term deadly weapon: . . . any knife having a blade longer than three inches[.]

RCW 9.94A.825.

Here, the jury was instructed:

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 crime.

A knife having a blade longer than three inches is a deadly weapon.

CP 40.

The jury was given the definition of “deadly weapon” that applies to robbery, not the one pertaining to the sentencing enhancement, and provides:

Deadly weapon means 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.

CP 12; WPIC 2.06.01 (2005) (emphasis added).

In his opening brief, Stewart argued the combination of these instructions eased the state’s burden to prove the enhancement. Looking to the former instruction (CP 40), jurors were merely directed that one example of a deadly weapon is a knife that has a blade longer than three inches. Jurors were not instructed they must find the knife in question did in fact have a blade longer than three inches. And it is entirely possible jurors doubted the knife that was admitted into evidence was in fact the knife Miller claimed was pulled on him.

In that instance, jurors logically would look to the latter instruction defining “deadly weapon” (CP 12). The problem is this instruction did not require jurors to find the knife “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.” RCW 9.94A.825.

Thus, jurors could have convicted Stewart of the sentencing enhancement without finding the knife had a blade longer than three inches and without finding it was used in a manner likely to produce death. In short, the instructions allowed the jury to convict merely if it found that Stewart possessed a knife that was readily capable of causing *substantial bodily harm*. BOA at 18.

In response, the state argues this Court should decline to review the issue because:

Moreover, on appeal Stewart does not even acknowledge that he failed to object to the instruction at trial, and he makes no attempt to establish, which is his burden to do, that the alleged error was constitutional and manifest. Under such circumstances, a reviewing court should refuse even to address the matter.

BOR at 21 (citation omitted).

The state is wrong. Due process requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; In re Matter of Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The same is true of sentencing enhancements. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004). Jury instructions that relieve

the State of its burden to prove every element of an offense violate due process. State v. Thomas, 150 Wash.2d 821, 844, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, such errors affect a constitutional right and may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Chino, 117 Wash.App. 531, 538, 72 P.3d 256 (2003).

And contrary to the state's mischaracterization, Stewart did raise the issue as constitutional. Stewart's Assignment of Error 2 states: "The court's instructions on the deadly weapon enhancement eased the state's burden of proof as to whether the alleged knife qualified as a 'deadly weapon.'" BOA at 1.

As set forth in the argument section for Assignment of Error 2 of Stewart's opening brief:

In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court held that, under the Sixth Amendment, any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Thus, in order to increase a defendant's penalty under Washington's sentencing enhancement statutes, the state must first prove to the jury beyond a reasonable doubt that the defendant engaged in the conduct proscribed under the applicable sentencing enhancement statute.

BOA at 16.

And finally, after explaining exactly how the instructions eased the state's burden, Stewart concluded: "This was constitutional error." BOA at 18. Thus, the state's argument Stewart made no attempt to show the error was constitutional is unsupported and should be rejected.

This Court should likewise reject the state's argument Stewart made no attempt to show the error was manifest. As indicated above, instructions which relieve the state of its burden of proof may be raised for the first time on appeal. It is the state's burden to prove harmlessness. State v. Cook, 69 Wn. App. 412, 418, 848 P.2d 1325 (1993).

Regardless, Stewart in fact has shown the constitutional error was manifest. "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wash.2d 918, 935, 155 P.3d 125 (2007). To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Kirkman, 159 Wash.2d at 935.

The instructional error here had practicable and identifiable consequences in the trial of the case. No knife was found in Stewart's possession when he was apprehended. Although police

dog Hobbs found a knife that was along the route Stewart allegedly ran while trying to get away, no fingerprints were recovered from the knife. Nor did store security specialist Miller ever identify the knife as the knife Stewart allegedly pulled on him. And Miller's description of the knife Stewart allegedly pulled was vague and confusing. Miller testified the knife was "the length of my hand folded, so probably about four and a half, five inches." 3RP 71. But he didn't say if he was describing the blade itself or the entirety of the knife, including the handle. Therefore, the jury could have doubted the knife presented by the state was in fact the knife that was used. Moreover, jurors could have doubted that Miller's description was of a knife with a blade of longer than three inches.

Despite doubts about Hobbs' knife being the knife, however, jurors may have believed some kind of knife was used. In that circumstance, jurors would have looked to the definition of "deadly weapon," which required jurors to agree only that the manner in which the knife was used was readily capable of causing "substantial bodily harm." CP 12. This is a practicable and identifiable consequence of the constitutional error in the enhancement instructions. It is also why the state cannot show the error is harmless. BOA at 19-20.

Contrary to the state's argument, State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2006) is nowhere near "virtually identical to the case at bar." BOR at 21. Eckenrode dealt with the nexus requirement for being "armed" with a firearm, which requires the state to prove not only the elements of being armed with a firearm, i.e. that a firearm was easily accessible and readily available for use, but there was a connection between the defendant, the crime and the weapon. Eckenrode, 159 Wn.2d at 490. This "nexus" requirement has evolved through case law as a means to harmonize the "Hard Time for Armed Crime Act" with the right to bear arms, to ensure that people are not punished merely for exercising this constitutional right. Eckenrode, 159 Wn.2d at 490.

As such, it is not comparable to an element the state must prove to the jury beyond a reasonable doubt, such as the existence of an operable firearm or a weapon that qualifies as "deadly." See e.g. State v. Pierce, 155 Wn. App. 701, 230 P.3d 237 (2010) ("Moreover, the trial court instructed the jury on deadly weapon enhancements and not firearm enhancements. Thus, the jury was not required to find that the alleged firearm was operable. Accordingly, we hold that the sentencing court exceeded its

authority by entering a sentence that does not reflect the jury's findings."); State v. Recuenco, 163 Wash.2d 428, 439, 180 P.3d 1276 (2008); accord State v. Williams–Walker, 167 Wash.2d 889, 225 P.3d 913 (2010); In re Pers. Restraint of Delgado, 149 Wash.App. 223, 237, 204 P.3d 936 (2009).

(ii) State's Burden to Prove Harmlessness

Alternatively, the state argues that this Court should reject Stewart's constitutional challenge on the merits because "[t]he only knife admitted into evidence, or even mentioned in the case, had a four-inch blade, a per se deadly weapon." BOR at 22. However, that knife was neither found in Stewart's possession nor identified by Miller. Nor were any fingerprints recovered from it. It would not be unimaginable for a juror under these circumstances to have a reasonable doubt the knife Hobbs found was the knife actually involved in the incident.

After describing the special verdict instruction (CP 40), the state further argues:

Stewart now argues that based on this instruction, to which he did not object at trial, "jurors could have convicted Stewart of the sentencing enhancement without finding the knife had a blade longer than three inches and without finding that the knife was used in a manner likely to produce death." Brief of Appellant at 18. Stewart's argument relies on

speculation that the jury may have believed that Stewart pulled a knife on Miller, but that the knife pulled was not the knife with a four-inch blade that was admitted into evidence. Therefore, according to his argument, the jury instruction should have included the “manner of use” language. Stewart’s argument depends on utter speculation, not on the evidence in this case.

BOR at 24 (emphasis added).

Interestingly, the state does not argue it is not possible this is in fact what happened. Rather, the state argues it is speculation. But the state is forgetting who has the burden here. Constitutional error is presumed prejudicial and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013). Speculation aside, the state cannot prove what Stewart argues did not in fact happen. In other words, the state cannot carry its burden.

3. STEWART WOULD HAVE BEEN ENTITLED TO A NEXUS INSTRUCTION HAD HE REQUESTED ONE.

The state claims Stewart did not receive ineffective assistance of counsel by his attorney’s failure to request a “nexus” instruction, on grounds he would not have been entitled to one. BOR at 28. As a general rule, however, the Court looks at the evidence in the light most favorable to the proponent of the instruction. See e.g. State v. Corey, 181 Wash. App. 272, 276, 325

P.3d 250, 253, review denied, 181 Wash. 2d 1008, 335 P.3d 941 (2014) (When determining whether the evidence at trial was sufficient to support the trial court's giving of a lesser-degree offense jury instruction, we view the supporting evidence in the light most favorable to the instruction's proponent); State v. Fernandez–Medina, 141 Wash.2d 448, 455–56, 6 P.3d 1150 (2000) (same); State v. Walden, 131 Wash. 2d 469, 473, 932 P.2d 1237, 1239 (1997) (To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense).

Stewart testified:

I carry a knife every day, it is my God given right to carry a knife. That man had no right to put his hands on me. If I would have slashed a knife at that man, you wouldn't have been able to talk to him.

3RP 27-28.

Viewed in the light most favorable to Stewart, his statement supports an inference he merely possessed a knife and did not pull it on Miller. A person is not “armed” merely by virtue of possessing a weapon. Therefore, it would have been appropriate for the court to instruct the jury – had defense counsel asked – there must be

some nexus between the defendant, the weapon, and the crime. Eckenrode, 159 Wn.2d at 494.

Counsel's failure to request the instruction was deficient under the circumstances of this case. Without the instruction, there is a "reasonable probability" the jury answered "yes" to the special verdict based solely on Stewart's admission to carrying a knife. Stewart was denied his right to effective assistance of counsel. See In re Crace, 174 Wash. 2d 835, 841-42, 280 P.3d 1102, 1106 (2012).

As the state points out, Stewart described this outcome in his opening brief as a "possibility" that undermines confidence in the outcome. BOA at 24. This was an unfortunate and/or inarticulate word choice, as the test is one of "reasonable probability." Crace, at 841-42. Stewart should not be penalized for his attorney's poor choice of words. The issue is whether he received ineffective assistance of counsel. That issue is properly before this Court.

C. CONCLUSION

Because Stewart was convicted of an uncharged alternate means of committing robbery, this Court should reverse his robbery conviction and accompanying deadly weapon enhancement. Alternatively, this Court should reverse Stewart's deadly weapon enhancement because the court's instructions eased the state's burden to prove all elements of the enhancement. Finally, this Court should reverse the enhancement because Stewart's attorney failed to request a "nexus" instruction, which resulted in a reasonable probability the jury answered "yes" to the special based solely on his admission to carrying a knife.

Dated this 7th day of January, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 73163-7-1
)	
LORENZO STEWART,)	
)	
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 7TH DAY OF JANUARY, 2016, 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] LORENZO STEWART
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SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JANUARY, 2016.

X *Patrick Mayovsky*