

NO. 74964-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO RECUENCO,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

1. The invited error doctrine precludes review of a jury instruction that the defendant proposed. Recuenco proposed a deficient special verdict form that asked whether he was armed with a “deadly weapon” instead of asking whether he was armed with a “firearm.” Does the invited error doctrine preclude review of this claim?

2. Constitutional error is harmless if it can be said beyond a reasonable doubt that the error did not affect the verdict. A special verdict form in this case failed to require an express finding that Recuenco was armed with a firearm but other instructions defined a “deadly weapon” as a firearm, and the evidence conclusively established that the weapon at issue was a firearm, not some other weapon. Was the error in the special verdict form harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Arturo Recuenco was charged by amended information with assault in the second degree, interfering with domestic violence reporting and malicious mischief in the third degree. CP 159-60. He was convicted on all counts. CP 391, 396. The jury found by special verdict that the defendant was armed with a deadly weapon when he committed the assault, CP 237, and the sentencing court imposed a firearm enhancement. CP 397-98.

2. SUBSTANTIVE FACTS

On the evening of September 18, 1999, Officers Lucas and Moore of the Seattle Police Department were dispatched on a 911 call originating from a residence in the Greenwood area of Seattle. 5RP 228-29.¹ The officers approached the front door and knocked, the defendant opened the door. 5RP 231.

¹ The verbatim report of proceedings consists of eleven volumes, referred to in this brief as follows: 1RP (Jan. 10, 2000); 2RP (Jan. 11, 2000); 3RP (Jan. 12, 2000); 4RP (Jan. 13, 2000); 5RP (Jan. 18, 2000); 6RP (Jan. 19, 2000); 7RP (Jan. 20, 2000); 8RP (Jan. 24, 2000); 9RP (Jan. 25, 2000); 10RP (Jan. 28, 2000); and 11RP (Feb. 24, 2000).

The officers immediately heard a woman inside the house shout to them that Recuenco had a gun and was going to kill her. 5RP 233. The woman was the defendant's wife, Amy Recuenco; she approached the officers at the front door, crying and very upset. 5RP 233-34. Officer Lucas separated Ms. Recuenco from her husband, took her into another room and asked her to explain what had happened. 5RP 235.

Ms. Recuenco testified that the defendant told her to cook dinner for his sisters, who were to arrive from Vancouver, British Columbia later that evening. 6RP 486. She went into the kitchen, but did not begin cooking. 6RP 488. Recuenco came into the kitchen and demanded to know why she had not yet prepared dinner. 6RP 488. He then picked up a metal pipe and hit the stove, smashing it. 6RP 488.

Recuenco then walked into the living room, reached into a file cabinet, and removed a gun. 6RP 491. He pointed the gun at his wife. 6RP 491. She told him that she was going to call the police and picked up the telephone. 6RP 493. The defendant put the gun back in the drawer, ran over to the phone cord and yanked it, ripping the jack from the wall. 6RP 495, 5RP 244. Ms. Recuenco testified that she was very afraid when her husband

pointed the gun at her; she believed he was going to shoot her. 6RP 496-97. She ran to her room, where she waited until she heard the police officers arrive. 6RP 497.

Officer Lucas testified that he retrieved the gun, a .380 caliber, fully loaded semiautomatic pistol. 5RP 237- 39. Recuenco was arrested at the scene and transported to the police station; the gun was placed in evidence. He told the arresting officers that he had indeed held the gun in his hand during the altercation with his wife, but he claimed that she could not see the gun and he denied pointing the gun at her. 5RP 242-43.

Recuenco testified at trial that he damaged the stovetop with a kettle because he was angry that his wife would not cook dinner. 7RP 634. He testified that his wife began to phone the police after he damaged the stove and that he attempted to take the phone from her. 7RP 639-40. He claimed that, in reaching for the receiver, he unintentionally grabbed the cord, pulling the phone jack from the wall. 7RP 640. He denied pointing a gun at his wife. 8RP 707-08. He admitted telling police that the gun was in his hand during the argument with his wife, but he seemed to claim at trial that what he meant, was that he held the gun only *after* the

argument, as he tried to hide the gun in a file drawer before police arrived. 8RP 709, 725-27

After all the evidence was received, the Court conferred with counsel regarding jury instructions. With regard to the weapons instructions, the Court said:

Counsel, quite frankly there is no dispute in this case that we are talking about a gun . . .

8RP 797. Defense counsel did not dispute the Court's characterization of the evidence, but counsel then spoke at length regarding his proposed definition of firearm for purposes of the element of assault in the second degree. He asked the Court to use WPIC 2.06 instead of WPIC 2.06.01 because the former instruction dealt with the *manner* of using a deadly weapon. 8RP 798. The Court decided on WPIC 2.06.01, which provides that "[t]he term deadly weapon includes any firearm, whether loaded or not." CP 222 (Instruction No. 9).

Counsel objected to the definition of "deadly weapon" in the instruction dealing with the special verdict form. 8RP 801-02. Again, he argued that the instruction should include the notion that the *manner* of using the firearm was relevant to determining whether it was a deadly weapon. 8RP 802. The Court noted his

objection, and decided to submit WPIC 2.07.02. CP 231 (Instruction No. 18). The trial court ruled that "...[t]he WPIC comments instruct that if the only weapon involved is a firearm that the simplified definition of deadly weapon should be used, and that is WPIC 2.06. And indeed the Court is giving only the more simplified version, since no other weapons are the subject of this trial other than a firearm." 8RP 810

Defense counsel proposed a special verdict form as follows:

We, the jury, return a special verdict by answering as follows: Was the defendant, ARTURO R. RECUENCO armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?
ANSWER: _____ (Yes or No).

CP 150. At the jury instruction conference, counsel specifically accepted the version proposed by the Court:

On Instruction No. 20, it is the same as my special verdict instruction, which is appropriate. Instruction -- *the special verdict form is the same as what I have proposed, so there is no objection to that.*

8RP 802-03 (italics added). Accordingly, the Court submitted a special verdict form identical to that sought by Recuenco. CP 237.

Defense counsel's closing argument repeatedly referred to the firearm as the weapon alleged in the assault. See, e.g., 9RP 838. Likewise, at a post-trial hearing to consider defendant's motion to vacate the jury verdict, defense counsel stated, "...Your Honor, the firearm is an element of this offense as it has been pleaded and argued to the jury and evidently, perhaps obviously, proven to the jury." 11RP 912-13.

C. ARGUMENT

Recuenco claims that his sentence is improper because the deadly weapon special verdict form submitted to the jury, called for a finding that he was armed with a "deadly weapon," instead of asking whether he was armed with a "firearm." He claims that the judge thus could not impose sentence on a "firearm" enhancement, because that finding goes beyond the jury's verdict.

Recuenco is correct that the special verdict should have asked whether he was armed with a "firearm." Although the State argued in the Court of Appeals that the judge's decision to impose the firearm penalty was not subject to the Apprendi rule, that argument is no longer tenable following the Unites States Supreme

Court's decision in Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 72 U.S.L.W. 4546 (2004).

It does not follow, however, that Recuenco's sentence must be reversed. First, Recuenco invited any error by proposing the instructions and interrogatories he now challenges on appeal. Second, assuming arguendo that error was not invited, it was harmless as there is no evidence that Recuenco assaulted his wife with anything but a firearm.

1. RECUENCO INVITED ERROR BY PROPOSING A FAULTY SPECIAL VERDICT FORM.

The doctrine of invited error prevents a party from creating error in the trial court and then attempting to profit from that error on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 58 P.3d 273 (2002). The doctrine applies to errors of constitutional magnitude, even to the complete failure to include an element in the "to convict" instruction. In City of Seattle v. Patu, for example, the defendant was charged with obstructing a police officer but the trial court omitted an element from the to convict instruction. This Court refused to consider Patu's challenge to the instruction on appeal because Patu had proposed the faulty instruction at trial.

Patu, at 720-21. This Court has consistently applied the invited error doctrine under similar circumstances. See State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999) (improper instruction on self-defense); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990) (failure to specify the defendant's intended crime in an attempted burglary case). See also State v. Summers, 107 Wn. App. 373, 380-82, 28 P.3d 780 (2001) (omission of the knowledge element of unlawful possession of a firearm).

The invited error doctrine should apply to Recuenco's claim, too. He proposed the faulty instruction, CP 150, and he expressly acquiesced in the giving of the instruction. 8RP 802-03. He should not be heard to complain on appeal.

2. BECAUSE THE EVIDENCE WAS OVERWHELMING THAT THE WEAPON AT ISSUE WAS A FIREARM, ANY ERROR IN THE COURT'S SPECIAL VERDICT FORM WAS HARMLESS BEYOND A REASONABLE DOUBT.

Even if this court reviews Recuenco's claim, any error was harmless. Numerous Washington cases hold that instructional errors on sentencing enhancements are subject to harmless error review. Likewise, a large body of caselaw recognizes that

Apprendi² error is subject to harmless error review. Here, the fact that the weapon involved was a firearm was uncontested, and fully supported by the evidence, so this court should conclude that any error was harmless.

Under Washington law, a deadly weapon that is not a firearm will enhance a sentence for a class B felony by one year, whereas a deadly weapon that is a firearm results in a three-year enhancement. RCW 9.94A.510(3)(b) and RCW 9.94A.510(4)(b). In Recuenco's case, the special verdict that enhanced Recuenco's sentence by five years asked the jury to determine, beyond a reasonable doubt, whether the defendant was armed with a deadly weapon. CP 237. The special verdict form did not ask the jury whether the deadly weapon was a firearm.

In Blakely v. Washington, the United States Supreme Court held that a defendant has a Sixth Amendment right to have a jury determine aggravating facts (other than recidivist facts) used to impose an exceptional sentence above the standard range. Under Blakely v. Washington, because Recuenco's sentence was enhanced by the fact that he was armed with a firearm, he was

² Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

entitled to have a jury make the factual finding that he was armed with a firearm.³

Nonetheless, the verdict form error in this case does not require reversal because Washington has a long history of applying harmless error analysis to sentencing enhancements, and the error was clearly harmless here.

In State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961), the Washington Supreme Court found harmless error when a sentencing enhancement was not submitted to the jury. In Mode, the defendant was convicted of the crime of carnal knowledge; that crime required that the victim be less than eighteen years old. A separate statute provided for a maximum term of imprisonment of twenty years if the victim was under fifteen years old. The defendant challenged his twenty-year sentence on the ground that the jury was only instructed that they had to find that the victim was under eighteen, and, thus, had not found that the victim was under

³ Prior to Blakely v. Washington, Washington trial judges could determine whether the deadly weapon was in fact a firearm. State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998); State v. Rai, 97 Wn. App. 307, 983 P.2d 712 (1999); State v. Olney, 97 Wn. App. 913, 987 P.2d 662 (1999). In light of Blakely, however, these cases appear to be overruled because a jury must determine all facts that increase the defendant's maximum sentence.

fifteen. The Washington Supreme Court easily rejected this claim: “Her age was stated in the information as thirteen, and was so proved by uncontradicted testimony. It is unnecessary to require the jury to answer a special verdict respecting the victim's age.” Mode, 57 Wn.2d at 837.

This Court has taken the same approach with regard to firearm enhancements. In State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980), the Washington Supreme Court found that it was error to fail to instruct the jury that deadly weapon and firearm findings must be proved beyond a reasonable doubt. Subsequently, several Washington cases held that the failure to so instruct was subject to a harmless error analysis, and convictions were upheld when it was clear that any error was harmless beyond a reasonable doubt. State v. Willoughby, 29 Wn. App. 828, 832, 630 P.2d 1387, review denied, 96 Wn.2d 1018 (1981)(harmless error that jury not instructed that it needed to find firearm enhancement beyond a reasonable doubt given uncontroverted evidence that firearm was used); State v. Cook, 31 Wn. App. 165, 175-76, 639 P.2d 863, review denied, 97 Wn.2d 1018 (1982)(same); State v. Braithwaite, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983)(same).

Recent Washington decisions are in accord. In State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); this Court held that harmless error analysis was appropriate where a mistake was made in drafting an accomplice instruction. Brown, 147 Wn.2d at 341 (citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

Federal courts have taken a similar approach regarding sentencing factors that were not submitted to juries. In fact, two years ago, the United States Supreme Court held that Apprendi error is subject to harmless error analysis. In United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 151 L. Ed. 2d 689 (2002), the defendants received enhanced penalties at sentencing after the trial court made factual determinations concerning the quantity of drugs involved. The defendants challenged their sentences for failure to submit the drug quantity issue to the grand jury. In a unanimous decision, the court held that it would apply the federal "plain error" standard because the defendants had never raised the issue at the trial level. Applying this standard, the court rejected the defendants' claim, given the uncontroverted evidence:

The evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and

"essentially uncontroverted." Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base.

Cotton, 535 U.S. at 633 (footnote omitted). In no uncertain terms,

the Court indicated that any other result would be unjustified:

In providing for graduated penalties in 21 U.S.C. § 841(b), Congress intended that defendants, like respondents, involved in large-scale drug operations receive more severe punishment than those committing drug offenses involving lesser quantities. Indeed, the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the "fairness, integrity, and public reputation of judicial proceedings" would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.

Cotton, 535 U.S. at 634.

Consistent with Cotton, the federal courts repeatedly have considered whether Blakely and Apprendi errors were harmless in cases where the trial courts have failed to submit the sentencing enhancements to the jury. These courts have reviewed the

evidence presented at sentencing or trial in order to determine whether any error was harmless. See United States v. Cordoza-Estrada, ___ F.3d ___, (2004), WL 2179594 (1st Cir. 2004); People v. Vonner, 17 Cal.Rptr.3d 460, 467 (2004); Campbell v. United States, 364 F.3d 727 (6th Cir. 2004) (failure to submit drug quantity enhancement to jury was harmless); United States v. Matthew, 312 F.3d 652 (5th Cir. 2002), cert. denied, 538 U.S. 938 (2003) (failure to submit car-jacking enhancement to jury was harmless beyond a reasonable doubt given overwhelming, uncontroverted evidence supporting enhancement); United States v. Valensia, 299 F.3d 1068 (9th Cir. 2002) (failure to inform defendant that the Government was required to persuade the trier of fact beyond a reasonable doubt regarding the quantity of the controlled substance was harmless because the evidence at sentencing overwhelmingly demonstrated the amount of drugs); United States v. Minore, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003) (failure to inform defendant that the government would be required to prove drug quantity to the jury beyond a reasonable doubt was harmless error given the overwhelming evidence of the amount of drugs).

Likewise, the State of Arizona engaged in a similar harmless error analysis when reviewing its capital cases impacted by Arizona v. Ring, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In Ring, the United States Supreme Court applied Appendi to Arizona's capital sentencing scheme and held that it violated the Sixth Amendment right to a jury trial because the judge, rather than the jury, determined whether aggravating factors existed. Upon remand, the Arizona Supreme Court held that the Appendi error was subject to harmless error analysis, and indicated it would review the facts of each case to determine if the error was harmless beyond a reasonable doubt. State v. Ring, 65 P.3d 915, 933-36 (Ariz. 2003).

In State v. Thomas, 150 Wn.2d 821, 849-50, 83 P.3d 970 (2004), this Court declined to apply harmless error analysis to Appendi/Ring error in a capital case. The Court's decision was based on a misunderstanding of federal precedent (“[W]e do not perform a harmless error analysis since to do so would violate the Supreme Court's holdings in Appendi and Ring”) as it made no mention of the Supreme Court's explicit application of harmless

error analysis to Apprendi error in United States v. Cotton, 535 U.S. 625 (2002), nor to the numerous authorities applying harmless error analysis to Apprendi error.

Here, any error was harmless beyond a reasonable doubt. The State charged Recuenco, inter alia, with using a firearm to commit assault. CP 45. There was extensive testimony from the witnesses concerning how Recuenco handled his gun on the night in question. 6RP 491. Recuenco admitted to police officers that he had handled the gun; he simply denied pointing it at his wife. 5RP 242-43. At trial, he suggested that what he meant was that he had possessed the gun *after* their argument, and denied using it to assault his wife. The arguments of the lawyers, likewise, made it patently clear that the weapon at issue in the assault charge was a firearm, not some other weapon. 9RP 838.

Likewise, the jury instructions ensured that the jury's deadly weapon verdict was based on Recuenco's use of a firearm; the term "deadly weapon" was defined solely in terms of being a firearm, and there was no suggestion that some other weapon would support a guilty verdict. See CP 221, 222, 231, 233, 237. Thus, in considering whether the defendant was guilty of assault in

the second degree, the jury necessarily was required to find that he used a firearm.

Finally, the trial judge and defense counsel repeatedly characterized the assault evidence as focussing solely on firearms, not some other deadly weapon. Under these circumstances, it is abundantly clear that the jury, when it returned its special verdict that Recuenco was armed with a deadly weapon, concluded that the deadly weapon was a firearm.

D. CONCLUSION

Although the special verdict form should have asked whether the jury was finding that Recuenco was armed with a firearm, Recuenco invited that error by proposing a special verdict form that simply asked the jury to find that he was armed with a deadly weapon. Even if error was not invited, Washington law and federal law permit a harmless error analysis for Apprendi and Blakely errors. In light of all the jury instructions and in light of the

evidence, it is clear beyond a reasonable doubt that the jury's verdict necessarily included the finding that Recuenco was armed with a firearm.

DATED this 8th day of October, 2004.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. RECUENCO, Cause No. 74964-7 in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

10/8/04
Date 10/8/04