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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 286274-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DANIEL WEBB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WEBB DISPLAYED WHAT APPEARED TO BE A FIREARM, AN ESSENTIAL ELEMENT OF FIRST DEGREE ROBBERY

Mr. Webb was convicted of robbery in the first degree under the alternative that he was armed with what appeared to be a firearm or other deadly weapon, RCW 9A.56.200(a)(ii), when he robbed a convenience store with what the cashier recognized was a toy gun. On appeal, Mr. Webb argues his conviction for first degree robbery cannot stand in the absence of proof beyond a reasonable doubt that he displayed what appeared to be a firearm. Amended Brief of Appellant at 10-17. In response, the State argues it met its burden of proof because the store cashier was not immediately certain that the gun was a toy and because the element should not be analyzed from the point of view of the victim. Brief of Respondent at 15-26.

When Mr. Webb demanded the cashier at the Thorp AM/PM mini mart give him gasoline and beverages, he pulled out a toy gun for only five to ten seconds. 1RP 9, 10, 11, 12; Ex. 9 at 2:44-45. The cashier, Eric Owens quickly realized it was a toy. 1RP 10-11, 19, 28-29, 33, 40; CP 96-98, 99-100. Company policy, however,

required Mr. Owens to comply with Mr. Webb's requests whether or not he was armed. 1RP 29-30; 2RP 21, 23. Because the cashier was aware that the gun was not real during virtually the entire interaction, including when he handed Mr. Webb money from the cash register, the State did not prove beyond a reasonable doubt that Mr. Webb displayed what appeared to be a deadly weapon in the course of the robbery.

The State's argument that whether the object appears to be a deadly weapon should not be examined from the point of view of the robbery victim conflicts with the full text of the robbery statutes. The robbery definitional statute, RCW 9A.56.190, requires the defendant unlawfully take personal property from another person against his will by the use or threatened use of immediate force, violence, or fear of injury. RCW 9A.56.190; CP 42 (Instruction 5). RCW 9A.56.200(1)(a) additionally requires the defendant "display" what appears to be a weapon during or in flight from the robbery to elevate a robbery to robbery in the first degree. RCW 9A.56.200; CP 43-44 (Instructions 6-7). "Display" means to exhibit or show. State v. Kennard 101 Wn.App. 533, 537, 6 P.3d 38, rev. denied, 142 Wn.2d 1011 (2000); State v. Henderson, 34 Wn.App. 865, 867, 664 P.2d 1291 (1983); State v. Hauck, 33 Wn.App. 75, 77, 651

P.2d 1092 (1982), rev. denied, 99 Wn.2d 1001 (1983). The person to whom the apparent deadly weapon is displayed is logically the person from whom the defendant takes property by the threatened use of force.

Thus, this Court approved an instruction that defined “display” of what appears to be a firearm to mean exhibiting or showing what appears to be a firearm to the view of the victim.” Kennard, 101 Wn.App. at 537. Similarly, this Court looked at two robbery victims’ testimony that neither saw a gun in determining the jury was properly instructed on both first and second degree robbery in State v. Barker, 103 Wn.App. 893, 901-02, 14 P.3d 863 (2000), rev. denied, 143 Wn.2d 1021 (2001).

The Legislature enacted RCW 9A.56.200(1)(b) to “proscribe conduct in the course of a robbery which leads the victim to believe the robber is armed with a deadly weapon, whether the weapon is actually loaded and operable or not, and whether the weapon is real or toy.” Henderson, 34 Wn.App. at 868. The Legislature was thus concerned that display of an apparent deadly weapon would create fear in the victim that would aid the defendant in taking the victim’s property. The State nonetheless hypothesizes that the Legislature’s intent was based upon the possibility that display of

an apparent weapon could trigger violence by bystanders. Brief of Respondent at 16-18. The State provides no authority for its theory. This Court may thus assume that counsel was unable to find any such authority after a diligent search and ignore the argument. Oregon Mutual Insurance Co. v. Barton, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001), rev. denied, 146 Wn.2d 1014 (2002).

Moreover, the prosecutor's theory is at odds with the Henderson Court's reasoning in upholding two first degree robbery convictions based upon the display of what appeared to be a deadly weapon even though two victims did not see any weapon. Henderson, 34 Wn.App. at 867-69. One robbery victim testified the defendant's right hand was concealed in his right front pocket, which had a bulge, and she therefore believed the defendant had a small caliber pistol. Id. at 866. The victim of the second robbery believed the defendant was armed because the robber indicated he had "this" and put his hand in his jacket pocket. Id. at 867. The impact of the defendant's behavior on the victims was critical to the court's determination there was sufficient evidence to support both convictions for first degree robbery. Id. at 868-69.

It seems to us that where the accused indicated (verbally or otherwise) the presence of a weapon (real or toy), the effect on the victim is the same whether it is actually seen by the victim or whether it is directed at the victim from inside a pocket. In either situation the apprehension and fear is created which leads the victim to conclude the robber is truly armed with a deadly weapon. According, the victim feels compelled to comply with the accused's demand for money.

Id. (emphasis added).

The State refers to State v. Scherz, 107 Wn.App. 427, 27 P.3d 252 (2001), to support its argument that the victim's perspective is not determinate. Brief of Respondent at 20 (citing Scherz, 107 Wn.App. at 435 (quoting State v. Barker, 103 Wn.App. at 908, 14 P.3d 863 (Schultheis, J., dissenting))). As the State admits, however, there was no display of an apparent deadly weapon in Scherz, which case holds that words alone cannot support a conviction for first degree robbery under this prong. This case does not support the State's position.

The State also argues the statute does not state the "degree of certainty" the item must appear to be a deadly weapon. Brief of Respondent at 16-17. The State, however, must prove beyond a reasonable doubt that the object appeared to be a firearm or other deadly weapon. CP 44 (Instruction 7); Apprendi v. New Jersey,

530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Thus, the jury must determine beyond a reasonable doubt that the object appeared to be a firearm.

The State did not prove beyond a reasonable doubt that Mr. Webb displayed what appeared to be a deadly weapon when the robbery victim knew Mr. Webb only had a plastic toy gun. His first degree robbery conviction must therefore be reversed.

**2. THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT THE ROBBERY
INVOLVED A DESTRUCTIVE AND FORESEEABLE
IMPACT ON PERSONS OTHER THAN THE VICTIM**

Mr. Webb challenges the sufficiency of the evidence to support the jury's finding that the robbery involved a destructive and foreseeable impact on persons other than the victim, a statutory aggravating factor. CP 62; RCW 9.94A.535(3)(r); Amended Brief of Appellant at 17-20. The State responds that the evidence and common sense support the jury's finding. Brief of Respondent at 26-29. The State, however, fails to address Mr. Webb's argument that the aggravating factor must be based upon evidence showing the crime had a destructive impact that was greater than produced by a typical first degree robbery.

Mr. Webb's jury found that the robbery "involved a destructive and foreseeable impact on persons other than the victim." CP 51, 62. Because an aggravating factor increases the defendant's possible maximum sentence, it is an element of a higher crime that the State must prove beyond a reasonable doubt.¹ Blakely v. Washington, 542 U.S. 296, 305, 124 S.Ct. 2531, 59 L.Ed.2d 403 (2004); Apprendi, 530 U.S. at 494 n.19; State v. Stubbs, ___ Wn.2d ___, 240 P.3d 143 at ¶ 8 (2010); RCW 9.94A.537(3). This Court reviews the sufficiency of the evidence under the same standard as for other elements of the crime. Stubbs, 240 P.3d at ¶ 8.

Because the jury's finding of an aggravating factor permits the sentencing court to impose a sentence over the high end of the standard sentence range, Washington law requires the aggravating factor set the defendant's crime apart from the normal offense in that category. Thus, an exceptional sentence may only be imposed based upon the severity of the victim's injuries when the injuries "substantially exceed the level of bodily harm necessary to satisfy the elements of the offense" and are also "greater than that

¹ In Mr. Webb's case, the court sentenced him to 82 months in prison, twice the maximum term possible absent a jury finding of an aggravating factor. CP 66-67.

contemplated by the Legislature in setting the standard range.” Id. at ¶¶ 9,10 (quoting State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996)). The Stubbs Court held that excessive bodily harm cannot be aggravating factor for first degree assault because that statute covers all serious bodily injury short of death. Stubbs, 240 P.2d at ¶¶ 9-20. Similarly, an exceptional sentence based upon a foreseeable and destructive impact on persons other than the victim may only be imposed when the defendant’s actions have an impact that is both foreseeable to the defendant and “of a destructive nature that is not normally associated with the commission of the offense in question.” State v. Cuevas-Diaz, 61 Wn.App. 902, 906, 812 P.2d 883 (1991).

The State argues the jury determination that the robbery had a destructive impact on Mr. Webb’s daughter is supported by evidence of Meadow’s demeanor during and immediately after the robbery. Brief of Respondent at 28-29. The State further attempts to bolster this argument by its own decision not to call Meadow as a witness because it might further traumatize the child, a fact not before the jury and thus irrelevant to this Court’s analysis. Brief of Respondent at 28-29 (citing 2RP 46-47).

Any witness to a first degree robbery is likely to appear stunned and afraid. The State did not produce any evidence that Meadow was more harmed by this robbery than other observers of robberies, that the impact upon Meadow was more destructive than normal or even that there was any impact beyond the day of the robbery. The State therefore did not meet its burden of proving the "destructive and foreseeable impact" aggravator beyond a reasonable doubt, and the aggravator must be reversed and the resulting exceptional sentence vacated.

3. MR. WEBB'S SIXTH AMENDMENT RIGHT TO A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION

Mr. Webb argues his constitutional right to present his defense was violated when the trial court refused to instruct the jury on involuntary intoxication. Amended Brief of Appellant at 21-28. The State defends the trial court's decision, arguing there was no evidence Mr. Webb's intoxication rendered him unable to make decisions or form the requisite criminal intent for robbery. Brief of Respondent at 30-36.

Mr. Webb was entitled to have the jury instructed on his theory of the case. State v. Williams, 132 Wn.2d 248, 259-60, 937

P.2d 1052 (1997). The Washington Supreme Court addressed the failure to give a voluntary intoxication in a prosecution for second degree child molestation in State v. Stevens, 158 Wn.2d 304, 306-10, 143 P.3d 817 (2006). There, the jury heard evidence the defendant had consumed two bottles of beer and two shots of whiskey before encountering two 13-year-old girls and then grabbed one girl's breast when he saw them again an hour later. Id. at 306. The Supreme Court held this evidence supported a voluntary intoxication instruction and reversed the conviction. Id. at 310.

Without the proposed jury instruction on voluntary intoxication, Stevens was precluded from arguing his theory of the case to the jury. Although Stevens was allowed to present evidence of intoxication, the jury was not instructed on how or whether they could consider this evidence in determining if Stevens acted with the purpose of sexual gratification. . . . Stevens was entitled to present evidence of his intoxication and to have the trial court instruct the jury on voluntary intoxication.

Id. The Stevens Court made this ruling without reference to the Gallegos² factors relied upon by the trial court in Mr. Webb's case and was unconcerned by the absence of direct evidence that the

² State v. Gallegos, 65 Wn.App. 230, 237, 828 P.2d 37, rev. denied, 119 Wn.2d 1024 (1992).

alcohol use impacted the defendant's ability to form the required mental state. Id. at 308-10.

In Mr. Webb's case, the jury heard evidence of his intoxication, but did not have an instruction that permitted them to consider that evidence in determining if Mr. Webb formed the requisite criminal intent. As in Stevens, this Court must reverse Mr. Webb's convictions and remand for a new trial.

4. RCW 9.94A.535(3)(r), PERMITTING AN EXCEPTIONAL SENTENCE TO BE IMPOSED IF "THE OFFENSE INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM," VIOLATES DUE PROCESS VAGUENESS PROHIBITIONS

Penal statutes must provide citizens with fair notice of what conduct is proscribed and provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement.

Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); State v. Williams, 144 Wn.2d 197, 203-04, 26 P.3d 890 (2001). Mr. Webb argues RCW 9.94A.535(3)(r) is unconstitutionally vague because it fails to provide citizens with warning of what conduct is illegal or provide juries with guidance in determining if a crime had a "foreseeable and destructive impact" on a third person. Amended Brief of Appellant at 28-36.

The State first argues that an aggravating factor is not “subject to due process vagueness concerns.” Brief of Respondent at 36-38. This argument must be rejected, as an aggravating factor is simply an element of an aggravated crime. Blakely, 542 U.S. at 305; Apprendi, 530 U.S. at 494 n.19; Stubbs, at ¶ 8. Penal statutes are subject to vagueness challenges, and aggravating factors are penal statutes.³ A citizen must therefore be given notice of what conduct elevates a first degree robbery to an aggravated first degree robbery that is subject to a higher sentence because of its destructive and foreseeable impact upon a third party.

In a brief paragraph, the State points out that Mr. Webb did not challenge the aggravating factor on vagueness grounds in the trial court. Brief of Respondent at 38. The issue raised here, however, is a constitutional one. This Court may review a constitutional issue for the first time on appeal if it is an issue of constitutional magnitude. RAP 2.5(a). The appellate court must determine (1) if the error is truly of constitutional magnitude, and (2) if so, what affect the error had on the trial using the constitutional harmless error standard. State v. Schaler, 169 Wn.2d 274, 284,

³ Even a condition of a convicted offender's sentence may be unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 755-57, 193 P.3d 678 (2008).

236 P.3d 858 (2010). The analysis requires the appellate court to determine if the error and practical and identifiable consequences in the defendant's trial, and is thus case specific. Id.

Certainly, conviction under a vague aggravating factor has a practical and identifiable impact on Mr. Webb. The State refers this Court to a case where the Washington Supreme Court declined to reach a vagueness challenge to a jury instruction defining assault raised for the first time on appeal, State v. Fowler, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990), overruled on other grounds, State v. Blair, 117 Wn.2d 479, 486-87 (1991). Brief of Respondent at 38. Fowler, however, does not mandate this Court to reject Mr. Webb's challenge on this basis.

Finally, the State argues RCW 94A.535(3)(r) is not unconstitutionally vague because Mr. Webb must have known bringing his nine-year-old daughter to a robbery would have a destructive impact on her. Brief of Respondent at 39-40. The State misunderstands the appropriate analysis. Under the due process clauses of the federal and state constitutions, a criminal statute is void for vagueness if (1) the statute does not define the offense "with sufficient definiteness that ordinary people can understand what conduct is proscribed," and (2) the statute does not provide

“ascertainable stands of guilt to protect against arbitrary enforcement.” Williams, 144 Wn.2d at 203 (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)); U.S. Const. amend. XIV; Const. art. I, § 3. The test is whether a reasonable person would know what conduct was prohibited, not whether the defendant would know his particular conduct was appropriate. Williams, 144 Wn.2d at 204-06.

In Williams, the Supreme Court addressed a misdemeanor criminal harassment statute that prohibited maliciously doing an act that is “intended to substantially harm the person threatened or another person with respect to his or her physical or mental health.” Id. at 203. “Mental health” was not defined in the statute, and the Williams Court held that the statute simply did not tell the public what acts were prohibited because “each person’s perception of what constitute the mental health of another will differ based on each person’s subjective impressions.” Id. at 206.

Like the statute in Williams, RCW 9.94A.535(3)(r) is “overly subjective.” Id. at 205 (quoting Lorang, 140 Wn.2d at 31). Whether an act will have a “destructive impact” on a third person depends upon what is meant by the term, which is not defined by the statute. The average citizen has no idea what constitutes a “destructive

impact” on a third party, and the fact that the impact must be foreseeable does not cure the problem. RCW 9.94A.535(3)(r) is unconstitutionally vague.

5. THE JURY WAS NOT INSTRUCTED ON THE LEGAL STANDARD DEFINING THE AGGRAVATING FACTOR THAT THE CRIME INVOLVED A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM

Mr. Webb’s jury was not given an instruction defining the aggravating factor that the crime involved a destructive and foreseeable impact on persons other than the victim. CP 36-59. Instead, the jury was simply given a special verdict form that asked if the robbery involved a destructive and foreseeable impact on persons other than the victim. CP 62. On appeal, Mr. Webb argues the special verdict must be stricken because the jury was thus not instructed on the elements of the crime of first degree robbery with an aggravating factor. Amended Brief of Appellant at 36-43. The State responds that providing the jury only with a special verdict form was not in error and, in the alternative, any error was harmless. Brief of Respondent at 41-45.

Mr. Webb’s case is on point with Gordon, where this Court held that the jury must be instructed on the definition of the statutory aggravating factors of deliberate cruelty and particularly

vulnerable victim. State v. Gordon, 153 Wn.App. 516, 536-39, 223 P.3d 519 (2009), rev. granted in part, 169 Wn.2d 1011 (2010). The State first suggests the result in Gordon is “not actually mandated by Blakely,” but provides no argument or authority for this position. Brief of Respondent at 43. Because the prosecutor failed to provide argument or legal authority as required by RAP 10.3(a)(6) and RAP 10.3(b), this Court need not consider the issue. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Amalgamated Transit Union Local 587 v. State, 142 Wn.2d 183, 203, 11 P.3d 762, 27 P.3d 608 (2001) (court did not consider issue because party’s argument consisted of citation to one case and conclusory statements).

The State next argues that Gordon is distinguishable because no appellate cases have defined or interpreted the statutory factor in Mr. Webb’s case. Brief of Respondent at 43-44. Yet in several cases, appellate courts had pointed out that an exceptional sentence may be based upon the destructive impact of the defendant’s actions on people other than the crime victim if the impact on others is of a “destructive nature not normally associated

with the commission of the crime in question".⁴ State v. Jackson, 150 Wn.2d 251, 274, 76 P.3d 217 (2003); State v. Johnson, 124 Wn.2d 57, 74-75, 873 P.2d 514 (1994); State v. Crutchfield, 53 Wn.App. 916, 928, 771 P.2d 746 (1989), overruled on other grounds, State v. Chadderton, 119 Wn.2d 390, 396 (1992); Cuevas-Diaz, 61 Wn.App. at 906. The jury was not so instructed in Mr. Webb's case.

In addition, the reported cases are based upon trial court findings that the third parties were suffered significant trauma. The sentencing court found the children in one case, for example, were "severely traumatized" and continued to exhibit severe anxiety and fear for their safety at the time of sentencing. Cuevas-Diaz, 61 Wn.App. at 906, In Jackson, the trial court found the students and staff of the victim's elementary school were "tremendously impacted," noting the children had nightmares and their homework suffered. Jackson, 150 Wn.2d at 275; accord Johnson, 124 Wn.2d at 75 (children afraid to attend school where shooting occurred). Thus, the jury was not fully informed of the elements of the aggravating circumstance because it was not instructed that any destructive impact must be both serious and long-lasting.

⁴ The reported cases were all decided prior to Blakely and thus do not address jury instructions.

Last, the State asserts any error in failing to instruct the jury on the meaning of the aggravating factor was harmless. Brief of Respondent at 44-45. This argument ignores the dearth of evidence that the impact on Meadow was serious and long-lasting and greater than the impact on anyone who was present during an armed robbery. Where the only evidence of the impact on Meadow was her expression at the time of the robbery and her demeanor shortly thereafter, this Court cannot conclude the error in failing to provide the jury with an instruction that set forth the elements of the aggravating factor was harmless beyond a reasonable doubt.

Gordon, 153 Wn.App. at 538-39.

6. THE AGGRAVATING FACTOR AND EXCEPTIONAL SENTENCE MUST BE VACATED BECAUSE THE JURY WAS INCORRECTLY INSTRUCTED THAT UNANIMITY WAS REQUIRED TO ANSWER "NO" ON THE SPECIAL VERDICT FORM

The Washington Supreme Court held that while the jury is required to unanimously find an aggravating factor beyond a reasonable doubt in order to answer "yes" on a special verdict form, unanimity is not required for a "no" answer. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010). Mr. Webb therefore argues the aggravating factor in his case should be vacated because the jury was incorrectly instructed it had to be unanimous

in order to answer “no” on the special verdict form. Supplemental Brief of Appellant. The State, however, responds that Bashaw does not apply to Mr. Webb's case because it involved a school bus zone enhancement, found at RCW 69.50.435 (1)(c), and not an SRA aggravating factor. Brief of Respondent at 45-47.

The Bashaw Court relied heavily on its prior opinion in State v. Goldberg, 149 Wn.2d 888, 893-94, 72 P.3d 1083 (2003). The Goldberg Court addressed an aggravated first degree murder conviction based upon the aggravating circumstance that the crime was committed because of the victim's role as a witness in an adjudicative proceedings. Id. at 890-91, 894; RCW 10.95.020(8). While recognizing the constitutional right to a unanimous jury verdict, the Goldberg Court found that unanimity is not required to answer “no” on the special verdict form addressing the aggravating circumstance. Id. at 892-93. Thus, the State's attempt to distinguish Bashaw on the grounds that it addressed a school zone enhancement rather than an SRA aggravating factor must be rejected.

The State also argues that if this Court vacates the Mr. Webb's enhancement, a new trial is warranted despite the holding of Bashaw that a retrial would waste scarce judicial resources.

Brief of Respondent at 46-47; Bashaw, 169 Wn.2d at 146-47. The State does not explain, however, how the stakes are different for a school zone enhancement, which doubles the defendant's maximum term, and an SRA aggravator, which only permits the court to sentence up to the maximum term. RCW 69.50.435(1); RCW 9.94A.537(6).

The jury was incorrectly instructed that it had to be unanimous to answer the special verdict form "no" as well as "yes," in conflict with Bashaw and Goldberg. The aggravating factor must be stricken and Mr. Webb's case remanded for a standard range sentence.

E. CONCLUSION

For the reasons stated above and in the Amended Brief of Appellant, Mr. Webb's conviction for robbery in the first degree and the accompanying aggravating factor must be reversed because the State did not prove beyond a reasonable doubt that Mr. Webb displayed what appeared to be a deadly weapon or that the crime had a destructive and foreseeable impact on a third person.

In the alternative, Mr. Webb's convictions for first degree robbery and reckless endangerment must be reversed and remanded for a new trial due to the trial court's failure to instruct the

jury on voluntary intoxication or define the aggravating factor.
Additionally, Mr. Webb's case should be remanded for a standard
range sentence because RCW 9.944A.535(3)(r) is
unconstitutionally vague, the aggravating factor was not defined for
the jury, and the jury was improperly instructed that it had to be
unanimous to answer the special verdict form in the negative.

DATED this 3rd day of December 2010.

Respectfully submitted,



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