

FILED
COURT OF APPEALS
DIVISION II

08 SEP 15 PM 12:39

STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Respondent)

.v.)

ALLEN R. CLAYTON)
Appellant)

No. 37345-9-II.

STATEMENT OF ADDITIONAL
GROUNDS

I, Allen R. Clayton, have reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief.

I understand that the court will review this statement of additional grounds for review when my appeal is considered on the merits.

ADDITIONAL GROUND # I

THE TRIAL COURTS ERROR IN IMPOSING A DEADLY WEAPONS ENHANCEMENT DENIED THE DEFENDANT DUE PROCESS OF LAW UNDER THE WASHINGTON CONSTITUTION, ARTICLE I § 3, AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

(1). Can a deadly weapons enhancement be given for a knife with a blade of less than three inches ? First, it should be asked : Can a knife with a blade of less than three inches potentially inflict death, and therefore be subject to a deadly weapons enhancement ?

Unquestionably, depending on the manner in which it was used, and the surrounding factors, a knife with a blade of less than three inches could inflict death and potentially be grounds for a deadly weapons enhancement.

If a person committed murder, or attempted to take another's life with a knife having only a two and a half inch blade, that person would rightfully be subject to a deadly weapons enhancement, for a knife having a blade under three inches.

However, say a person gets into a argument with another individual, and some words are exchanged, does the mere presents, (In that individuals pocket), of a knife with a two and half inch blade make him, or her, subject to a deadly weapon enhancement if convicted of a crime not involving the knife, and never having removed the knife from his or her pocket ?

As was the legislatures intent in writing RCW 9.94A.602, and the courts have tended to rule, the person would not be subject to a deadly weapons enhancement.

If the weapon, in question, had been a (per-se) deadly weapon, then, without question ... The individual could be subject to a deadly weapon enhancement.

It appears that in making two categories of deadly weapons, (per-se) and (non per-se), the legislature put inherently dangerous and non-common deadly weapons into one category. Per-se, while reserving common items like pocket knives for the non per-se category, to be deemed subject to a deadly weapons enhancement "only after considering the use", (EMPHASIS ADDED), and the injuries, if any, and the surrounding circumstances.

The case at bar includes a six month deadly weapons enhancement for unlawful imprisonment, and a six month deadly weapons enhancement for felony harassment.

It was proved, at trial that:

1: Defendant had a knife, and

2: The knife was less than three inches long, and thus, (non per-se).

RP 151-52, 160-61.

A knife with a blade less than three inches long does not automatically qualify for a deadly weapons enhancement. The state must prove, for the purpose of a deadly weapons enhancement, that the knife;

(1). had a capacity to inflict death, and; (2). Was used in a manner that was likely to produce, or may have easily produced death.

The state proceeded to present a case of 1st degree kidnapping, 2nd degree assault, and felony harassment. All with deadly weapons enhancements, presumably from the second degree assault, or assault with a deadly weapon.

When the state presented it's case, they alleged that the defendant assaulted Ms. White with a knife on both the arm, and the neck.

RP 46-48, 230.

The state defined assault, for the purpose of this case, in jury instruction No. 17. "CP" 36. Immediately following that, the state defined a deadly weapon. "CP" 37, which would included the defendants knife, if one believed Ms. White's story. RP 46-48. The to convict of assault instruction was No. 19 at "CP" 38.

As every case has two sides, the defense presented a case that significantly contrasted to Ms. White's allegations concerning the assault with a deadly weapon. the defense maintained that there was never an assault with a knife, and the defendant never withdrew his pocket knife from his pants pocket, and certainly never had it to Ms. Whites arm, or neck. RP 383, 401.

Prior to the defense beginning it's case, Mr. Hanify moved to dismiss the weapon enhancements, as well as the assault and kidnapping charges.

RP 260-63.

The court denied the motion, saying, "I think there's evidence taken most favorably to the state that could support the verdicts."

RP 263.

Again, this is before the defense had presented any of it's case.

As the knife was not a (per-se) deadly weapon, the court was allowing it to go to the jury on it's capacity to inflict death, and it's being used in a way, likely to produce, or could have easily produced death.

In other words, he let it go to the jury because the state was alleging second degree assault with a deadly weapon, and he felt the evidence could support the assault verdict.

RP 263.

The defense then presented it's case, including a Strong denial of any assault and any use of a knife, What-so-ever.

RP 383, 401.

The state also had the opportunity to submit lesser included to the jury, of unlawful display of a weapon.

RP 367-68.

The prosecutor took exception to this and objected, successfully, wanting only to proceed with 2ND^o assault with a deadly weapon.

RP 370

The case went to the jury, and they decided that the state had not proved it's case to them on the second degree assault with a deadly weapon and thus defendant was found not guilty of assault, as well as the kidnapping.

RP 460. See: "CP" 48, 49, 52, 53.

If one was to read jury instructions 16-19, "CP" at 35-38, and verdict form B. "CP" at 52, which is a not guilty pertaining to instruction 19, "CP" at 38, the logical conclusion that is reached is:

The state failed to prove to the jury that the defendant pulled the knife and assaulted Ms. White with it.

As the states only evidence concerning the supposed use of the knife failed to persuade the jury, they found in favor of the defendant.

In the case at bar, the petitioner argues that: (For sentencing purposes), the knife found in his pants pocket does not qualify as a deadly weapon.

In STATE.V.COOK, 69 Wash. App. @ 417, The Court states: The Supreme Court has stated that, for sentencing purposes, a deadly weapon is one that is capable of producing death "(under the circumstances of it's use.)"

In the case at bar there was no use, only possession.

In STATE.V.SORENSEN, 6 Wash. App. @ 273, the court state's: "By statutory definition, a knife having a blade longer then three inches, is a deadly weapon as a matter of law." But wether a knife with a blade of less then three inches is a deadly weapon is a matter of fact. The character of an implement as a deadly weapon is determined by it's capacity to inflict death, or injury, and it's use as a deadly weapon by the surrounding circumstances, such as the intent, and present ability of the user, the degree of force, the part of the body to which it is applied, and the physical injuries inflicted."

The Washington Supreme Court agreed with this decision in STATE.V.THOMPSON, 88 Wa.2d. @ 548-49. This five part test has been applied more recently in STATE.V. ZUMWALT, 79 Wash. App. @ 130.

The jury in the case at bar has obviously found a large portion of the states case untrue and thus non-factual, including the states allegations concerning the use of the knife.

This is apparent by the not guilty verdicts of assault with a deadly weapon, and kidnapping.

In failing to prove the majority of it's case, the state failed to prove, for the purposes of sentencing, that the defendant used the knife, (In a way that was likely to or could have easily produced death.) This is a standard needed to enhance a sentence for (non per-se) deadly weapon.

In looking at the Washington state Supreme Courts standards on review, of the (non per-se) weapon issue, in STATE.V.THOMPSON, 88 Wn. 2d. @ 548-49, The Court stated: A non per-se weapon is determined by; "It's use as a deadly weapon by the surrounding circumstances, such as the intent, and the present ability of the user, degree of force used, the part of the body to which it was applied, and the physical injuries inflicted.

The state failed to prove any of these aspects.

The appellant in this case argues that upon the not guilty verdict of assault with a deadly weapon, the remainder of the enhancements should have been dropped especially considering that the allegation of assault with a deadly weapon is the only grounds that the judge allowed the state to proceed with it's enhancement.

RP 260-63.

The sentencing courts error in implementing two six month deadly weapon enhancement's for a weapon, that under the circumstances of it's use, and the law, does not qualify as a deadly weapon, necessitates that the appellants deadly weapons enhancement's be overturned and he be re-sentenced.

ADDITIONAL GROUNDS # II.

THE TRIAL COURTS ADMISSION OF EVIDENCE THAT WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER THE WASHINGTON CONSTITUTION, ARTICLE 1 § 3, AND THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

The trial court erred in allowing the state to present evidence to the jury of prior bad acts by the defendant. In STATE.V.DINGES, 48 Wash. 2d. 152 (1956), @ 153-54, citing multiple cases, the court stated:

A defendant must be tried for the offense charged. To introduce evidence of unrelated crimes is grossly, and erroneously prejudicial, unless the evidence of unrelated crimes is admissible to show motive, intent, absence of accident or mistake, a common scheme or plan, or identity. These exceptions are not necessarily exclusive; In numerous cases cited, "The true test is that the evidence of the other criminal offense must be, RELEVANT, and NECESSARY to prove an essential ingredient of the crime charged."

In the case at bar, the state moved to admit evidence that the defendant had told Ms. White that, he fired a weapon at someone in Oregon, and had served time for that.

RP 14,15. The state argued that the prior bad acts was relevant to show Ms. White's fear in regard's to the felony harassment charge.

RP @ 15,16. The court ruled that the evidence was relevant to show apprehension, and allowed the state to elicit it. RP 17-18.

But under limited circumstances; RP 18-19. The court never determined if the evidence was necessary. RP 14-20.

In Grahms treaties on the equivalent federal rule, it states the court should consider:

The importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and the length of the chain of inferences necessary to establish the fact of consequence, the availability of other means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and where appropriate, the potential effectiveness of a limiting instruction. m. Grahm, federal evidence 403-1 @ 180-81 (2nd ed. 1986). This was quoted in STATE.V.KENDRICK, 47 Wash. App. @ 629, See also the comment to ER 404 (B).

In the case at bar, the fact of consequence that the evidence was being offered for was not disputed. If the threat occurred, as the state was alleging, then any fear would be reasonable.

Furthermore the state had alternate means of proof, namely the second degree assault with a deadly weapon where the allegation was that defendant held a knife to Ms. Whites arm, and neck.

RP 47-48.

This would constitute enough reasonable grounds to believe any threat to kill, and meet the states requirements for felony harassment.

The prior criminal charge was not RELEVANT to this case, being over five years old, and in self defense to an attempted vehicular assault. The prior criminal charge was not NECESSARY either, as the state had alternative means of proof.

The appellant, in this case, also argues in anticipation of the respondents brief that, the prior bad acts were not admissible to prove felony harassment. If the state chooses to take that position, for the reasons stated above, as well as this courts decision in STATE.V.MAGERS, No. 33323-6-II (2006, the argument will fail.

The second element of felony harassment is, "That the words or conduct of the defendant placed Jessica White, in reasonable fear that the threat would be carried out. "CP" 42.

If the allegations had been only a, verbal threat, to kill over the telephone, then the state may have needed the bad acts to prove it's case. IF they had no alternative means of proof.

In this case they alleged that the defendant took a substantial step to induce the fear that the threats would be carried out, and that by that substantial step Ms. White subsequently believed that threat. RP 46-48.

Thus the prior bad acts were not necessary to prove any element of the states case and was unfairly prejudicial , as state had an alternative means of proof. See ER 401-404 (B).

In STATE.V.GOEBEL, 36 Wash. 2d. 367 (1950) @ 378, the court stated: "If the evidence is shown to be relevant to any material issue before the jury it MAY be admitted, and if it is, an explanation should be made at the time, to the jury, of the purpose for which it is admitted. The court should, state to the jury it's purpose for admitting the evidence, the court should also give cautionary instruction." at 379 Id.

In the case at bar, on at least four occasions, evidence of the oregon crime was allowed to be heard by the jury , without any explanation to the jury, as to why or any cautionary instruction. RP 360-61, 408-10, 416-17, 48.

In STATE.V.GOEBEL, 36 Wash. 2d. 367 @ 379, The court stated: "We have intentionally used the phrase (MAY BE ADMITTED) because we are of the opinion that this class of evidence, where not essential to the establishment of the case, should not be admitted, even though falling within the generally recognized exceptions to the rule of exclusion."

In the case at bar, again the evidence about the oregon crime was not essential to the states case, and should have been excluded.

Allowing the oregon crime, unfairly prejudiced the defendant.

In STATE.V.SMITH, 106 Wash.2d. 772 (1986, @ 776, The court stated: "In SALTARELLI: "This court defined the analysis a trial court must employ before admitting evidence of the crimes. First, The court must identify the purpose for which the evidence is to be admitted, SALTARELLI @ 362. Second, the court must determine the RELEVANCY, of the evidence. In determining the relevancy, 1. The purpose for which the evidence is offered (must be consequence to the outcome of the action), and, 2. The evidence must tend to make the existence of the identified fact more probable, SALTARELLI @ 362-63, and, Third, after the court has determined the RELEVANCY, it must then, "(Balance the probative value against prejudicial effect.)" This analysis has been used more recently in STATE.V.THANG, 145 Wash.2d. 630 (2002).

In the case at bar, this analysis was not performed, further the court never weighed the probative value against the prejudicial effect. In this case, where the evidence was not NECESSARY to prove the states case, and only slightly, if at all RELEVANT, considering over five years had pasted since the crime, the prejudicial effect of shooting at someone, far outweighs any probative value, in this case.

In STATE.V.JACKSON, 102 Wash. 2d. 689 (1984) @ 693, The court states: "We have frequently observed that this balancing of probative value versus prejudicial effect should be done on the record." We cannot overemphasize the importance of making such a record. Here as in cases arising under ER 609, the absence of a record precludes effective appellate review. See: STATE.V.JONES, 101 Wash. 2d. 113 (1984). Moreover, a judge who carefully records his reasons for admitting evidence of prior crimes is less likely to err, because the process of weighing the evidence, and stating specific reasons for a decision, insures a thoughtful consideration of the issues. These reasons, as well as others, led us to conclude in JONES, that a trial judge err's when he does not enunciate the reasons for his decision.

We hold the same rule applies to evidence of prior misconduct admitted under ER 404 (B)." In STATE.V.THORP, 96 Wash. 2d. 591 (1981), @ 597, The court said: ... "Without such balancing and a conscious determination made by the court, on the record, the evidence is not properly admitted."

In the case at bar, the trial court erred by failing to complete an analysis, and making a record for his reasons, and absent any balancing process of probative value versus prejudicial effect, on the record the evidence was not properly admitted.

In the case at bar, had the oregon crime been RELEVANT, and NECESSARY, that is, if the state had no other means of proof, to show the reasonableness of Ms. Whites fear, then it would have only been necessary to ask Ms. White what she was told by the defendant.

To elicit testimony about the oregon crime, at any other time, would be needless presentation of cumulative, and prejudicial evidence. See: ER 403. The state elicited this evidence on at least four occasions. RP 48, 360-61, 408-10, 416-17. Furthermore the court ruled that, "only" what Ms. White had been told, by the defendant, could be elicited." RP 14-20.

The state went far beyond this, and unfairly prejudiced the defendant, when the oregon crime is elicited from the defendants mother. RP 360-61. And when the state changed the direction, of the testimony, from what Ms. White was told, (thus bearing on the apprehension), to what actually happened, RP 409, the exchange at 409 over stepped the scope of the courts ruling during motion in limine.

The exchange at, RP 416-17, borders on prosecutorial misconduct, and was timed as close to jury deliberations as the state could manage.

The state leads into the questioning by asking the defendant about his temper. RP 416. This brings the defendant's character into the trial. The state then points out two instances of the defendant's anger, one being the Oregon crime. RP 416-17.

Rather than ask a question, the state asserts that, "you were mad enough to take a shot at them." And, "but you were mad enough to fire a weapon, a gun at that person." RP 416-17.

The above exchange was not relevant, or necessary. It had nothing to do with Ms. White believing any threat, it's a statement by the prosecution, and not what Ms. White was previously told. This went against the court's ruling on what was going to be allowed, pertaining to the Oregon crime. RP 18-19.

It was to inflame the jury's opinion of the defendant, by showing that he was angry by nature, and had a propensity for violence. In the exchange at, RP 416-17, the state used the Oregon conviction for two reasons that are expressly not allowed: To prove character, and/or show propensity. See: ER 404.16 (crimes, wrongs, bad acts "not admissible" to prove character, or show propensity.)

The state continually brought up the oregon crime for the jury; Providing needless presentation of cumulative evidence. See; ER 403. Each instance was more prejudicial then the last, denying a fair trial right. As the evidence in this trial was far from overwhelming, as shown by the not guilty verdicts of assault and kidnapping, this err, and the prejudice, cant be deemed harmless; But for the states showing on at least four occasions, of the defendants angry character and propensity for violence in the past; the jury very well might have fully acquitted the defendant.

In short the court allowed evidence of past crimes that was not RELEVANT, an/or NECESSARY. The court allowed this evidence to prove a fact of consequence that was not in dispute. The court permitted evidence without employing an analysis for it's necessity, and his reasons on the record. The court failed to weigh the probative value against the prejudicial effect. The trial court failed to take notice that the state had alternative means to prove Ms. Whites fear. The trial court failed to inform the jury, at the time that the oregon crime was elicited, his reasons for allowing the testimony. The trial court allowed the state to present the past crimes beyond the scope of the trial courts original ruling. The court also allowed the state to use the oregon crime, to prove the defendants character, and propensity.

These errors entitle the defendant to a new trial untainted by the inadmissible, prejudicial evidence.

Petition sworn as true and correct Pursuant 28 USC

 9-11-2008

ALLEN R. CLAYTON, Pro-se

AIRWAY HEIGHTS CORRECTIONS CENTER

PO BOX 2079

AIRWAY HEIGHT, WA 99001-2079