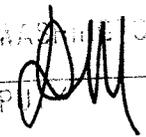


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
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No. 38499-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Wade Hill,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00404-2

The Honorable Judges F. Mark McCauley and David L. Edwards

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 4

I. The court’s instructions violated Mr. Hill’s Fourteenth Amendment right to due process by allowing conviction without proof of each essential element of Assault in the Second Degree. 4

II. The trial court’s failure to give a unanimity instruction denied Mr. Hill his state constitutional right to a unanimous jury. 9

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972) 9
In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). 4, 8, 9

WASHINGTON CASES

State v. Boyd, 137 Wn.App. 910, 155 P.3d 188 (2007)..... 11
State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 5, 8
State v. Chino, 117 Wn.App. 531, 72 P.3d 256 (2003) 4
State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007)..... 9, 10, 11, 12
State v. Elmore, 155 Wn.2d 758, 123 P.3d 72 (2005) 9
State v. Greathouse, 113 Wn.App. 889, 56 P.3d 569 (2002)..... 10
State v. Harris, 122 Wn.App. 547, 90 P.3d 1133 (2004)..... 4
State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) 5
State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997)..... 4
State v. Skenandore 99 Wn.App. 494, 994 P.2d 291 (2000) 6
State v. Sorenson, 6 Wn.App. 269, 492 P.2d 233 (1972) 6
State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 4
State v. Vander Houwen, 163 Wn.2d 25, 177 P.3d 93 (2008)..... 10
State v. Watkins, 136 Wn.App. 240, 148 P.3d 1112 (2006) 5, 8
State v. Woods, 138 Wn.App. 191, 156 P.3d 309 (2007) 5, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV i, 1, 4, 8
Wash. Const. Article I, Section 21 9

WASHINGTON STATUTES

RCW 9.94A.602..... 6
RCW 9A.04.110..... 5, 6, 9, 12
RCW 9A.36.021..... 5

OTHER AUTHORITIES

RAP 2.5..... 4, 10

ASSIGNMENTS OF ERROR

1. Mr. Hill's Fourteenth Amendment right to due process was violated when the court's instructions permitted conviction without proof of each essential element of the charged crime.
2. Mr. Hill's state constitutional right to a unanimous jury was violated when the state failed to elect a single act for conviction, and the judge failed to give a unanimity instruction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Assault in the Second Degree by means of a deadly weapon requires proof that the weapon was used, attempted to be used, or threatened to be used in such a manner as to be readily capable of causing death or substantial bodily harm. The court's instructions permitted the jury to convict Mr. Hill if it found that the blade of his knife was longer than three inches, regardless of how it was used. Did the court's instructions violate Mr. Hill's Fourteenth Amendment right to due process because they permitted conviction without proof of each essential element of Assault in the Second Degree?
2. When evidence of multiple criminal acts is introduced to support a single conviction, either the state must elect one act upon which to proceed, or the court must give the jury a unanimity instruction. Here, the state introduced proof of two assaults with two different deadly weapons and argued for conviction based on both acts, but the trial judge failed to give a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Mr. Hill's constitutional right to a unanimous verdict?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On August 12, 2009, Wade Hill was sitting on the back porch of his friend's home, where he was staying. RP (10/15/08) 7-8. Sean Brown, an off-duty guard at Green Hill School, came to dump off some garbage. RP (10/15/08) 8-9. The home was being used by Brown's uncle, who had been homeless and was Mr. Hill's friend. RP (10/15/08) 9.

Brown asked Hill where his uncle was, and noticed that Mr. Hill was smoking some marijuana. RP (10/15/08) 9. Mr. Hill stood up and said he wasn't there, causing the bag of marijuana that was on Hill's lap to fall. RP (10/15/08) 10. Brown picked up the bag and told Mr. Hill, "You aren't going to do this here." RP (10/15/08) 10. Mr. Hill pulled a knife from his pocket, and told Brown to give him back the marijuana. Brown described the knife as a butter knife, RP (10/15/08) 11, 19.

Mr. Hill held the knife and told Brown not to leave. Brown offered to smoke a bowl of the marijuana with Mr. Hill. RP (10/15/08) 11-12. Brown picked up a board and backed away, while Mr. Hill continued to tell him to return the marijuana and not leave. RP (10/15/08) 13-14. Brown bolted to the dumpster and called 911, standing in the road with his board. Mr. Hill threw garden bricks and yelled to Brown to return the marijuana. RP (10/15/08) 14-16.

Police came and arrested Mr. Hill. RP (10/15/08) 16. A knife with a four-inch blade was found in his pocket RP (10/15/08) 20, 28. Mr. Hill was charged with Assault in the Second Degree with a Deadly Weapon enhancement. CP 1-2.

At trial, neither party proposed a unanimity instruction, and the court did not give one. Court's Instructions to the Jury, Supp. CP. The court did give two instructions defining the phrase "deadly weapon":

Deadly weapon means any weapon or instrument 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.
Instruction No. 6, Court's Instructions to the Jury, Supp. CP.

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 person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of weapon, and the circumstances under which the weapon was found.

A knife having a blade longer than three inches is a deadly weapon. A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.
Instruction No. 13, Court's Instructions to the Jury, Supp. CP.

During closing arguments, the prosecutor referred to two different alleged assaults: brandishing the knife, and throwing the garden bricks. RP (10/15/08) 14, 19. The jury convicted Mr. Hill, and found (by special verdict) that he was armed with a deadly weapon. He was sentenced and this timely appeal followed. CP 4-12, 15-16.

ARGUMENT

I. THE COURT'S INSTRUCTIONS VIOLATED MR. HILL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING CONVICTION WITHOUT PROOF OF EACH ESSENTIAL ELEMENT OF ASSAULT IN THE SECOND DEGREE.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense 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). Jury instructions that relieve the state of its burden to prove every element of an offense violate due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Such instructions also create a manifest error affecting a constitutional right, and thus can be raised for the first time on appeal. RAP 2.5(a); *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003).

Juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Accordingly, a court's instructions to the jury "must more than adequately convey the law. They must make the relevant legal standard 'manifestly apparent to the average juror.'" *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Jury instructions that misstate an element are not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Woods*, 138 Wn.App. 191, 202, 156 P.3d 309 (2007).

To convict Mr. Hill, the state was required to prove that he assaulted Mr. Brown with a deadly weapon. RCW 9A.36.021. For purposes of the statute, the phrase 'deadly weapon' means "any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance... 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." RCW 9A.04.110(6). Thus explosives and firearms are deadly weapons *per se*, while other implements can only be considered deadly weapons based on the

circumstances in which they are used. These “ ‘[c]ircumstances’ include ‘the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.’”

State v. Skenandore 99 Wn.App. 494, 499, 994 P.2d 291 (2000) (quoting *State v. Sorenson*, 6 Wn.App. 269, 273, 492 P.2d 233 (1972)).

This definition of “deadly weapon” differs from the definition used to establish a deadly weapon enhancement. Under the enhancement statute, “any knife having a blade longer than three inches” is considered a deadly weapon *per se*, without regard to the circumstances in which it is used. RCW 9.94A.602. Thus, for example, a four-inch knife would constitute a deadly weapon *per se* for purposes of the enhancement. The same knife would only be a deadly weapon under RCW 9A.04.110(6) if it were used, attempted to be used, or threatened to be used under circumstances where it was “readily capable of causing death or substantial bodily harm.”

Because the term “deadly weapon” has two very different meanings, special care must be used in instructing a jury when both definitions are necessary. In this case, the trial judge did not use special care. The judge instructed the jury that “Deadly weapon means any weapon or instrument 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.” Instruction No. 6, Supp. CP. The court did not explain to the jury that this definition applied only during consideration of the assault charge itself. Court’s Instructions, Supp. CP.

The judge also instructed the jury that “A knife having a blade longer than three inches is a deadly weapon.” Instruction No. 13, Supp. CP. This was the beginning sentence for a separate paragraph in Instruction No. 13, Supp CP. Although the instruction’s first paragraph started with the phrase “For purposes of a special verdict...,” nothing in the instruction clarified that the definition of deadly weapon contained in the second paragraph applied only to the enhancement. Instruction No. 13, Supp. CP. The fact that the state had to prove that Mr. Hill was “armed” with a deadly weapon “[f]or purposes of a special verdict” does not imply that the phrase ‘deadly weapon’ has two distinct meanings. Instruction No. 13, Supp. CP.

In this case, if any jurors noticed that the two definitions of ‘deadly weapon’ were subtly different, they likely believed the two definitions supplemented each other. Thus they may have assessed the (butter) knife using both definitions, and concluded that it was a deadly weapon *per se* because it had a blade longer than three inches. It is unlikely that the jury would have understood—without further clarification—that a single knife could be considered a deadly weapon (for purposes of the enhancement)

while at the same time failing to qualify as a deadly weapon (for purposes of the assault charge).

The idea that a single phrase (such as ‘deadly weapon’) may have two different meanings is a familiar one to lawyers and judges. However, the average juror would not be familiar with this peculiarity of the legal system. Accordingly, the instructions should have made it “manifestly apparent” that Instruction No. 6 applied only to the assault charge, and the definition contained in the second paragraph of Instruction No. 13 applied only to the special verdict.

Because the instructions did not make it “manifestly apparent” that the second definition applied only to the enhancement, the jury may have voted to convict without proof of every essential element. *Watkins*, at 240-241. This violated Mr. Hill’s Fourteenth Amendment right to due process. *Winship, supra*.

The error is not harmless because it cannot be shown beyond a reasonable doubt that the error did not contribute to the verdict. *Brown*, at 341. Mr. Hill brandished the knife, but he did not actually attempt to injure Brown, and Brown was not injured. Had the jury understood that the *per se* definition applied only to the enhancement, they would most likely have concluded that Mr. Hill did not use the (butter) knife under circumstances making it “readily capable of causing death or substantial

bodily harm.” RCW 9A.04.110(6). Therefore, the error was not trivial, formal, or merely academic; instead, it may have prejudiced Mr. Hill and influenced the verdict. *Woods*.

Mr. Hill’s conviction for Assault in the Second Degree must be reversed, and the case remanded for a new trial. *Winship*. Upon retrial, the court must clearly instruct the jury that the first definition of deadly weapon applies only to the substantive charge, and the second definition applies only to the enhancement.

II. THE TRIAL COURT’S FAILURE TO GIVE A UNANIMITY INSTRUCTION DENIED MR. HILL HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

An accused person has a state constitutional right to a unanimous jury verdict.¹ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *Coleman*, at 511.

¹ The Federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.² *Coleman*, at 512; *see also State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Coleman*, at 512.

In this case, the prosecution presented evidence that Mr. Hill committed two assaults, with two different potentially deadly weapons. First, Brown testified that Mr. Hill assaulted him by brandishing a "butter knife." RP (10/15/08) 19. Second, the state produced evidence that Mr. Hill assaulted Brown by throwing large garden bricks at him. RP

² Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn.App. 889, 916, 56 P.3d 569 (2002).

(10/15/08) 14. The court did not give a unanimity instruction, and the prosecutor addressed both episodes in closing.³ RP (10/15/08) 53-56.

Thus the evidence included two separate acts, the state failed to elect one act, and the court failed to give a unanimity instruction. This violated Mr. Hill's constitutional right to a unanimous jury, and gives rise to a presumption of prejudice. *Coleman*, at 511-512.

Although the two alleged assaults occurred in sequence, they cannot be considered part of a single continuing course of conduct. *See, e.g., State v. Boyd*, 137 Wn.App. 910, 923, 155 P.3d 188 (2007) (“[A unanimity] instruction need not be given when the evidence demonstrates a continual course of conduct rather than several distinct acts.”) This is so because the state produced evidence of two potentially deadly weapons: the butter knife and the garden bricks. In the absence of an election or a unanimity instruction, a divided jury might vote to convict if some jurors thought the knife qualified as a deadly weapon, while others thought the garden bricks qualified. Thus *Coleman* requires the instruction, even though the assaults occurred in sequence.

The error is not harmless, because a rational juror could have entertained a reasonable doubt as to either act. Brown described the knife

³ The Information specifically mentioned only the knife. CP 1.

as a “butter knife” to police, but Hill was not found in possession of a butter knife. RP (10/15/08) 19, 31. Furthermore, jurors may have had a reasonable doubt as to whether or not the knife was “used, attempted to be used, or threatened to be used” in such a manner as to be “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110. Likewise, jurors may have entertained similar doubts about the garden bricks used in the second alleged assault.

Under these circumstances, the error was not harmless beyond a reasonable doubt. Accordingly, Mr. Hill’s conviction must be reversed, and the case remanded for a new trial. *Coleman, supra*. Upon retrial, if the same evidence is presented, either the state must elect a single act or the court must give a unanimity instruction. *Coleman, supra*.

CONCLUSION

For the foregoing reasons, the conviction must be reversed. The case must be remanded for a new trial, with instructions directing the trial judge to protect Mr. Hill's constitutional right to due process (through instructions clarifying when each definition of 'deadly weapon' applies) and his constitutional right to a unanimous jury (either through the state's election or through a unanimity instruction).

Respectfully submitted on April 20, 2009.

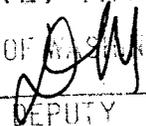
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Wade Hill, DOC #741131
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and to:

Grays Harbor Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 20, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 20, 2009.



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