

NO. 39721-8-II

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COURT OF APPEALS

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY SW
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STATE OF WASHINGTON,

Respondent,

Vs.

ALBERT JAMAAL YOUNGBLOOD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John Nichols, Judge

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Albert J. Youngblood, Doc #333592
Appellant

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of SAG
to P Tiller
& M Rennie
8/31/10 SW
Date Signed

ASSIGNMENT OF CLAIMS:

Claim NO. 1: The trial court erred by denying Mr. Youngblood's motion to dismiss first-degree kidnapping charges at the close of the state's case where the state neglected to present sufficient credible evidence for a reasonable trier of fact to conclude beyond a reasonable doubt that Mr. Youngblood's actions constitute a legitimate finding of guilt for a "true kidnapping" based on the evidence and testimony presented. (trial #2)

Claim NO. 2: Trial counsel was constitutionally ineffective in failing to request a jury instruction for the lesser-included offense of unlawful imprisonment. (trials #1 and #2)

Claim NO. 3: Imposition of the 60 month firearm enhancement violates double jeopardy where the use of a firearm is already an element of first-degree robbery. (trial #1)

Claim NO. 4: The trial court erred by failing to instruct the jury on the lesser degree crime of unlawful imprisonment as opposed to the more severe kidnapping in the first-degree. (trials #1 and #2)

Claim NO. 5: The trial prosecutor impeached witness Javier Rivera by calling him to testify in the second trial with prior knowledge of the conflicting testimony Mr. Rivera intended to present. (trial #2)

Claim NO. 6: The trial court erred by imposing a sentence for firearm enhancements on counts I, II, and III where there is insufficient evidence in the record to support Youngblood's firearm enhancements. (trials #1 and #2)

SUMMARY OF FACTS

In the early morning hours of May 21, 2008 two men entered the Shari's restaurant on 164th street in Vancouver, Washington wearing ski mask which covered their faces. RP 3A, P.189. At least one of the men had a gun. RP 3B, P.369. Regina Bridges, Roberta Damewood and Javier Rivera were working at Shari's at the time, and a regular customer named Brad was eating breakfast. RP 3B, P.317-389. Regina Bridges was working in the front of the restaurant when the men entered. RP 3B, P.368-369. One of the men approached her with a gun. RP 3B, P. 369. The man directed her to the kitchen area where she saw another man holding Javier, the cook. RP 3B, P.371. The other man took Javier and Roberta, the baker, back to a mop closet and the first man took Regina back to the till area. RP 3B, P. 373. Regina used her "mag card" to open the till and the man reached in and took the cash and coins and stuffed it in his pockets. RP 3B, P.374. The man then called to the other man and he came out from the kitchen and they left. RP 3B, P.376.

Roberta, the baker saw Javier and Regina approaching her, and she saw a man behind Regina. RP 3B, P. 319, RP 10, P.1588. The man directed her and Javier to a mop closet. RP 3B, P. 321, RP 10, P. 1590. Roberta did not see anyone holding a gun. RP 3B, P.323, RP 10, P. 1609. The man moved Javier from the mop closet to an area just outside the mop closet. RP 3B, P. 324, RP 10, P. 1591. Roberta could not recall how long they remained there, but guessed it was between five and ten minutes. RP 3B, P. 325. Roberta called 911 with a cell phone she had successfully hidden while back in the mop room. RP

10, P. 1593-1596. Despite not having seen a gun, Roberta told the 911 operator she was afraid she would be shot. RP, P. 1606, 1608, 1609.

Javier Rivera was the cook on shift when the incident transpired. RP 10, P. 1476-1477. Javier encountered a man standing behind him and another man standing in front of him. RP 10, P. 1477. In the first trial on this matter Javier denied seeing a gun. RP 3B, P.351. In the second trial, however, Javier claimed that the man standing in front him briefly pointed a gun at him. RP 10, P. 1477-1478. Javier testified that the reason he perjured himself in the first trial was because he feared retaliation if he testified to seeing a gun. RP 10, P. 1525-1527.

After retrieving the money from the till the two masked men left Shari's and got into a Lincoln town car and traveled to Longview. RP 3A, P.265, 269, 743. Mr. Ferguson was seen driving that car while it made a short detour in Ridgefield. RP 4B, P. 674-675. Mr. Youngblood was arrested in Longview shortly after the Lincoln town car was involved in a collision, in an area near the crash.

Mr. Youngblood was charged with robbery in the first-degree with a firearm enhancement, two counts of kidnapping in the first-degree with additional firearm enhancement(s), and one count of eluding a police vehicle after a first jury trial. CP 37, 40-41. Because the jury hung on the kidnapping charges, Mr. Youngblood was retried on those charges and convicted, with a firearm enhancement, after a second trial. CP 38-39, 76-79. He was given a standard range sentence of 329 months in prison.

ADDITIONAL GROUND CLAIM NO. 1:

THE TRIAL COURT ERRED BY DENYING MR. YOUNGBLOOD'S MOTION TO DISMISS FIRST-DEGREE KIDNAPPING CHARGES AT THE CLOSE OF THE STATE'S CASE WHERE THE STATE NEGLECTED TO PRESENT SUFFICIENT CREDIBLE EVIDENCE FOR A REASONABLE TRIER OF FACT TO CONCLUDE BEYOND A REASONABLE DOUBT THAT MR. YOUNGBLOOD'S ACTIONS CONSTITUTE A LEGIMATE FINDING OF GUILT FOR A "TRUE KIDNAPPING" BASED ON THE EVIDENCE AND TESTIMONY PRESENTED.

Counsel for Mr. Youngblood made a motion at the close of the state's case to dismiss the kidnapping charges because they were incidental to the robbery. RP 12, P. 1928-1929. The state resisted the motion by arguing that because it alleged, in the information, that the victim of the robbery was Regina Bridges, rather than Shari's, that the crime had a different victim than the kidnappings. RP 12, P. 1931. The state opined that it could defeat any suggestion that the kidnapping was incidental to the robbery, but that so long as it was not the "same victim", *State vs. Korum* (120 Wn.App. 686,86 P.3d 166 (2004)); reversed *on other grounds*, 157 Wn.2d 614 (2006)) did not apply.

At the outset, it must be noted that when a commercial establishment is robbed only one robbery has occurred even where multiple employees, who have joint control over the establishment, are present. *State vs. Molina*, 83 Wn.App.144, 920 P. 2d 1228 (1996)); *State vs. Tvedt*, 153 Wn.2d 705, 107 P. 3d 728 (2005)). It was disingenuous for the state to suggest, as it did here, that Regina Bridges was the victim of this robbery to the exclusion of the other employees present. The money taken did not belong to Ms. Bridges but to Shari's. She was simply the employee who was closest to the cash register. Mr. Rivera and Ms. Damewood were victims of this robbery to the same degree that Ms.

Bridges was. Similarly, Ms. Bridges was restrained to the same degree as Mr. Rivera and Ms. Damewood when she was grabbed in the shoulder area by a man who had brandished a gun and moved her to the kitchen area where Mr. Rivera and Ms. Damewood were located. The restraint of all three individuals was incidental to the robbery because it is impossible to commit a first-degree robbery of a commercial establishment without restraining the employees with at least as much restraint as was used in this incident.

Under the incidental restraint doctrine, evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State vs. Elmore*, NO. 34861-6-II (2010); citing *State vs. Saunders*, 120 Wn.App.800, 817-818, 86 P. 3d 232 (2004). “Although rooted in merger doctrine, courts reviewing kidnapping charges that are arguably merely incidental to another crime frequently borrow a sufficiency of the evidence analysis.” *Id*; *Saunders* at 817. Whether a “kidnapping is incidental to the commission of other crimes is a fact-specific determination.” *Elmore, State vs. Green*, 94 Wn.2d 216, 227, 616 P. 2d 628 (1980).

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 u.s. 358, 364, 25 L.Ed.2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the state could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State vs. Salinas*, 119 Wn.2d 192, 829 P. 2d 1068 (1992); *State vs. Green*, 94 Wn.2d 216, 220-222, 616 P. 2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all

reasonable inferences from the evidence must be drawn in favor of the state. State vs. Partin, 88 Wn.2d 899, 906-907, 567 P. 2d 1136 (1977). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. State vs. Theroff, 25 Wn.App. 590, 593, 608 P. 2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

As the jury was instructed in this case, the essential elements of first-degree kidnapping are intentional abduction "with the intent to facilitate the commission of a robbery or flight thereafter." CP 66. RCW 9A.40.020(1) "Abduct" is defined as, "restrain a person by using or threatening to use deadly force." RCW 9A.40.010(2). "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010(1).

The substantial interference with a person's liberty required to prove restraint must be a "real or material interference," as contrasted with a slight inconvenience or petty annoyance. State vs. Robinson, 20 Wn.App.882, 884, 582 P.2d 580 (1978), *affirmed on other grounds*, 92 Wn.2d 307, 597 P. 2d 892 (1979). By placing the word "substantial" in the statutory definition of restraint, the legislature demonstrated that the statute is intended to reach significant conduct restricting a person's freedom of movement in "important" and "essential" ways. *Id* at 885.

Further, this substantial interference with a person's freedom of movement must be incidental to the commission of another crime. *Green* at 227; *Korum* at 707.

Kidnapping is a serious offense and requires more than interference with a person. *Robinson* at 884-885.

Even when kidnapping and robbery convictions do not violate double jeopardy, there may be insufficient evidence to prove a separate kidnapping offense. *In re pers. Restraint of Bybee*, 142 Wn.App.260, 265-267, 175 P. 3d 589 (2007). Offenses that involve moving or holding another person may include conduct that technically falls under the legal definition of kidnapping, but does not meet the legal requirements for true kidnapping. *Green* at 227. Interference with a person's freedom of movement must have a significance that is independent of the other offense being committed. *Id.* otherwise, the restraint does not amount to the commission of the separate crime of kidnapping. *Id.*

In *Green*, for example, the defendant picked up his victim, stabbed her, and carried her to another part of an apartment building. *Green* at 226. the court ruled that "the mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not standing alone indicia of a true kidnapping." *Green* at 227. Although *Green*, "Lifted and moved the victim to the apartment's exterior holding area, it is clear these events were actually an integral part of and not independent of the underlying homicide." *Id.* at 226-227. Moving a person's body against that person's will is considered an incidental restraint if it was done solely as a mean of committing another crime. *Id.*

More analogous to Mr. Youngblood's additional grounds, in *Korum* the defendants committed several robberies inside people's homes and restrained the victims. In two of the robberies, the victims were restrained with duct tape at gunpoint. *Korum* at 690-691. In another robbery, the defendants tied up seven people with wrist restraints and duct tape at gunpoint. *Korum* at 691.

The *Korum* court found the restraint, abduction, and use of force "incidental" to the robberies. *Korum* at 707. The purpose of the restraint was to complete the robbery and prevent the victims' interference with the thefts; the secretion of the victims was not extreme, remote, or for longer than it took to complete the robberies; and the restraint did not raise a separate and distinct injury. For example, the five minutes it took one victim to free himself from the duct tape restraints showed he was not restrained to a degree so significant as to establish a separate offense. *Korum* at 707.

Likewise, in Mr. Youngblood's case, the purpose and extent of the restraint was to accomplish the robbery. Although restrained, the victims were not so unduly restricted in movement, as shown by the fact that Mr. Rivera was able to secret his wallet and Ms. Damewood utilized a hidden cell phone to call 911.

As noted in *Korum* and *Green*, kidnapping may readily hew close to the line of being subsumed by another offense when that offense, like robbery, necessarily involves some detention against the victims will. *Green* at 306; *Korum* at 705. While "a literal

reading” of statutes might suggest every robbery could be a kidnapping, this overlap should not be interpreted as intentional. *Id.* Youngblood’s kidnapping convictions are incidental to the robbery. Where kidnapping is incidental to the robbery, the kidnapping must be dismissed. This court should grant relief by dismissing the kidnapping charges and remand for resentencing.

ADDITIONAL GROUND CLAIM NO. 2:

TRAIL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO REQUEST A JURY INSTRUCTION FOR THE LESSER-INCLUDED OFFENSE OF UNLAWFUL IMPRISONMENT.

See also State v. Smith ___ Wash. App. ___, ___ P.3d ___, 2009 WL 5108382 (December 29, 2009) *See also State v. Hassan*, 151 Wash. App. 209,211 P.3d 441 (2009).
Response at 16.

The Hassan court noted that in examining the deficient performance prong of a claim that trial counsel was ineffective for failing to request a lesser-included offense instruction, the reviewing court must engage in a “highly fact specific inquiry.” Hassan, 151 Wash.App. At 219. The court identified three factors which it had found significant in Ward in evaluating trial counsel’s performance. First, is there a “significant disparity in the penalty between the grater and the lesser offense”?; second, is the defense theory consistent for the greater and the lesser offense?; and third, what are the risks of conviction if an all-or-nothing strategy is pursued? Hassan, 151 Wash.App. At 219, *see also Ward*, 125Wash.App. At 249-250.

Mr. Youngblood easily satisfies the three *Ward/Hassan* factors. First, and most importantly, there was a huge disparity between the sentence Mr. Youngblood received for first-degree kidnapping and the sentence he could have received had he been convicted of unlawful imprisonment. On the first-degree kidnapping charges, Mr. Youngblood was given a mid-range sentence of 95 months, to-run-consecutive twice, plus the 60 month firearm enhancement, to-run-consecutive twice, for a total of 329 months confinement. With an offender score of six, Mr. Youngblood's range for unlawful imprisonment would have been 22 to 29 months and the firearm enhancement would have been 18 months rather than 60 months. Even assuming that Mr. Youngblood would have received a high-end sentence of 29 months plus 18 months, had he been convicted of the lesser 29 months plus 18 months for the firearm, his sentence would have been a total of 198 months, 16.6 years substantially less than the sentence he received. In other words, the incentive for trial counsel to reduce Mr. Youngblood's exposure by requesting a lesser-included offense instruction should have overwhelmed any and all competing interests.

Second, there is no inconsistency between Mr. Youngblood's defenses on the greater and the lesser crimes. His over arching defense to both charges was that the state failed to prove that the elements of first-degree kidnapping were committed by anyone.

Finally, the risk of conviction in pursuing the all-or-nothing strategy adopted by trial counsel- if indeed trial counsel had any strategy at all- was overwhelming. DNA evidence tied Mr. Youngblood to a black mask, Mr. Youngblood was found with U.S. currency in his pocket and a roll of coins beneath his person at the time of his arrest. All

consistent with what was taken in the robbery and what witness and victims testified to the robbers' descriptions and the attire they wore. Just as was the case in Ward, trial counsel's "all-or-nothing approach was extremely risky in these circumstances, because it relied for its success chiefly on the credibility of the accused." Ward, 125 Wash.App. At 250.

Given the evidence adduced at trial and the enormous disparity in potential sentencing consequences, it was objectively unreasonable for trial counsel to fail to request a lesser-included offense instruction for the crime of unlawful imprisonment. This court should grant the petition and order a new trial.

ADDITIONAL GROUND CLAIM NO. 3:

IMPOSITION OF THE 60 MONTH FIREARM ENHANCEMENTS VIOLATES DOUBLE JEOPARDY WHERE THE USE OF A FIREARM IS ALREADY AN ELEMENT OF FIRST-DEGREE ROBBERY.

See State v. Workman, 90 Wn.2d. 443 (1978). *See also Busic v. United States*, 446 u.s. 398, 64 L.Ed.2d 381 (1980), *See also Simpson v. United States*, 435 u.s.6, 55 L.Ed.2d 70 (1978).

In *Simpson*, and again *Busic* the U.S. Supreme court considered federal statutes similar to Washington's, using both statutory construction analysis and constitutional considerations. Using statutory construction the court stated, "where a criminal statute provides for increased seriousness, and a longer sentence because the use of a firearm in the commission of that crime, then any additional penalty due to a firearm enhancement

should not be applied unless the legislature makes it clear that in fact it intended to do just that, increase the severity of the crime and apply a firearm enhancement.

Our Supreme court has also weighed in on this issue *See State v. Workman*, 90.Wn. 2d 443 (1978). (RCW 9a.56.200), which makes being armed with a deadly weapon an element of the crime. The firearm statute requiring enhancement of a sentence when a crime is committed with a firearm, may not be applied to first-degree robbery convictions.

Clearly this is the issue in Mr. Youngblood's case. Appellant was twice punished for the single act of using a firearm during the commission of a robbery. This is contrary to both federal and state authority, violating double jeopardy amendment. *See, Busic v. United States*, 446 u.s. 398, 64 L.Ed.2d (1980), *Simpson v. United States*, 435 u.s. 6, 55 L.Ed.2d 70 (1978), *State v. Workman*, 90 Wn.2d.443 (1978). Mr. Youngblood's conviction for first-degree robbery required the jury to find that the robbery was committed with a firearm. For this he received a sentence of 87 months. Mr. Youngblood was further punished to an additional 60 months to-run-consecutive sentence, for being, "armed with a firearm at the time of the commission of the crime of robbery in the first-degree."

Eliminating the element that, "the robbery was committed with a firearm," Mr. Youngblood could only have been convicted at most of second-degree robbery (RCW. 9a.56.210). first-degree robbery carries a substantial greater sentence than that of second-

degree robbery. Class A vs. Class B felonies increasingly vary as such *ie.* Class A- maximum term of life in prison vs. Class B- 10years maximum confinement. Based upon the states calculation of Mr. Youngblood's offender score (6), a standard range of 77 to 102 months, (level IX) as opposed to 33-43 months, (level IV). Mr. Youngblood was again further punished for the use of the firearm during the commission of aforementioned robbery under the same (criminal act) by the imposition of the 60 month, to-run-consecutive firearm enhancement sentence.

In addition to statutory construction, a criminal defendant is protected under both the U.S. Constitution and the state of Washington Constitution from twice being punished for the same criminal act. Although neither *Simpson*, nor *Busic* were decided on constitutional grounds, the courts reasoning leads one to conclude that if a legislature does in fact make it clear that it intends to twice punish a defendant for the single use of a firearm by both increasing the severity of a crime and adding a firearm enhancement, then that law would be subject to such a constitutional analysis. *Simpson, Supra*, 55 L.Ed.2d at 75-76.

So, as charged against Mr. Youngblood, the use of a firearm was an essential element of the robbery and that firearm in law and in fact increased the offense from second-degree robbery to first-degree robbery. The reasoning and decisions of *Simpson*, *Busic* and *Workman* must therefore control. For the reasons set forth this court should grant relief and remand for resentencing.

ADDITIONAL GROUND CLAIM NO. 4:

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE LESSER DEGREE CRIME OF UNLAWFUL IMPRISONMENT AS OPPOSED TO THE MORE SEVERE, KIDNAPPING IN THE FIRST-DEGREE.

Mr. Youngblood was charged with and tried for first-degree robbery, first-degree kidnapping (2 counts), and felony attempting to elude a pursuing police vehicle. Yet the trial court failed to instruct the jury in alternative on the lesser degree crime of unlawful imprisonment as opposed to the more severe first-degree kidnapping charges (counts 2 and 3).

State v. Korum, 120 Wn.App.686,86 P.3d 166 (2004) – selection of criminal charges- “A public prosecutor is a Quasi-judicial-officer” who represents the state and must “act impartially.” A prosecutor’s duty to do justice on behalf of the public transcends mere advocacy of the state’s case: “The prosecutor’s ethical duty is to seek the fairest rather than necessarily the most severe outcome.” The fairest outcome may include refraining from filing criminal charges legally supported by the evidence if filing those charges will result in statutorily-authorized punishment disproportionate to the particular offense or offender.

We acknowledge and respect the “broad ambit to prosecutorial discretion, most of which is not subject to judicial control.” Under the sentencing reform act of 1981 (SRA), our legislature has given prosecutors great latitude in determining what charges to file against a defendant. *State v. Lewis*, 115 Wn.2d 294,299, 797 P.2d 1141 (1990). None-the-less, the legislature did not leave the prosecutors’ charging discretion unbridled. On the contrary, the legislature limited prosecutors’ charging discretion as follows: (1) the

prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges: (a) will significantly enhance the strength of the state's case at trial; or (b) will result in restitution to all victims. (2) the prosecutor should not over charge to obtain a guilty plea. Overcharging includes: (a) charging a higher degree; (b) charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged. Former RCW. 9.94a.440(2) (1996), recodified as RCW 9.94a-411 (2), subcaptioned, "decision to prosecute" (emphasis added).

The prosecutor's decision to try Mr. Youngblood in counts 2 and 3 for kidnapping in the first-degree did not significantly enhance the strength of the state's case, nor did it result in restitution to all victims. This error was compounded by the prosecutors neglect to instruct the jury of the lesser offense of unlawful imprisonment as an alternative to first-degree kidnapping. This court should grant relief and remand for resentencing.

ADDITIONAL GROUND CLAIM NO. 5:

THE PROSECUTOR IMPEACHED WITNESS JAVIER RIVERA BY CALLING HIM TO TESTIFY IN SECOND TRIAL WITH PRIOR KNOWLEDGE OF THE CONFLICTING TESTIMONY MR. RIVERA INTENDED TO PRESENT.

A witness may be impeached with a prior inconsistent statement er 613 (b). The proper procedure is for the witness to first be confronted with the statement and afforded the opportunity to explain or deny the statement. If the witness denies making the prior statement, then the party seeking to impeach may introduce extrinsic evidence of the statement. Er 613 (b). It is Black-Letter Law in this that such “[I]mpeachment evidence affects a witness’ credibility and is not proof of the substantive facts encompassed in such evidence.” *State v. Johnson*, 40 Wash.App. 371, 377, 699 P.2d 221 (1985). When “such evidence is admitted, an instruction cautioning the jury to limit it’s consideration of the statement to its intended purpose is both proper and necessary.” *Id.*

Before a witness’ credibility may be impeached, that person’s credibility must be at issue- it must be of some consequence to the case being tried. *State v. Allen S.*, 98 Wash.App. 452, 464, 989 P.2d 1222 (1999) *rev denied*, 140 Wash.2d 1022 (2000); *see also* Er 401 (evidence is relevant if it tends, “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”)

Clearly, this is what transpired in Mr. Youngblood’s case. Mr. Rivera’s recanted statements during the second trial were highly prejudicial and overwhelmingly contradictory to his prior statements made while under oath during the first trial. This renewed testimony increasingly enhanced Mr. Youngblood’s chances of being convicted of the kidnapping in the first degree charges, making the prosecutor’s desire to reach a

conviction more than less probable. *See* Rp. Pg.150 (trial #1) Questions by defense attorney, Jeff Sowder, answers by States' witness Javier Rivera.

Rp. Pg.150 – Cross-examination (trial #1)

Q: So are you used to seeing hunting weapons and pistols?

A: In my house we never had one.

Q: But you know what a pistol looks like?

A: Yes.

Q: And you did not see a pistol that day?

A: That day I did not see a gun. I know someone was pointing something, but I don't know what it was. It was very quickly, I didn't see a gun.

Q: Okay. Sir, do you have any problem with your vision, can you see well?

A: I don't have any sight problems.

Rp. Pg.1207 – Direct (trial #2) trial prosecutor Anthony Golik (questions), States' witness Javier Rivera (answers).

Q: What happened next?

A: When I turned around, there was a person standing there. He grabbed me like this, so I turn to look at the window.

Q: What did you see?

A: And there was another person standing there, pointing at me.

Q: Okay. Now, what was he pointing?

Rp. Pg.1208 – Direct (trial #2), questions by trial prosecutor Anthony Golik, answers by States' witness Javier Rivera.

A: Pointing at me with a gun.

Q: What kind of gun?

A: I don't know about arms. I didn't recognize it.

Q: Okay. Was it a long gun, like a rifle, or a short gun, like a pistol?

A: A pistol.

Q: Were the two individuals back in the cooking area where you were, or were they out in the front of the store still?

A: One was with me, and the other one was on the other side of the counter, in front of me.

Q: Which one was pointing the pistol at you?

A: The one that was on the other side.

The inconsistencies in these statements are transparent. Further, Mr. Rivera's renewed testimony in second trial weighed substantially in regards to the outcome of the case. The jury could easily have been swayed to believe that all elements to-convict for first-degree kidnapping were met in light of his statement of a pistol being pointed in his direction. This witness should have been impeached as his statements withheld no consistency when it pertained to the most pivotal factor(s) in determining the elements of the crime and to what extent those elements were met in fact of law.

For this reason set forth, this court should grant relief, or in alternative set forth for a new trial.

ADDITIONAL GROUND CLAIM NO. 6:

THE TRIAL COURT ERRED BY IMPOSING A SENTENCE FOR FIREARM ENHANCEMENTS ON COUNTS I, II AND III WHERE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT YOUNGBLOOD'S FIREARM ENHANCEMENTS.

See also State v. Pierce, Wash.App. Wn.2d 1016 (2007). 135 Wn.App. 1014, 2006 WL 2924475, AT 11-12, 2006 Wash.App. Lexis 2258 at 30-32.

The *Pierce* court noted that “[I]n order to prove a firearm enhancement, the state must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a ‘firearm’: ‘A weapon or device from which a projectile may be fired by an explosive such as gunpowder.’” *Recuenco*, 163 Wn.2d at 437 (quoting 11 Washington practice: Washington pattern jury instructions: criminal 2.10.01 (2d ed.sipp.2005)). To uphold a firearm enhancement, the state must present the jury with sufficient evidence to find a firearm operable under this definition. *Recuenco*, 163 Wn.2d at 437 (citing *State v. Pam*, 98 Wn.2d 748, 754-755, 659 P.2d 454 (1983) overruled in part on the other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988))

Mr. Youngblood easily satisfies the *Pierce* factors. Here, the state failed to present sufficient evidence from which a reasonable jury could find that the firearm Youngblood allegedly used during the commission of the crime was operable. States’ witness Detective John Ringo who was the lead investigative officer in this case failed to thoroughly execute his job duties by neglecting to test fire the gun that was determined to be used during the commission of the aforementioned crime. Detective Ringo had ample opportunity to solidify the States’ case in respect to the weapon by test firing the instrument to eliminate any doubt as to whether or not the gun was in-fact operable. However, Mr. Ringo’s testimony weighed substantially in light of the firearm facts, inadequately presented evidence that could have easily swayed the jurors’ decisions into believing that the gun did not need to be test fired in order to prove without a reasonable doubt its’ operability. *See* Rp. 10. Pages 1525, 1526 and 1528. Questions by defense

attorney, David Kurtz, answers by States' witness, Detective John Ringo, on cross examination during trial #2.

Rp 10 pg.1525

Q: Detective Ringo, with regard to - - you said the gun was functional, does that mean it can be fired?

A: Based on my exam, without taking it to the range and firing it, I would assume that it is a functioning firearm capable of discharging a projectile.

Q: Okay. So you didn't test fire it, but you've cocked it back and it gave that little indication that the hammer was ready to go and the firing pin was - - the firing pin's in order and all that?

Rp 10 pg.1526

A: That would be correct.

Q: Okay. But you don't know that?

A: Don't know?

Q: For a fact that it could be fired?

A: I - - correct, I did not take it to the range and fire it.

Q: Is there a reason why you didn't test fire it either for the first trial or this trial?

A: No.

Rp. 10 pg.1528

Q: Detective Ringo, why didn't you test fire the gun either in February or now as opposed to just cocking it back and seeing if that little mark is there? Why?

A: The firearm, it's a deadly weapon on its' face. Whether or not it is an actual functioning firearm, when we take it into our possession, the assumption is that it is. Didn't see the benefit in taking the firearm out and test firing it. Would have been a good idea, maybe, but we just didn't. It's a functioning firearm that appears to be in good working order.

Clearly Detective Ringo has based his testimony in part of the firearms' operability on opinionated views. "The assumption," and "what appears," to Mr. Ringo are not sufficient indication to substantiate evidence without a reasonable doubt as to whether or not the weapon in question was, or was not operable. Just as one can not merely from observation of another determine whether that person is terminally suffering from a brain tumor. It takes proper screenings and/or tests to be run on the individual to

