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STATE OF WASHINGTON
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No. 33875-1-II
(Consolidated with No. 33919-6-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Simanovski,

Appellant.

Jefferson County Superior Court

Cause No. 05-1-00103-3

The Honorable Judge Craddock Verser

Appellant's Reply Brief

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ARGUMENT

I. THE USE OF EXCESSIVE COURTROOM SECURITY WITHOUT ADEQUATE CAUSE REQUIRES REVERSAL.

Respondent argues that the presence of extra courtroom security officers does not require reversal. Brief of Respondent, pp. 9-14.

Respondent erroneously implies that the issue is not preserved (apparently because defense counsel did not object strenuously enough). Brief of Respondent, p. 10. This argument is without merit, first, because Mr. Simanovski *did* object RP (8/21/05) 10-12, and second because a challenge of this type is a manifest error affecting a constitutional right, which may be raised for the first time on appeal. RAP 2.5(a); *See, e.g., State v. Jaquez*, 105 Wn. App. 699 at 708 n.7, 20 P.3d 1035 (2001).

Respondent also argues that the trial judge “arranged the guards to minimize any potential interference with defendants and counsel...” Brief of Respondent, p. 11. The record does not support this assertion. One guard indicated that he planned to remain “up there the whole time...” near the defendant; another said he would stand “over there.” which the court opined (without explanation) would be “fine.” RP (8/21/05) 11-12. This does not establish that the security presence was unobtrusive; indeed, it suggests the opposite. Where a defendant’s constitutional rights are infringed, the burden is on the prosecution to demonstrate that the error

was harmless beyond a reasonable doubt. *Jaquez*, at 708. In the absence of an evidentiary hearing, the record is insufficient to establish the absence of any prejudice to Mr. Simanovski.

Third, Respondent suggests that the applicable standard is “whether an unacceptable risk is presented of impermissible factors coming into play...,” a test which is met if the jury sees something “so inherently prejudicial as to pose an unacceptable threat to the defendant’s right to a fair trial.” Brief of Respondent, p. 11-14. *quoting In re Woods*, 154 Wn.2d 400 at 417, 114 P.3d 607 (2005) and *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). Respondent implies that the burden is on the defendant, and that review is for an abuse of discretion. Brief of Respondent, p. 12.

Respondent is incorrect about the appropriate legal standard. First, neither *Woods* nor *Holbrook* involved a direct appeal. *Woods* was a personal restraint petition and *Holbrook* was a federal *habeas corpus* action. In both proceedings, the defendant bore the burden of establishing error. *Woods*, at 409; *Holbrook*, at 572. Neither opinion purported to establish the standard for reviewing claims of error on direct appeal. Second, *Woods* involved spectators wearing ribbons in memory of the victim, rather than the posting of extra security personnel, and is inapplicable to Mr. Simanovski’s case.

The correct standard for reviewing the use of extra security guards on direct appeal is set forth in *State v. Gonzalez*, 129 Wn.App. 895, 120 P.3d 645 (2005). When a trial court imposes security measures that cannot be concealed from the jury, the judge must make a record of “a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape” to justify use of those measures. *Gonzalez*, at 902. The burden is on the state to perfect such a record, and if it is unable to do so, the error is presumed prejudicial. *Jaquez, supra*, at 708; *State v. Finch*, 137 Wn.2d 792 at 859, 975 P.2d 967 (1999). The state then bears the burden of overcoming the presumption beyond a reasonable doubt. *Finch*, at 859.

Under this standard, reversal is required. *Gonzalez, supra*.

II. THE MANDATORY PRESUMPTION CONTAINED IN THE “KNOWLEDGE” INSTRUCTION REQUIRES REVERSAL.

Respondent argues that the mandatory presumption was “appropriate” in this case, apparently because there is one interpretation of the phrase that could reasonably apply to the facts. Brief of Respondent, p. 15-16.

This argument is erroneous for two reasons. First, the Supreme Court has disallowed the use of mandatory presumptions, regardless of how reasonable they might seem. *State v. Deal*, 128 Wn.2d 693, 911 P.2d

996 (1996). Second, the instructions provide no guidance as to what intentional act gives rise to the mandatory presumption. As the Supreme Court has noted:

The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve [ambiguous wording] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.
State v. Lefaber, 128 Wn.2d 896 at 902, 913 P.2d 369 (1996).

The instruction here was not manifestly clear. Respondent assumes that the intention to go shooting is the intentional act upon which the jury focused, but the jurors may have latched on to any intentional act undertaken by Mr. Simanovski. For example, jurors might have believed knowledge could be presumed from Mr. Simanovski's intentional decision to get in the vehicle, even if he had no idea there were guns present.

Because of this, the instruction was erroneous. The conviction must be reversed and the case remanded for a new trial. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S "KNOWLEDGE" INSTRUCTION.

Respondent has not provided any substantive argument on this point; accordingly, Mr. Simanovski rests on his opening brief.

IV. THE TRIAL COURT’S “REASONABLE DOUBT” INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL (ARGUMENT INCLUDED TO PRESERVE ERROR).

Mr. Simanovski rests on his opening brief.

V. RESPONDENT MISCHARACTERIZES THE PROSECUTOR’S CLOSING ARGUMENT.

Respondent contends that the prosecutor simply quoted the jury instruction and explained how the evidence satisfied the instruction. Brief of Respondent, p. 18. This is incorrect.

The prosecutor in this case repeatedly argued that accessibility was sufficient to establish possession, regardless of dominion and control. *See* Appellant’s Opening Brief, pp. 20-21. This was contrary to the court’s instructions, which required proof of dominion and control to establish constructive possession. Instruction No. 15, Supp. CP 17.

By making this argument repeatedly, the prosecutor committed misconduct requiring reversal. *State v. Huckins*, 66 Wn.App. 213 at 218, 836 P.2d 230 (1992); *see also State v. Allen*, 127 Wn.App. 125 at 137, 110 P.3d 849 (2005).

VI. RESPONDENT’S SENTENCING ARGUMENTS ARE ERRONEOUS.

Respondent suggests that Mr. Simanovski bore the burden of objecting to the prosecution’s claims regarding his criminal history. Brief

of Respondent, p. 19. This is patently incorrect. As the Supreme Court held in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.
State v. Ford, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

This applies to the same criminal conduct determination as well. A defendant may, by affirmative conduct, waive the issue (*State v. O'Neal*, 126 Wn.App. 395, 109 P.3d 429 (2005); *State v. Beasley*, 126 Wn.App. 670, 109 P.3d 849 (2005)). However, the mere failure to raise the issue in the trial court does not amount to a waiver, and will not preclude appellate review. *See, e.g., State v. Anderson*, 92 Wn.App. 54, 960 P.2d 975, *review denied* 137 Wn.2d 1016, 978 P.2d 1099 (1999); *State v. Rowland*, 97 Wn.App. 301, 983 P.2d 696 (1999); *see also State v. Nitsch*, 100 Wn.App. 512 at 521, 997 P.2d 1000, *review denied* 141 Wn.2d 1030, 11 P.3d 827 (2000).

There is nothing in the record to suggest that Mr. Simanovski affirmatively waived review of the trial court's 'same criminal conduct' determination. His attorney admitted that he hadn't even looked at the list of criminal history; any waiver under these circumstances should not be held against Mr. Simanovski.

Furthermore, even if a waiver by counsel is found, Mr. Simanovski also argued that his attorney was ineffective. Respondent has not addressed this argument.

For these reasons the sentence must be vacated, and the case remanded for a new sentencing hearing.

VII. THE TRIAL COURT VIOLATED MR. SIMANOVSKI'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER *BLAKELY* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS (ARGUMENT INCLUDED TO PRESERVE ERROR).

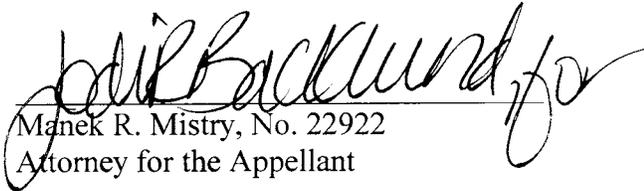
Mr. Simanovski stands on his opening brief.

CONCLUSION

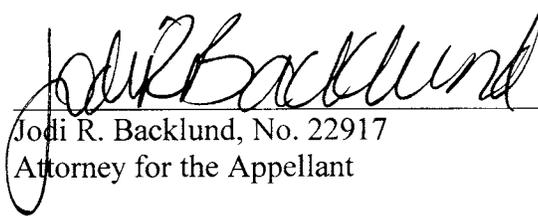
For the foregoing reasons, Mr. Simanovski's conviction must be reversed and the case remanded for a new trial. In the alternative, Mr. Simanovski's sentence must be vacated and the case must be remanded for a new sentencing hearing.

Respectfully submitted on August 30, 2006.

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