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68146-0 KN

No. 68146-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

ROGER HOLMES,

Appellant.

---

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

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OPENING BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by finding on the Judgment and Sentence that the jury entered a special verdict or finding of domestic violence, although the jury did not make such a finding.

2. The trial court erred by finding on the Judgment and Sentence that the jury entered a special verdict or finding of rapid recidivism, although the jury did not make such a finding.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Mr. Holmes's Judgment and Sentence states that domestic violence as defined in RCW 10.99.020 was pled and proved for Count I. The jury made no such finding, and the phrase, "domestic violence," was not even mentioned in the court's jury instructions. Must the "domestic violence" finding and label be stricken from the Judgment and Sentence because it may be used to elevate Mr. Holmes's offender score and resulting punishment, should he commit a new offense?

2. Mr. Holmes's Judgment and Sentence states that aggravating circumstances as to Count I were proved by special verdict or findings, in that the crime was "committed shortly after being released from custody," pursuant to RCW 9.94A.535(3)(t). The "rapid recidivist" aggravating factor was not found by the jury,

and Mr. Holmes never waived his right to a jury finding on this aggravating factor. Did the court's finding of rapid recidivism violate Mr. Holmes's Sixth Amendment right to a trial by jury, requiring vacation of the aggravator?

C. STATEMENT OF THE CASE

On November 16, 2010, there was a disturbance on the street near East Denny Way and 30<sup>th</sup> Street. 10/27/11 RP 28-29.<sup>1</sup> A neighborhood resident called the local 911 dispatcher to report that he heard arguing and screaming near his home. Id.<sup>2</sup>

The neighbor, Dustin Byers, testified at trial that he saw an old Cadillac parked on his street, with people tussling and arguing outside the car. Id. at 30, 42. He also stated that he saw a woman sitting in the back seat of the car; a few seconds later, when Mr. Byers emerged from his home, the woman was lying in the street. Id. at 36. Mr. Byers stated that this woman quickly got to her feet

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<sup>1</sup> The Report of Proceedings consists of five non-consecutively paginated volumes, and a sixth consisting of sentencing, which will be referred to by date.

<sup>2</sup> At trial, the State amended the information to a sole count of Domestic Violence Felony Violation of a Court Order. CP 16; 10/26/11 RP 2. The State had initially charged Mr. Holmes with Robbery in the First Degree, as well, but had soon determined that the car that the alleged victim claimed Mr. Holmes had stolen from her was not actually hers. 10/31/11 RP 10, 16-17.

and that she seemed to be both upset and intoxicated. Id. at 38-40.<sup>3</sup>

At trial, the jury also heard testimony from Lieutenant Rory Dees, a Seattle firefighter who responded to the scene. He stated that he had assisted the woman and identified her as Michelle Garza. 10/27/11 RP 63. Lieutenant Dees testified that Ms. Garza was alert when he treated her, and that she informed him that she had been injured and thrown from her car by her former boyfriend. Id. at 63-64. Ms. Garza did not appear or testify at trial.

After a jury trial before the Honorable Michael Heavey, the jury convicted Mr. Holmes as charged. CP 39, 41-43. This appeal follows. CP 111-24.

#### D. ARGUMENT

##### 1. THE PORTION OF THE JUDGMENT AND SENTENCE STATING THERE WAS A "SPECIAL VERDICT OR FINDING" THAT MR. HOLMES'S CONVICTION WAS A CRIME OF DOMESTIC VIOLENCE MUST BE STRICKEN

The jury was never asked to determine if the conviction for felony violation of a court order was a crime of domestic violence. The court nevertheless noted on Mr. Holmes's Judgment and Sentence that the jury made a finding that the conviction was a

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<sup>3</sup> Mr. Byers's 911 call was played for the jury. Ex. 5.

crime of domestic violence. CP 45. The court also concluded Mr. Holmes was found guilty of “domestic violence felony violation of a court order.” CP 44. The reported jury finding and designation of felony violation of a court order as a crime of domestic violence must be stricken as they are not based upon a jury verdict or finding.

Due process requires the jury find beyond a reasonable doubt any fact that increases the defendant’s potential punishment. U.S. Const. amends. VI, XIV; Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This principle applies to every fact that increases the maximum penalty faced by the defendant. Blakely, 542 U.S. at 303; Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 Ed.2d 556 (2002); Apprendi, 530 U.S. at 482-83.

Washington’s Constitution also protects these due process rights and provides even greater protections for jury trials than does the federal constitution. Const. art. I §§ 21, 22; State v. Williams-Walker, 167 Wn.2d 889, 895-86, 225 P.3d 913 (2010); State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (Recuenco III). Under the Washington Constitution, the sentencing court is

bound by the jury's factual determinations. Williams-Walker, 167 Wn.2d at 897. The court cannot substitute its judgment by imposing sentence based upon a fact not found by the jury, even if it is supported by the evidence presented at trial. Id. at 888-90. When the court does so, the error cannot be harmless, as it is never harmless for the court to sentence the defendant for a crime not found by the jury. Id. at 899-900; Recuenco III, 163 Wn.2d at 442.

In Recuenco III, the defendant was convicted of second degree assault, and the jury found by a special verdict form that he was armed with a deadly weapon. Recuenco III, 163 Wn.2d at 431-32. The sentencing court, however, imposed a 36-month enhancement for committing a crime with a firearm rather than the 12-month enhancement authorized by the jury's deadly weapon finding. Id. The Recuenco III Court found that the trial court lacked authority to sentence Recuenco for the additional two years that corresponded to the firearm enhancement in the absence of a jury finding that the defendant was armed with a firearm. Id. at 440.

The error in this case occurred when the trial judge imposed a sentence enhancement for something the State did not ask for and the jury did not find. The trial court simply exceeded its authority in imposing a sentence not authorized by the charges.

Id. at 442 (emphasis added).

The court similarly exceeded its authority by stating that the jury found Mr. Holmes's conviction for felony violation of a court order was a crime of domestic violence. The jury was informed that, in order to convict Mr. Holmes, it had to find only five elements beyond a reasonable doubt: (1) that on or about November 16, 2010, there existed a no-contact order applicable to Mr. Holmes; (2) that Mr. Holmes knew of the existence of this order; (3) that on or about this date, Mr. Holmes knowingly violated a provision of this order; (4) that – a) his conduct was an assault – or b) he has twice previously been convicted for violating the provisions of a court order; and (5) that Mr. Holmes's acts occurred in Washington. CP 33; RCW 26.50.110(1),(4),(5).

The jury was never asked to determine if Mr. Holmes and Ms. Garza met the definition of family or household members or if the crime was a crime of domestic violence.<sup>4</sup> RCW 10.99.020. In fact, the words "domestic violence" are not found anywhere in the court's instructions to the jury or the verdict form. CP 18, 19-36.

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<sup>4</sup> A pattern special verdict form asking the jury if the defendant and the alleged victim were family members is easily accessible. Washington Supreme Court Committee on Jury Instructions, 11A Washington Practice: Washington Pattern Jury Instructions Criminal, WPIC 190.11 (2008).

The court nonetheless checked a box on the Judgment and Sentence form declaring that there was a special verdict or jury finding that the conviction for felony violation of a court order, Count I, was a “domestic violence offense as defined in RCW 10.99.020,” indicating it was “pled and proved.” CP 45.

Washington’s domestic violence statute, RCW 10.99, is designed to remind courts that crimes involving family members should be enforced in an even-handed manner. RCW 10.99.010; State v. O.P., 103 Wn. App. 889, 891-92, 13 P.3d 1111 (2000). The statute does not require or even authorize a court to find sua sponte that the defendant committed a crime of domestic violence, as was done in Mr. Holmes’s case.

This Court has ruled in prior cases that the Sixth Amendment does not prohibit the court from labeling a conviction “domestic violence” without a jury finding beyond a reasonable doubt, reasoning that such a finding does not authorize an exceptional sentence or increase potential punishment. State v. Winston, 135 Wn. App. 400, 406, 144 P.3d 363 (2006); State v. Felix, 125 Wn. App. 575, 578-81, 105 P.3d 427, rev. denied, 155 Wn.2d 1003 (2005). More recently, however, the Legislature amended the Sentencing Reform Act so that a domestic violence

finding subjects an offender to greater punishment should he commit a new offense. 2010 Laws of Washington Ch. 274, §§ 402, 403 (effective June 10, 2010) (codified at RCW 9.94A.030(20), (39); RCW 9.94A.535(1)(i), (3)(h)(i); RCW 9.94A.525(21)). Now, when an offender is sentenced for a crime where domestic violence was “pled and proven,” prior convictions where domestic violence was “pled and proven” after August 2011 will count as two rather than one point in determining the SRA offender score and resulting standard sentence range. RCW 9.94A.525(21). Here, the Judgment and Sentence states that the jury found the second degree assault was a crime of domestic violence when the jury did not do so.

In Williams-Walker, the trial court imposed a firearm enhancement even though the jury found the defendants were armed with a deadly weapon, not specifically a firearm. Williams-Walker, 167 Wn.2d at 901. The court emphasized that the sentencing court must look to the jury’s findings to determine the applicable enhancement, and “if the jury makes no finding, no sentence enhancement may be imposed.” Id. at 901-02. In so doing, the court made it clear that the trial court is bound by any

finding or lack of finding made by the jury. Williams-Walker, 167 Wn.2d at 901-02.

While a domestic violence finding was not a sentencing enhancement in this case, the court's erroneous notation will lead to increased punishment should Mr. Holmes be convicted of a new crime involving domestic violence. This Court should vacate the portion of the Judgment stating the jury found the felony violation of a court order conviction was one of domestic violence and referring to the crime as "domestic violence felony violation of a court order." CP 44-45.

2. THE TRIAL COURT VIOLATED MR. HOLMES'S  
SIXTH AMENDMENT RIGHT TO TRIAL BY JURY  
AND EXCEEDED ITS SENTENCING AUTHORITY  
BY RELYING ON AN AGGRAVATING FACTOR  
NOT FOUND BY THE JURY

a. The trial court erred by relying on an aggravating factor not found by the jury and not personally waived by Mr. Holmes. As discussed above, following Blakely, the Sentencing Reform Act (SRA) was amended to specify which aggravating factors must be found by a jury and which can be found by the sentencing judge. 542 U.S. at 303-04; State v. Womac, 160 Wn.2d 643, 661 n.10, 160 P.3d 40 (2007); RCW 9.94A.535(2), (3), .537.

The rapid recidivism aggravating factor which the trial court included as a “special verdict or finding” on Mr. Holmes’s Judgment and Sentence, pursuant to RCW 9.94A.535(3)(t), was not found by the jury. CP 45. Instead, defense counsel agreed to stipulate to the aggravator once the jury returned with a guilty verdict. 11/1/11 RP 6-7. The record indicates that defense counsel and Mr. Holmes “conferred previously” about this decision; however, Mr. Holmes did not waive the right to a trial by jury on this factor, either orally or in writing. Id. at 2-12. The trial court failed to conduct a colloquy with Mr. Holmes concerning the rapid recidivism aggravator, and no stipulation was entered into evidence.

b. The trial court’s error requires resentencing. The jury was never asked to determine whether Mr. Holmes’s conduct supports what the legislature intended to include under the rapid recidivism law. RCW 9.94A.535(3)(t). Because the trial court found, sua sponte, that the instant violation was committed “shortly after being released from custody,” Mr. Holmes was denied his Sixth Amendment right to a jury trial on the rapid recidivism aggravating factor and must be resentenced without the aggravating factor finding.

E. CONCLUSION

Mr. Holmes respectfully asks this Court to strike the portion of his Judgment and Sentence designating his conviction as a crime of domestic violence and incorrectly concluding the jury rendered these findings. In addition, Mr. Holmes requests that the rapid recidivism finding be vacated and that he be resentenced.

Respectfully submitted this 20<sup>th</sup> day of June, 2012.



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DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68146-0-I
v.	)	
	)	
ROGER HOLMES,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF JUNE, 2012, 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:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF JUNE, 2012.

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