

28093-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DWIGHT L. RUSS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. Trial judge erroneously refused to instruct the jury on the lesser included offenses of residential or second degree burglary and misdemeanor assault.
2. The judge erred in imposing sentences of life without the possibility of parole.

B. ISSUES

1. When the witnesses give widely varying accounts of the events that gave rise to the charged crimes, such that the jury could find evidence to support numerous possible scenarios, including ones that would support finding the defendant was innocent of the charged crimes and guilty of lesser degrees of the charged crimes, or lesser included offenses, does the court err in refusing to instruct the jury on the lesser offenses?
2. Under the due process clause of the Fourteenth Amendment and the Sixth Amendment right to a jury trial, does the court err in imposing sentences of life without the possibility of parole based on the trial court's finding of prior convictions by a preponderance of the evidence?

3. Does the State violate the equal protection clause of the Fourteenth Amendment by excluding from the class of recidivist offenders whose sentences are based on prior convictions that must be found by a jury beyond a reasonable doubt those offenders whose prior convictions are defined as most serious offenses?

C. STATEMENT OF THE CASE

Will and Melody Goode were having a birthday party for their friend, Natalie Benda, on December 22, 2007. (RP 7-8, 73) They met up with Ms. Benda and several of her friends at One Bridge North, where she works as a bartender. (RP 8, 72, 121) For the next few hours they drank, shot some pool, and played some darts. (RP 8, 112, 122) Some time between 7:30 and 10:00 pm, everyone went to the Goodes' house where they continued to drink, shoot pool, and play poker. (RP 9, 20, 74) According to Ms. Goode, she and her husband gave Ms. Benda a ride and when they arrived at their house she went to bed. (RP 9) Mr. Goode recalls that Ms. Benda showed up later. (RP 75) Around midnight, Ms. Goode went upstairs to sleep on the couch. (RP 10)

About 3:00 a.m. Ms. Goode was awakened by a knock on the door. (RP 10) She saw Ms. Benda's boyfriend, Dwight Russ, and let him in.

(RP 11, 72) Ms. Goode told Mr. Russ that Ms. Benda was in the bedroom, and he awakened her and brought her to the living room. (RP 11) Ms. Goode went downstairs to tell the four people who were still there that Ms. Benda was leaving. (RP 11) According to Ms. Goode, Mr. Goode, Steve Rijon, Mr. Rijon's uncle, Earl Davis and another person named Ryan came up to say good-bye to Ms. Benda. (RP 12 77) Suddenly, Mr. Russ came through the door and went after Mr. Davis. (RP 12) According to Ms. Goode, everyone pushed Mr. Russ out the door to stop the fight. (RP 12)

According to Mr. Goode, by the time he got upstairs, there was a great commotion involving pushing and shoving. (RP 77) Mr. Russ had returned, accompanied by Antoine Marshall. (RP 12-13, 78) Mr. Goode stepped outside and pushed Mr. Marshall off the porch. (RP 77-78) Returning indoors, he found Mr. Davis running around the house trying to strike Mr. Russ with a skillet. (RP 79) Mr. Goode kept asking Mr. Russ not to fight in his house and told him to leave. (RP 79) According to Mr. Goode, everyone finally calmed down and Mr. Russ and Mr. Marshall left. (RP 79) Ms. Goode and Ms. Benda got in the Goodes' truck to take Ms. Benda home. (RP 14)

Mr. Goode recalled that some time after the two women had left, he saw Mr. Russ enter his house with a gun tucked in his trousers.

(RP 80) Steve Rijn asked “What are you gonna shoot me?” (RP 81) Mr. Russ pointed the gun at Mr. Rijn, who walked over, pulled the gun to his forehead and said, “Shoot me, mother fucker. What are you gonna do, spend the rest of your life in prison?” (RP 81) During this time, Mr. Goode saw Mr. Marshall standing in the doorway. (RP 81) He went downstairs and called the police. (RP 82) When he returned to the living room Mr. Russ and Mr. Marshall had left. (RP 82)

Mr. Rijn has no recollection of any of these events. (RP 110-18)

Mr. Davis recalled that, by the time he got to the living room, Mr. Russ was already arguing with Mr. Rijn. (RP 123) He remembered that Mr. Russ threatened to shoot Mr. Rijn, left the house, and came back with a gun and pointed it at Mr. Rijn’s chest. (RP 123-26) The two men continued arguing so Mr. Davis found a frying pan and tried to hit Mr. Russ. (RP 126) After a bit of a tussle, Mr. Russ and Mr. Marshall left. (RP 126)

Mr. Marshall remembers driving Mr. Russ to the Goodes’ house to pick up Ms. Benda. (RP 219) After waiting in the car for a time, Mr. Marshall went to the door, and a scruffy guy let him in and then drew a knife. (RP 219) Mr. Marshall left, found a gun in a car that was parked in the driveway, and returned to the house. (RP 220) When someone opened the door, Mr. Marshall saw Mr. Russ and told him, “come on, let’s

go.” (RP 220) Mr. Marshall returned to his car and put the gun under the driver’s seat. (RP 222) The police arrived and arrested Mr. Russ and Mr. Marshall. (RP 61, 223)

Mr. Russ was tried on charges of first degree burglary while he or a participant in the crime was armed with a deadly weapon, and second degree assault with a deadly weapon. (CP 15)

Defense counsel asked the court to instruct the jury on lesser included offenses of residential or second degree burglary and misdemeanor assault, based on the theory that while Mr. Russ may have entered or remained in the residence unlawfully with the intent to assault someone, and did assault Mr. Rijon, he was not involved in Mr. Marshall’s decision to arm himself with a gun and come to the door of the residence. (RP 262-65, 271)

Reasoning that even if Mr. Russ was not armed with a weapon, then if the jury found he was guilty of anything it would have to find he was guilty as an accomplice to Mr. Marshall, who was armed with a gun, the court refused to give the requested instructions. (RP 266-67) The court cited an absence of evidence from which a jury could find a reason for Mr. Russ’s presence at the residence that would establish the commission of assault and burglary unless he knew about the presence of the weapon. (RP 267)

The court instructed the jury on the elements of first degree burglary and second degree assault:

To convict the defendant of the crime of burglary in the first degree as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt: One, that on or about the 23rd day of December, 2007, the defendant entered or remained unlawfully in a building; two, that the entering or remaining was with the intent to commit a crime against a person or property therein; three, that in so entering or while in the building or in immediate flight from the building, the defendant or an accomplice in the crime charged was armed with a deadly weapon; and four, that the acts occurred in the state of Washington.

(RP 278)

To convict the defendant of the crime of assault in the second degree as charged in count 2, each of the following two elements of the crime must be proved beyond a reasonable doubt: “One, that on or about the 23rd day of December, 2007, the defendant assaulted Steven Rijn with a deadly weapon; and two, that this act occurred in the state of Washington.”

(RP 279)

The court’s definition of assault included the following:

An assault is an intentional touching . . . of another person with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person.

(RP 280)

The jury found Mr. Russ guilty of both first degree burglary and second degree assault. (CP 187) Finding Mr. Russ has two prior

convictions for most serious offenses, the court imposed concurrent sentences of life without the possibility of parole. (CP 188, 190)

D. ARGUMENT

1. MR. RUSS'S CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL JUDGE ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF RESIDENTIAL OR SECOND DEGREE BURGLARY AND MISDEMEANOR ASSAULT.

The court erred in failing to give Mr. Russ's requested instructions on the lesser included offenses of residential burglary and simple assault.

A defendant may be found guilty of an offense of an inferior degree to the offense with which he is charged. RCW 10.61.003, .010. These statutes guarantee the "unqualified right" to have the jury pass on the inferior degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wash. 273, 276-277, 60 Pac. 650 (1900). "Regardless of the plausibility of this circumstance, the defendant had an absolute right to have the jury consider the lesser-included offense on which there is evidence to support an inference it was committed." *Id.* at 166.

The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *State v. Fernandez-Medina, supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, 102 Wn.2d at 164.

The evidence that Mr. And Ms. Goode, Ms. Benda, Mr. Rijon, and Mr. Davis had consumed substantial amounts of alcohol during the eight hours preceding the alleged offenses is undisputed, and the participants in these events gave inconsistent and conflicting accounts. (RP 83, 90-95, 112-16) Consequently, the evidence is insufficient to establish with any certainty how or when Ms. Benda arrived at the Goodes’ residence; whether Mr. Russ accosted Mr. Davis or Mr. Rijon or both; whether the other guests pushed Mr. Russ outside or Mr. Goode restored order and Mr. Russ left at his request; whether Mr. Marshall accompanied Mr. Russ when he entered the residence the second time or the third time, or both; whether Mr. Rijon made remarks to Mr. Russ about shooting him and going to prison or whether Mr. Russ threatened to shoot Mr. Rijon; or whether Mr. Marshall ever entered the house. “The jury is entitled to pick and choose what evidence it wishes to believe and may draw any

reasonable inferences therefrom.” *Safeco Ins. Co. of America v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 14, 680 P.2d 409 (1984).

In the plain language of the statute, the possession of a deadly weapon elevates simple assault to second degree assault only if the weapon is used to commit the assault.¹ Viewing the witness’s testimony in the light most favorable to Mr. Russ, the jury could have chosen to believe Mr. Marshall’s testimony that he was the person who had the gun. Further, the jury could have chosen to disbelieve Mr. Goode’s and Mr. Davis’s testimony that when Mr. Russ later returned he was carrying a gun and used it to threaten Mr. Rijon. If so, Mr. Russ could only be guilty of second degree assault with a deadly weapon as an accomplice if Mr. Marshall committed the assault.

There is no evidence Mr. Marshall assaulted Mr. Rijon. According to Mr. Goode, when he entered the living room he saw Mr. Russ and Mr. Rijon together, there was pushing and shoving and he tried to “break it up.” (RP 78) He asked Mr. Russ “not to fight in my house.” (RP 79) From this testimony, a jury could infer that Mr. Russ assaulted Mr. Rijon, but not with a deadly weapon.

¹ “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . (c) Assaults another with a deadly weapon . . .” RCW 9A.36.021(1)

Similarly, if the jury believed that Mr. Marshall had a gun, and not Mr. Russ, then Mr. Russ's return to the Goode residence, with an intent to further assault Mr. Rijn, after Mr. Goode asked him to leave, would be burglary, but it would be first degree burglary while armed with a deadly weapon only if the jury found Mr. Marshall was a participant in the crime. According to Mr. Goode, Mr. Marshall never entered the residence. Based on Mr. Marshall's testimony, the jury could readily find he was not a participant in Mr. Russ's burglary.

Alternatively, the jury could have found Mr. Russ committed second degree burglary based on Mr. Goode's testimony that he repeatedly asked Mr. Russ to stop fighting and leave. "A person 'enters or remains unlawfully' in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3). The inference is that after Mr. Goode asked Mr. Russ to leave, Mr. Russ remained unlawfully for some period of time while Mr. Goode repeated his demands, and continued intentionally fighting.

The trial court's refusal to give the requested instructions resulted from the court's factual determination that accomplice liability was a given. This was error.

2. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED MR. RUSS OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

- a. Due Process Requires That A Jury Find Beyond A Reasonable Doubt Any Fact That Increases The Defendant's Maximum Possible Sentence.

No person shall be deprived of liberty without due process of law and every criminal defendant has the right to a jury trial. U.S. Const., amend. VI and XIV. The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)).

This principle applies not just to the essential elements of the charged offense, but also to the facts labeled “sentencing factors,” if the facts increase the maximum penalty faced by the defendant. See *Blakely v. Washington*, 542 U.S. 296, 304-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Apprendi, supra*.

The dispositive question is one of substance, not form: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.” *Ring*, 536 U.S. at 602 (*citing Apprendi*, 530 U.S. at 482-83). A judge may only impose punishment based on the jury verdict or guilty plea, not additional findings. *Blakely*, 542 U.S. at 304-05.

b. This Issue Is Not Controlled By Prior Federal Decisions.

In *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Court held that recidivism was not an element of the substantive crime that needed to be pleaded in the information, even though the defendant’s prior conviction was used to double the sentence otherwise required by federal law. *Almendarez-Torres*, 523 U.S. at 246. *Almendarez-Torres* had pleaded guilty and admitted his prior convictions, but he argued that his prior convictions should have been included in the indictment. *Id.* at 227-28. The Court determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* The Court expressed no opinion, however, as to the constitutionally-required burden of proof of sentencing factors used to increase the severity of punishment

or as to whether a defendant has the right to a jury determination of such factors. *Id.* at 246.

Since *Almendarez-Torres*, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance penalties. See e.g. *Blakely*, 542 U.S. at 301-02; *Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S. Ct. 1215, 143 L. Ed. 2d 311(1999). The *Apprendi* opinion did not purport to address the issue of whether a sentence enhancement based on prior convictions requires proof of the conviction to a jury beyond a reasonable doubt.

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

530 U.S. 466 at 488-490; see Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004).

Recognizing the United States Supreme Court's failure to embrace the *Almendarez-Torres* decision, the Washington Supreme Court has nevertheless felt obligated to "follow" it. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (addressing *Ring*), cert. denied, *Smith v. Washington*, 124 S. Ct. 1616 (2004); *State v. 24 Wheeler*,

145 Wn.2d 116, 121-24, 34 P.3d 799 (2001) (addressing *Apprendi*). Since *Almendarez-Torres* only addressed whether the allegations of prior convictions must be included in the indictment, Washington's courts remain free to determine that due process protections extend to sentencing factors such as prior convictions that increase a sentence above the statutory standard sentence range. *Blakely*, 542 U.S. at 305.

The use of Mr. Russ's prior convictions to elevate his punishment to life without the possibility of parole violated his rights to due process and a jury trial. His sentence should be vacated.

3. IMPOSITION OF A LIFE SENTENCE WITHOUT
POSSIBILITY OF PAROLE VIOLATED MR.
RUSS'S RIGHT TO EQUAL PROTECTION.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. *Thorne*, 129 Wn.2d at 771.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a

designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

- a. Repeat Offenders Constitute A Distinct Class Of Persons, But Not All Members Of The Class Are Afforded The Same Rights To Proof Beyond A Reasonable Doubt And Resolution Of Factual Issues By A Jury.

Washington’s recidivism-related criminal statutes create a class of recidivist offenders who commit crimes for which the existence of prior convictions, which result in more severe punishment, are considered elements of the offense that must be proved to a jury beyond a reasonable doubt. *See State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 25 (2008); RCW 9.94A.030 and .570. The statutes, as construed by the courts, do not, however, apply alike to all recidivist offenders.

Roswell involved the crime of communication with a minor for immoral purposes. *Roswell*, 165 Wn.2d at 191. The Court found that in the context of this and related offenses, proof of a prior conviction functions as an “elevating element,” in that it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime and providing for more severe sentences. *Id.* at 191-92.

Where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *Roswell*, 165 Wn.2d at 192. Because the recidivist fact in *Roswell* elevated the offense from a misdemeanor to a felony, “it actually alter[ed] the crime that may be charged,” and therefore the prior conviction was an element and must be proven to the jury beyond a reasonable doubt. *Id.*

The POAA, RCW 9.94A.570, effectively excludes from this class certain recidivist offenders whose prior convictions also result in a greater sentence, mandatory life without the possibility of parole: “The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions, whether used for determining an offender score or as predicate strike offenses for purposes of the POAA.” *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005) (citing *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)).

b. No Reasonable Grounds Exist For The Disparate Treatment Of Some Members Of The Class Of Recidivist Offenders.

No apparent grounds exist for distinguishing between recidivists whose prior offenses must be proved to a jury beyond a reasonable doubt

and those that need only be proved to a judge by a preponderance of the evidence. *Roswell* sought to distinguish between the existence of prior convictions as either “sentencing factors,” or elements, depending on the context. But the Supreme Court has rejected this distinction: “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) quoting *Apprendi*, 530 U.S. at 478.

A recidivist fact that potentially alters the maximum permissible punishment by classifying the crime as a Class C felony rather than a gross misdemeanor, as in *Roswell*, is not fundamentally different from a recidivist fact that alters the maximum punishment from a term of months to life without the possibility of parole. There is no rational basis for classifying a fact that justifies the punishment for recidivist criminals as an “element” in certain circumstances and as an “aggravator” in others.

- c. The Disparate Treatment Of Recidivist Offenders Bears No Rational Relationship To The Purpose Of The Legislation.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony, and the use of a prior conviction to elevate a Class A felony to an offense requiring a sentence of life without the possibility of parole, share the purpose of punishing the recidivist criminal more harshly.² But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter instance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

The legislative classification that permits this result is wholly arbitrary. The *Roswell* Court concluded that the recidivist fact was an element because it defined the very illegality, reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” *Roswell*, 165 Wn.2d at 192 (emphasis in original). But, as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not; the prior offense merely alters the maximum

² The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act as follows: “to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.” *Thorne*, 129 Wn.2d at 771-72.

punishment to which the offender is subject. *Id.* (“If all other elements had been proved he could have been convicted of only a misdemeanor.”).

Similarly, first degree burglary and second degree assault are crimes, whether one has a prior conviction for a most serious offense or not. Because the recidivist fact here operates to alter the punishment in the same fashion as in *Roswell*, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance—with the attendant due process safeguards afforded “elements” of a crime—and as an aggravator in another. The Court should strike Mr. Russ’s persistent offender sentence and remand for entry of a standard range sentence.

E. CONCLUSION

The conviction should be reversed and the matter remanded for retrial before a properly instructed jury. The sentence should be vacated.

Dated this 1st day of July, 2010.

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