

No. 66610-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW ARCHULETA,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The juvenile court erred in declining jurisdiction.

I certainly don't want to be responsible in four or five years for someone who bides his time and gets out and reups, if you will, with the philosophies has had up to now and decides to shoot somebody. You know my name will be attached to that. . . . I'm not saying it is Mr. Archuleta's fault, but its reality.

1/19/10 RP 140. Thus the juvenile court declined jurisdiction of Andrew's case.

The State acknowledges the trial court's oral ruling is sparse, and allows that the court's findings were merely conclusions. Brief of Respondent at 11. While Andrew agrees the trial court's findings are wholly inadequate, he disagrees with the State's characterization of the record in one respect. Andrew contends the record fully explains the trial court findings and motivation and those motivations are captured in the above quoted portion of the court's ruling. Thus, the record of the court consideration of the relevant factors is "sparse" simply because the court did not consider many of the factors at all and only superficially addressed the remaining factors.

On appeal, as it did below, the state points to the seriousness of the crime as the beginning and the end of the analysis. Thus, the State contends the crime was "very serious," Brief of Respondent at 12; the acts "denote a calculated and deliberate mental state;" *Id.* at 13; the crimes was

against a person. Id. But the same is true of attempted first degree murder, and yet the legislature has not mandated decline for that offense when it is committed by a 15 year-old. Thus, the State must be able to point to something other than the crime itself to differentiate this case from other attempted first degree murder cases that justifies declination. The State has not done so.

As explained above and in Andrew's prior briefing, the juvenile court abused its discretion in declining jurisdiction. This Court must reverse the order declining jurisdiction.

2. The declination procedure violated Andrew's Sixth and Fourteenth amendment rights because he was subjected to a significant increase in punishment based on facts found by a judge by a preponderance of the evidence.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment guarantees the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional provisions guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment

– whether or not the fact is labeled an “element.” Apprendi v. New Jersey, 530 U.S. 466, 476, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 490 (internal citations omitted). The State cannot dispute that decline decision “increase[d] the prescribed range of penalties to which [Andrew was] exposed” the Sixth and Fourteenth Amendment required the facts supporting that decision be found by jury beyond a reasonable doubt. Indeed, the maximum sentence Andrew could receive prior to the decline decision was about 5 years. Following that decision and based upon the same charges, he faced a standard range sentence of up to 35 years and could not receive sentence of less than 10. The facts that trigger that increase in the range of punishment must be found by jury beyond a reasonable doubt.

The State offers little in response to the Sixth and Fourteenth Amendment analysis Andrew has provided in his opening brief. The State does point to this Court decision in State v. H.O., in which this Court rejected a similar argument saying:

We do not read Apprendi and Ring [v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 Ed.2d 556 (2002)] as broadly as does H.O. In those cases, either the guilt or the sentence of

an accused was at issue. Neither guilt nor sentencing is at issue at the decline hearing.

State v. H.O., 119 Wn.App. 549, 554-55, 81 P.3d 883 (2003), review denied, 152 1019 (2004). But at the time this Court decided H.O. neither this Court nor any other Court believed Apprendi and Ring had any application to any proceeding in Washington. For example, the Washington Supreme Court had concluded Apprendi did not apply to exceptional sentences. State v. Gore, 143 Wash.2d 288, 311-12, 21 P.3d 262 (2002). After Blakely, decided about six months after H.O., that conclusion was no longer defensible. Thus the problem in H.O. was not that the appellant gave too broad a reading to Apprendi and Ring, rather the problem was that Washington Court's had provided too narrow a reading.

H.O. is at best a relic of a thoroughly discredited Sixth-Amendment jurisprudence. This Court should be disinclined to rely on pre-Blakely caselaw to define the scope of the Sixth Amendment.

The State fancifully speculates that to apply the Sixth and Fourteenth Amendments to factual findings resulting in a 600% increase in a person's sentence will require application of the jury-trial right to every judicial decision whether it actually effects punishment or not. See Brief of Respondent at 22. A decline decision does not merely have a

potential or speculative impact on the maximum sentence a child faces. Instead in this instance, based solely upon the decline decision, Andrew's maximum sentence increased from about 6 years to 35 years. Indeed, once the decline decision was made, there were no circumstance in which Andrew's sentence could be less than 10 years. That is a concrete and significant impact which flows directly from a judicial finding by mere preponderance of the evidence. That direct increase in punishment simply does not result from a decision to admit evidence as the State claims.

The Supreme Court has made clear that regardless of what one calls a fact – an “element,” a “sentencing factor,” a “forum factor,” or something else – an individual has a right to have “all facts legally essential to the punishment” proved to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 313 (emphasis added).

3. The deputy prosecutor's flagrant misconduct in closing requires reversal of Andrew's convictions.

Deputy prosecutor Karissa Taylor argued in this case that Andrew's defense was “smoke and mirrors” and insinuated the defense has actively tried to deceive the jury. 10/27/10 RP 103. But the State's improper comments did not stop at suggesting only that present defense counsel was deceiving the jury, rather Ms. Taylor went further and said “that's the job.” Id. Ms. Taylor's comments regarding the requirements

of the Sixth Amendment tells the jury to negatively view the exercise of that right. Ms. Taylor's suggestion that defense counsel's role was to deceive the jury violated Andrew's Sixth Amendment right to counsel.

But, Ms. Taylor's did not stop there. Instead, she then immediately contrasted her own role saying "My job is different . . . my job is the put the evidence on the stand that I believe is relevant in this case." 10/27/10 RP 103.

As it must, the State concedes that Ms. Taylor's comments were improper. Brief of Respondent at 23. But the State contends Ms. Taylor misconduct was not flagrant and ill intentioned.

It is clear that Ms. Taylor did not inadvertently disparage defense counsel.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1018 (1996); review denied, 131 Wn.2d 1018 (1997). Plainly Ms. Taylor engaged in her attack on defense counsel because she felt it would assist her case.

4. Instruction 17 omitted an essential element of the crime of attempted first degree murder.

“A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Premeditated intent is an essential element of the crime of attempted first degree murder. State v. Vangerpen, 125 Wn2d 782, 791, 888 P.2d 1177 (1995). Instruction 17, the “to convict” instruction, does not included premeditated intent. CP 63. Nor is that element included in Instrcutio12, which purports to define the crime of attempted first degree murder. CP 58.

The State asks this court to simply ignore Vangerpen. Brief of Respondent at 35. The State contends that Vangerpen concerned a “fundamentally different issue from the instructional issue here; charging documents and jury instruction serve very different purposes.” Brief of Respondent at 35. While the State’s observation regarding the purposes served by these two documents is certainly correct, the State asks this Court ignores a unifying requirement. Both the Information and the “to convict” must included the essential elements of the crime. Vangerpen, 125 Wn.2d at 788; Smith, 131 Wn.2d at 263. Importantly, in Vangerpen there was no dispute that premeditated intent was an essential element of

attempted first degree murder. The only issue was whether the late amendment of the information to add that necessary element required retrial. Premeditated intent is a “statutory element” of attempted first degree murder. Vangerpen, 125 Wn.2d at 791

In its effort to ignore the plain holding of Vangerpen the State urges the Court to instead follow the opinion of Division Two in State v. Reed, 150 Wn.App. 761, 208 P.3d 1274, review denied, 167 Wn.2d 1006 (2009). See, Brief of Respondent at 35.¹ This Court recently relied on Reed to conclude the State need not prove premeditated intent to the jury in order to convict a person of attempted first degree murder. State v. Besabe, 2012 WL 744618. Neither Reed nor Besabe could overrule the Supreme Court’s decision in Vangerpen. See, State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (the Washington Supreme Court’s decisions on issues of state law are binding on lower courts). Neither Reed nor Besabe even cite to Vangerpen apparently unaware of its contrary holding. The Supreme Court reversed the conviction of attempted first degree murder in Vangerpen because “the information alleged only intent to cause death, not premeditation.” Thus it is beyond dispute the premeditation is an essential element of attempted first degree

¹ The State also wrongly contends that State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2008), “directly address[ed]” this issue. However, DeRyke involved a crime of attempted first-degree rape, and thus most certainly did not address the elements of attempted first degree murder.

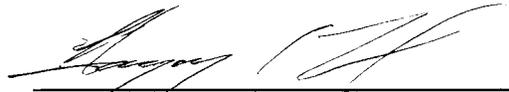
murder. Reed and Besabe are incorrect and are contrary to Vangerpen.

Instruction 17 omitted an essential element of the crime.

B. CONCLUSION

Because the juvenile court erroneously declined jurisdiction of Andrew's case his convictions must be reversed. The court's omission of an essential element from its jury instructions requires reversal of Andrew's convictions of attempted first degree murder. Further the deputy prosecutor's flagrant misconduct requires reversal of Andrew's convictions. Finally, because they are duplicative, the court must reverse and dismiss either the two firearm enhancements or Andrew's conviction of unlawful possession of a firearm.

Respectfully submitted this 19th day of March, 2011.



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)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **REPLY 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:

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