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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 29716-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LORENZO RENTERIA RAMOS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred by denying the defense motion to sever.

B. The court erred by allowing an uncertified interpreter to interpret during the trial.

C. The trial court erred by improperly instructing the jury in instruction 13 on the requirement of unanimity in answering the special verdict form:

. . . You will also be given a Special Verdict Form that relates to Count 2 only. If you either find the defendant not guilty of robbery in the first degree on Verdict Form D, or are unable to reach a unanimous verdict as to that charge, do not use the Special Verdict Form. If you find the defendant guilty on Verdict Form D, you will then use the Special Verdict Form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no." (CP 76-78)

D. The State's evidence was insufficient to support the convictions for second degree assault and first degree robbery.

.Issues Pertaining to Assignments of Error

1. Did the court err by denying the defense motion to sever?

(Assignment of Error A).

2. Did the court err by allowing an uncertified interpreter to interpret during the trial? (Assignment of Error B).

3. Did the court err when it improperly instructed the jury on filling out the special verdict form in instruction 13 by requiring unanimity of the jury to answer "yes" or "no?" (Assignment of Error C).

4. Was the State's evidence sufficient to support findings of guilt beyond a reasonable doubt on the charges of second degree assault and first degree robbery? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Ramos was charged by information with count 1 – second degree assault with a firearm enhancement, count 2 – first degree robbery with a firearm enhancement, and count 3 – theft of a motor vehicle. The case proceeded to jury trial. (CP 1-3).

Mr. Ramos moved to sever just before trial. (CP 56-57; Trial RP 14-23). The court denied the motion. (Trial RP 24). An interpreter was needed for trial. (Trial RP 53). Frank Rojas, the interpreter, had not yet received certification as he was still waiting to take the required ethics class. (*Id.*). Over defense concerns regarding his lack of certification, the court accepted Mr. Rojas as a certified interpreter. (Trial RP 54-55).

Since around December 2009, Mr. Ramos had been living with the family of Jose Orozco in Othello. (Trial RP 60-61). On

December 20, 2009, Mr. Ramos quit living in Mr. Orozco's home. (Trial RP 62). Mr. Orozco was asleep on December 19 when Mr. Ramos knocked on his door. (*Id.*). He came in and told Mr. Orozco he was going to kill him. (Trial RP 63). Mr. Ramos grabbed a rifle and Mr. Orozco grabbed on as well. (*Id.*). Mr. Ramos hit him in the forehead with the rifle and knocked him down. (*Id.*). He then stepped on his throat. (Trial RP 64). Mr. Orozco's son, Christopher, took Mr. Ramos and kicked him out. (Trial RP 64, 67). Mr. Orozco did not know which way Mr. Ramos went when he left the house. (Trial RP 73).

Mr. Orozco had pain on his forehead, throat, and arms. (Trial RP 65, 66). Police were called, whereupon he told them what happened. (Trial RP 67).

Christopher Orozco saw Mr. Ramos on top of his dad. (Trial RP 90). He said about 3-4 minutes passed between Mr. Ramos leaving his dad's room and leaving the house. (Trial RP 93). Mr. Ramos went out the front door with the rifle. (Trial RP 93-94). He went to a tan Ford Explorer and tried to leave, but he got stuck. (Trial RP 95). Christopher gave one of the officers Mr. Ramos's alien registration card to help identify him. (Trial RP 96).

Levi Meseberg was hunting geese the same morning. (Trial RP 162). He drove to the hunting field in his Ford F-150. (*Id.*). Mr. Meseberg later left the area in another vehicle, a pewter 2004 Chevy Silverado pickup belonging to his father. (Trial RP 163). When he came back to the field, he saw an older F-150 stuck in a ditch. (Trial RP 164). Helping out, Mr. Meseberg hooked up a tow strap and recognized the truck as belonging to Nick Anderson, a friend and guide for his father's business. (Trial RP 165). Mr. Ramos was in the Ford. (Trial RP 167).

Mr. Meseberg called Mr. Anderson and asked if anyone should have his vehicle. (Trial RP 167). He handed the phone to Mr. Ramos and a conversation ensued in Spanish. (*Id.*). After they hung up, Mr. Meseberg got the phone and went to call Mr. Anderson to see what the conversation was about. (*Id.*). He turned his back to Mr. Ramos. (*Id.*). When he turned around, Mr. Ramos had pulled a pistol that looked like a .22. (RP 168). Mr. Ramos gestured for him to step back. (*Id.*). He then got into the Silverado and took off. (*Id.*).

Mr. Meseberg called law enforcement. (Trial RP 169). When they arrived, he gave a description of Mr. Ramos and later identified him from an ID card the officers had. (Trial RP 171).

Michael Meseberg, Levi's father, owned the Silverado pickup. (Trial RP 202). The truck was recovered the following day in Caldwell, Idaho. (Trial RP 205-206).

Deputy Collin Hyer responded to an assault call on December 19, 2009. (Trial RP 210). He saw Mr. Orozco had blood on his face and a lump on the side of his head. (Trial RP 213). Mr. Orozco said Mr. Ramos was the suspect. (Trial RP 214). The deputy went to another location looking for Mr. Ramos. (Trial RP 216). He showed an ID card to Levi Meseberg, who identified Mr. Ramos, with respect to the incident involving the Mesebergs. (Trial RP 216). The location of this latter incident was about a mile or a mile-and-a-half from the Orozco residence. (Trial RP 219). The deputy later completed a stolen vehicle report after contacting Michael Meseberg about his pickup that had been taken from the scene. (Trial RP 227).

Officer Michelle Peters of the Parma, Idaho Police Department got a call around 9 p.m. on December 19, 2009, from a man asking her to come to his location. (Trial RP 123-24). On arrival, she saw a Hispanic male standing at the back of a silver Chevrolet pickup. (Trial RP 124). The man had apparently been asking for directions, but the reporting party believed there was a

problem. (*Id.*). The officer talked to the man, who turned out to be Mr. Ramos, for about 10 minutes. (Trial RP 125). As she was speaking to him, dispatch notified her the vehicle was reported stolen out of Washington state. (Trial RP 126). Several officers assisted in arresting Mr. Ramos. (*Id.*). The Silverado was impounded. (*Id.*).

Sergeant Jared George of the Wilder, Idaho Police Department was called to Parma, about 7 miles away, around 10:30 p.m. on December 19, 2009. (Trial RP 133). The sergeant took care of towing the silver Chevy pickup away. (Trial RP 134). While conducting an inventory of the vehicle, he found a .22 handgun in the console. (Trial RP 134-135). The pistol had no magazine, but a live round was in the chamber. (Trial RP 141). Papers bearing the name of Mike Meseberg were also found in the pickup. (Trial RP 138, 139).

Deputy Hyer obtained the .22 from Officer Peters after court was over on January 12, 2011. (Trial RP 229). He took the pistol to the Ephrata shooting range to perform a function check on it. (Trial RP 230). Deputy Hyer fired the pistol 3 times. (Trial RP 232, 233). The weapon was functional. (Trial RP 234).

After the State rested, the defense renewed its motion to sever, which the court again denied. (Trial RP 263). The defense also moved to dismiss for insufficiency of the evidence as to all counts. (Trial RP 263-275). The court granted the motion to dismiss on the firearm enhancement as to the second degree assault. (Trial RP 270-71). In all other respects, the motion was denied. (Trial RP 267, 269, 273, 274). The defense called no witnesses and rested. (Trial RP 261).

The jury found Mr. Ramos guilty of second degree assault, first degree robbery with a firearm enhancement, and theft of a motor vehicle. (CP 80, 83, 84, 85). The court sentenced Mr. Ramos to standard range concurrent sentences of 15 months for the second degree assault, 114 months for the first degree robbery including the 60-month firearm enhancement, and 6 months for theft of a motor vehicle. (1/31/11 RP 8-9; CP 93). This appeal follows. (CP 115).

III. ARGUMENT

A. The court erred by denying the defense motion to sever.

Joinder of offenses is deemed "inherently prejudicial." *State v. Ramirez*, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). CrR 4.4(b) requires severance of offenses when it will "promote a fair

determination of the defendant's guilt or innocence of each offense." See *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990). Moreover, when an accused shows that the manifest prejudice of joinder outweighs concerns for judicial economy, severance should be granted. *State v. MacDonald*, 122 Wn. App. 804, 814-15, 95 P.3d 1248 (2004), review denied, 153 Wn.2d 1006 (2005). Although a court's decision on a motion to sever is usually reviewed for an abuse of discretion, joinder cannot be used to prejudice a defendant and, if he can demonstrate substantial prejudice, reversal is required. *Ramirez*, 46 Wn. App. 226.

A defendant may be prejudiced by joinder in several ways:

(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime charged; or (3) the jury may cumulate the evidence of the crimes charged and find guilt when, if considered separately, it would not. *State v. Harris*, 36 Wn. App. 746, 750, 677 P.2d 202 (1984). But the court may look to factors that could mitigate this inherent prejudice:

(1) the strength of the State's evidence on each count, (2) clarity of defenses to each count, (3) the court properly instructs the jury to consider the evidence of the

crime *and* (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined. (emphasis in original). 36 Wn. App. at 750.

The 3 offenses at issue here were separate incidents involving separate victims. By trying them together, Mr. Ramos clearly suffered prejudice as the jury could not only infer a criminal disposition, *i.e.*, a crime spree, from evidence presented on any one of the charges and apply it to the other charged crimes, but could also cumulate the evidence on all 3 charged crimes to find guilt when it would not if considered separately. *Harris*, 36 Wn. App. at 750. Mr. Ramos was embarrassed and confounded in presenting separate defenses to each offense because the use of this single trial invited the jury to cumulate evidence to find guilt by inferring a criminal disposition. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

The court erred by denying the defense motion to sever since any concern for judicial economy did not outweigh the manifest prejudice of joinder. *MacDonald*, 122 Wn. App. at 814-15. The denial of a motion to sever is an abuse of discretion when there is prejudice, as here, and there are no curative instructions. *See State v. Redd*, 51 Wn. App. 597, 603, 754 P2d 1041, *review*

denied, 111 Wn.2d 1007 (1988). Mr. Ramos is entitled to a new trial.

B. The court erred by allowing an uncertified interpreter to interpret during the trial.

Over defense objection, the court used an uncertified interpreter, Mr. Rojas, at trial. (Trial RP 54-55). Although he had passed the written and oral tests for certification, Mr. Rojas had not yet received a certificate since he still had to complete the ethics portion. (Trial RP 53).

Mr. Ramos, a non-English speaker, enjoys the constitutional right to a competent interpreter. *See State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002 (1995). This right is based on the Sixth Amendment right to confront witnesses and the right inherent in a fair trial to be present at his own trial. *State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004), *review denied*, 153 Wn.2d 1028 (2005). A qualified interpreter must be provided during all legal proceedings. *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999).

RCW 2.43.030(1)(b) and (2) require that when an interpreter is not certified by the administrative office of the courts, the court must find good cause for using that interpreter and satisfy itself on

the record the proposed interpreter is competent. RCW

2.43.030(2) sets forth the required steps to determine whether an uncertified interpreter is competent:

The appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:

- (a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and
- (b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

Even if it is assumed Mr. Rojas was capable of communicating effectively because he passed his written and oral tests and had been so advised by the administrative office of the courts, the court still had to satisfy itself on the record that he read, understood, and would abide by the code of ethics for language interpreters. RCW 2.43.030(2)(b). The court did not do so.

Although Mr. Rojas acknowledged he had not taken the ethics class, the record shows the court did not follow up on the ethics issue as required by the statute and failed to ascertain whether he had even read the code of ethics for interpreters. There is also

nothing in the record to establish good cause for using an uncertified interpreter. In these circumstances, Mr. Ramos was denied his constitutional right to a qualified interpreter. *Pham*, 75 Wn. App. at 633. He must receive a new trial.

C. The court erred by improperly instructing the jury in instruction 13 on filling out the special verdict form by requiring unanimity of the jury to answer “yes” or “no.”

In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), the Supreme Court addressed this same issue and held the trial court incorrectly instructed the jury that its special finding had to be unanimous. The court framed the issue as a narrow one: “when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make a an additional finding that would increase the defendant’s sentence beyond the maximum penalty allowed by the guidelines, must the jury’s answer be unanimous in order to be final?” *Id.* at 145. The answer is no.

The *Bashaw* court, at 147, determined the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law:

Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, . . . it is not required to find the absence of such a special

finding. The jury instruction here stated that unanimity was required for either determination. That was error. (Italics by court; cite omitted).

Moreover, it held that such a jury instruction was not harmless. The sentence enhancements were thus vacated and the case remanded for further proceedings. 169 Wn.2d at 148.

The jury instruction held to be improper in *Bashaw* was the same instruction given by the trial court here. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break from precedent. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed.2d 649, 107 S. Ct. 708 (1987)). *Bashaw* therefore applies, is directly on point, and mandates vacation of the sentence enhancement and remand. *But compare State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011), *with State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011).

D. The State's evidence was insufficient to support the convictions for second degree assault and first degree robbery.

Upon completion of the State's case, Mr. Ramos moved to dismiss all charges based on insufficiency of the evidence. Except for its dismissal of the firearm enhancement on the second degree assault, the court denied the motion. The defense presented no witnesses. The jury found Mr. Ramos guilty on all counts.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Even so, the existence of a fact cannot rest on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App 726, 728, 502 P.2d 1037 (1972).

On the second degree assault, the State presented evidence that Mr. Orozco was bloodied and had a lump on the side of his head. (Trial RP 213). He said he had pain. (Trial RP 65, 66). The State had to prove Mr. Ramos inflicted "substantial bodily harm."

(CP 1, 68). The court instructed the jury that “substantial bodily harm’ means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.” (CP 72).

There was no evidence that Mr. Orozco suffered a substantial loss or impairment of function of the body or any fracture. There was also no evidence of any substantial disfigurement. Mr. Orozco suffered a bump on his forehead. That is not substantial disfigurement. At most, it satisfied the elements of third degree assault as reflected in jury instruction 7. (CP 70). The second degree assault conviction cannot be sustained. *Green, supra*.

As for the first degree robbery, the State failed to produce any evidence that the taking was against Levi Meseberg’s will by Mr. Ramos’s use or threatened use of immediate force, violence, or fear of injury. (CP 73). Indeed, the victim testified he was angered by the gun. (Trial RP 185). It was not traumatic. (*Id.*). This element was not proved beyond a reasonable doubt. Moreover, the State failed to show Mr. Meseberg felt any force or fear from

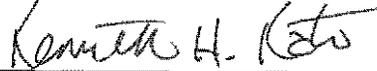
Mr. Ramos's actions. (CP 73). The first degree robbery conviction cannot stand. *Green, supra*.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ramos respectfully urges this Court to reverse his convictions and firearm enhancement and dismiss the charges or, in the alternative, to grant him a new trial.

DATED this 14th day of September, 2011.

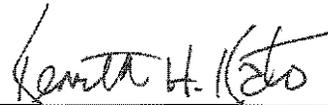
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 14, 2011, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on D. Angus Lee, Grant County Prosecutor, PO Box 37, Ephrata, WA 98832-0037; and Lorenzo R. Ramos, #346865, PO Box 900, Shelton, WA 98507.



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